

# TRANSITION BAROMETER

## 5<sup>TH</sup> EDITION



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## PRELUDE TO THE ZIMBABWE TRANSITION BAROMETER 5<sup>TH</sup> EDITION

Our fifth edition of the Zimbabwe Transition Barometer comes out as possibly the last before the critical harmonised elections take place. In light of the foregoing, it is important to highlight several things as a precursor to the actual report.

From the onset, the fact that it comes out amidst a mist of uncertainty, is itself a disquieting indicator of the state of political affairs in the country. A bad sign, given that the release of this 5<sup>th</sup> edition of the Zimbabwe Transition Barometer, also coincides with the anniversary of the disputed Run-off Elections of June 27 2008. This coinciding is not a coincidence. Given where the country is politically, and the arguably national and international consensus that we need to overcome the legacy of the June 27 2008 election, we felt that there would be no better timing for the release of this reflective and instructive barometer, which allows us to take stock of how far we have gone, or not gone, in overcoming the legacy of that sham election of June 27 2008.

The whole issue of trekking the transition is predicated on the belief and understanding that the institution of the Inclusive Government and the signing of the Global Political Agreement were premised on the aspiration for a democratic transition in Zimbabwe. As we head towards the next election, it is therefore crucial for Zimbabweans, and Zimbabwean watchers and supporters alike in the region and International Community to reflect honestly on whether we are on track. If not, what can be done to put the train firmly back on the rails? We also, in this crucial edition, surmise that while indications do point to the harsh reality that a democratic transition maybe out of reach, if Elections are held, as ordered by the Constitutional Court and Proclaimed by the President of Zimbabwe, on the 31<sup>st</sup> of July 2013, not all hope for a democratic transition is lost.

There are democratic gains that have been made that will be difficult for any ruling regime to effectively dissipate. In other words, irrespective of the nature and outcome of the next elections, Zimbabwe is firmly on a transitional path that will be hard to turn back on, and if a democratic transition is not achieved with the next electoral process, there is a little bit of comfort in that in good time, the goal will be attained.

The above qualifications, are a statement of reality and also possibility, they do not negate the aspirations by the majority of Zimbabweans for a peaceful, credible, free and fair election. Another element which makes this 5<sup>th</sup> edition integral to our efforts at democratising our country is the fact that its release also coincides with the launch, on this important day, in contemporary Zimbabwean political history, of a Civil Society Campaign for Free and Fair Elections, dubbed the Feya Feya Campaign..

The above stated campaign, whose need is underlined by the findings and recommendations in this 5<sup>th</sup> edition, is a multi-stakeholder, international campaign for free and fair elections in Zimbabwe, and signals an intent, by CSO's at the very least, not to give up on the dream for a democratic Zimbabwe.

So as we mention in this report, what ever happens at the next elections, there is some democratic light at the end of the tunnel of this prolonged transition, which we seem to be trapped in. The collective aspirations for another Zimbabwe, the evident quest for a Feya Feya election, and the collective need for progress by Zimbabweans, and their solidarity partners in the region, will see us through.

Forward-towards a democratic dispensation in Zimbabwe.

McDonald Lewanika

Executive Director (June 27 2013)

Okay Machisa

Chairperson (June 27 2013)

## Introduction

Our fifth edition of the Zimbabwe Transition Barometer continues to focus on key transitional issues and how they affect the quest for democratisation in the country. There is no doubt that the country is drawing closer to harmonised elections. As this happens, the political polarisation in the country, especially in the inclusive government, is becoming more evident. The Constitutional Court ruling, the proclamation of the election date by President Mugabe and the eventual Southern African Development Community (SADC) Special Summit held in Maputo, Mozambique on 15 June 2013; all constitute the key climax indicators of this barometer report.

The focus in this issue is on five areas that continue to have an impact on Zimbabwe's quest to attain a democratic transition. The areas of focus are:

- i) Media reforms
- ii) The agent of choice: voter registration and "aliens"
- iii) Alignment of old laws with the new Constitution
- iv) Role of SADC
- v) Election timing

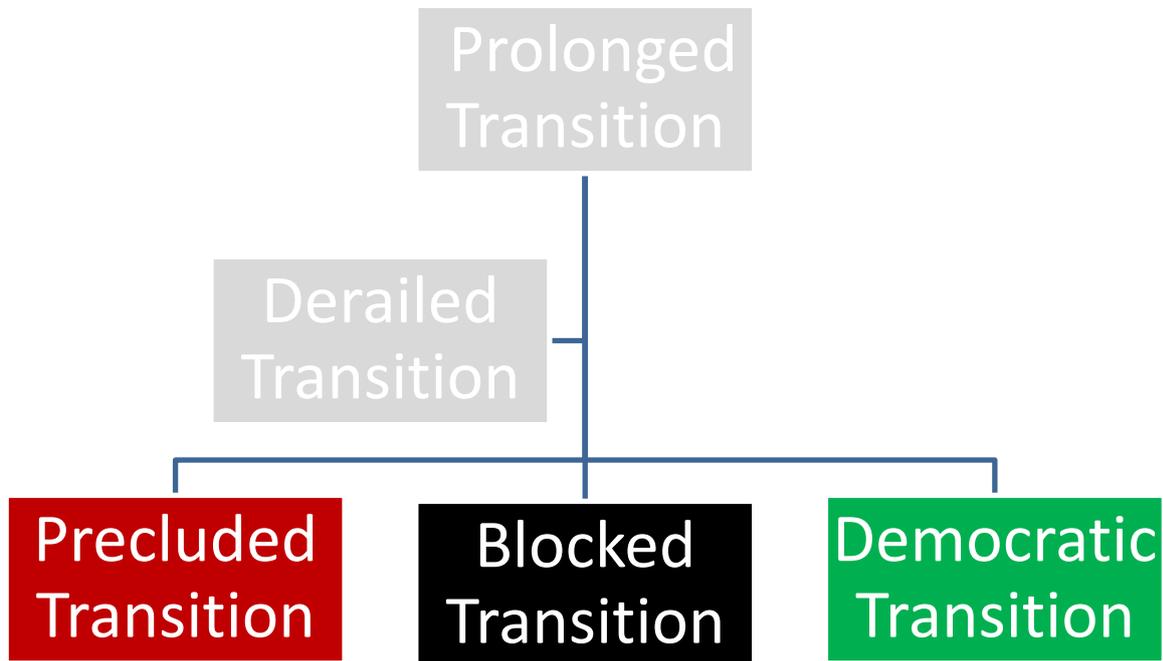
We *trek* reform progress in each of the five areas particularly in the past two months. The analysis is hedged within the broader goal of democratisation. The rate of progress also has an impact on political processes and informs possible scenarios. For each area of focus, some recommendations are made in order to ensure that the ultimate goal of a democratic transition remains feasible.

From a conceptual level, we argue that Zimbabwe is not on the verge of regressing into darker versions of transitional outcomes, namely a blocked and a precluded transition. As explained in our previous editions, in a blocked transition there is no apparent intention of holding elections and in a precluded transition the end result is characterised by civil war, chaos, armed rebels and loss of control by the central state. Based on the analysis of political developments in the past 2 months, these transitional outcomes remain unlikely.

On the other hand, a democratic transition seems possible but difficult to attain especially if the harmonised elections are held before implementation of critical break-through reforms as we detail later. A democratic transition occurs, at least, when there is a competitive, free and fair electoral environment that leads to a legitimately elected government taking or retaining state power. In a democratic transition, one can end up with a configuration of power that accommodates the winner and the loser (i.e. a democratic pacted transition) or a one party government (that is a zero-sum democratic transition). None is less democratic. In previous editions of the Zimbabwe Transition Barometer, we have enunciated the three possible outcomes of a transition, and these editions continue to be available for reference. In this 5<sup>th</sup> Edition, we utilise the space to elaborate and clarify our theoretical propositions to nuance the flawed transition paradigm.

This is because Zimbabwe is progressing toward a prolonged transition if necessary reforms are not expedited. We posit that a prolonged transition is a better version of a flawed transition that allows for more democratic progress. Even if elections are held on the 31<sup>st</sup> of July 2013 we cannot classify Zimbabwe's trajectory using Carothers' thesis of an 'end of the democratic transition paradigm'. Zimbabwe rather faces a prolonged path to democratisation. Even though the next election might fall short of democratic ideals, as the clauses in the constitution may not be followed with much conviction or consistency, it would be wrong to underestimate the democratic progress made to date. We need to clarify what exactly we mean by a prolonged transition? For now, we lay the possible transitional outcomes in the diagram below.

**Figure 1: Possible Transitional Outcomes (PTOs)**



In the next section, we explain our theoretical development of a prolonged transition from the broader paradigm of a flawed transition.

### **Derailed or Prolonged?**

In a flawed transition the incumbent makes half-hearted and tactical concessions resulting in some positive democratic outcomes such as new electoral rules, a constitution, commissions *et cetera*. However, in this process the incumbent is still determined to manipulate the new state institutions, electoral processes and economic resources to remain in power. In this scenario, there are undemocratic elections that favour the incumbent. The above is Bratton and van de Walle's conceptualisation which is useful as a starting point but needs more nuancing as there can be various variants of the same. Consequently, we made a proposition of two variants of a flawed transition. First, is a derailed transition that impedes democratic progress and signify an 'end to the democratic transition paradigm'. Second is a prolonged transition that signifies an evolution to democratisation. We explain in detail below.

### **Derailed – an end to the democratic transition paradigm**

In a derailed transition the incumbent 'wins' an election through election manipulation. In this context, the incumbent is confident enough to abandon power-sharing and form an exclusive one party government. The distinctive feature of a derailed transition is that the incumbent will become a backslider who abandons the democratic gains made during the transition (e.g. dissolve commissions, change the bill of rights, resort to naked repression) and seek to re-establish old authoritarian practices. This signifies a path toward reversal or an 'end to the democratic transition paradigm'.

## **Prolonged – an evolutionary path to democratic transition**

We define a prolonged transition as a situation where the incumbent will manipulate the elections but, unlike in a derailed transition, is determined to stabilise or even advance democratic gains made during the transition. That might include avoiding changes to the constitution, making sure that relevant commissions work, enable independent press to continue operating and commit to promote peace. The incumbent is faced with two routes to attain this. The first is to form another inclusive government with the protagonists for legitimacy or to enable an effective government. The decision might also be a result of external exigent factors such as the political agency and actions of a tenacious opposition, civil society and regional and international bodies.

The second route, like in a derailed transition, the incumbent might be bold enough to form a one party government as before the inclusive government, but, unlike in a derailed transition, the incumbent seeks political legitimacy or self-preservation through committing to stabilise or even advance the democratic gains that were made during the initial phase of the transition. The scale of democratisation will also depend on external pressure from the citizenry, civil society, political parties and regional and international pressure.

In a prolonged transition, there is no greater likelihood to return to closed authoritarian practices. Nevertheless, in the initial stages the democratic gains made during the transition will co-exist with some old authoritarian practices. Depending on the struggle for democratisation, a break-through will be found over time. As Mehler (2013) argues we need to think about the implications of power-sharing both on short-term and long-term. Five year transitional processes rarely solve all the problems and may serve as a foundational school of democracy. We now summarise the empirical realities.

## Executive Summary

Media reforms continue to dominate debate on pre-election reforms in Zimbabwe. Harassment of journalists, through impeding their work and physical abuse, as well as on suspicious and spurious charges continued in the past 2 months. The Access to Information and Protection of Privacy Act (AIPPA) of 2002 and the Public Order and Security Act (POSA) of 2002 have stifled freedom of expression and general media freedoms. The state media continued to function with a strong partisan bias in favour of the Zimbabwe African National Union-Patriotic Front (ZANU PF) and in disdain of other political parties, especially the Movement for Democratic (MDC) formations. The operations and behaviour of state owned media houses contravenes section 61(4) of the Constitution of Zimbabwe which provides for impartiality and fair representation, including that of all political parties. This also breaches section 61(5) which specifies on freedom of expression as a merited right for all citizens and institutions. The likelihood of increased media polarity as the country heads towards the general elections continues to be high. The state media is likely to continue to prop up ZANU-PF while the independent media will ostensibly back MDC positions. The recent recommendations by SADC at its Maputo extra-ordinary summit held on 15 June 2013, to establish an inter-ministerial committee to oversee pre-election media reforms, can be a trigger for positive change. However, implementation in the limited time available will be a considerable challenge.

The voter registration process has had two phases. The first 20-day phase was in the April/May period while the second 30-day phase began on 10 June and will legally end on 9 July 2013. Some of the normative positive developments in the second phase of voter registration process were:

- Those considered as “aliens” were able to attain full citizenship;
- The proof of residence requirement was replaced with the introduction of an affidavit; and
- Voter registration was in this period, supposed to be ward-based for easier access by registrants.

However, some of the challenges faced in the first phase have all persisted in the second phase of registration. These are:

- Irregular guidelines at registration centres;
- Inadequate information available to the public;
- Irregular opening times of some centres; and,
- Skewed distribution of registration centres suspected to be along political party dominant areas;

./ Since democratic tenets emphasize on the need for equal participation in elections, the challenges outlined above impact negatively on attaining a democratic transition.

The consummation of a second phase of registration, in accordance with 6<sup>th</sup> Schedule of the new Constitution, Part 3, section 6(3), was commendable as the first phase failed to serve all potential registrants. The second phase seemed to attempt compliance with constitutional guidelines. The ultimate goal is to produce a credible voters’ roll at the end of these processes, a quest that still needs to be achieved. However, without clarity on the mechanisms and the empirical procedures of ensuring a credible voters’ roll, the forthcoming election remains in danger of being disputed.

The Zimbabwe Cabinet agreed on the amendments to the Electoral Act, needed to align the act to the new Constitution. Although President Mugabe invoked the Presidential Powers (Temporary Measures) Act to “fast track” the enactment of the Electoral Act, SADC recommended that this be done through the due Parliamentary process and also that POSA and AIPPA be reviewed by Parliament for alignment to the new Constitution. The process of aligning the legal framework to the new Constitution urges the democratisation quest and ensures operationalization of the Constitution. However, the current emphasis is on aligning those legal instruments that have a direct impact on the pending harmonised elections. The rest of the alignment process will then be assigned to the next Parliament, after elections. Amendments to the Electoral Act will impact positively on transparency of the voting process, the minimisation of intimidation and the creation of opportunities for parallel voter tabulation. Although all Global Political Agreement (GPA) parties were consensual in amending the Electoral Act, ZANU-PF has indicated that it will resist when it comes to POSA and AIPPA.

SADC's role in the Zimbabwe conflict has evolved over the last five years. Previously the regional bloc was divided and failed to build consensus on key positions. It also "skirted around" issues and 'lacked the courage' to proclaim its expectations and to censure parties that were in contempt. To-date, the regional bloc has become more emphatic. The extra-ordinary summit held in Maputo was reflective of this new dimension, now characteristic of SADC. The intergovernmental status of the regional bloc, however, still creates limitations in being fully involved in major internal issues of member-states clothed under sovereignty, a factor that ZANU-PF has at times fully exploited. The demands that SADC has made as pre-election conditions in Zimbabwe will have a definite impact on the democratisation process in the country, should there be full implementation. SADC now needs to build effective and timeous implementation, evaluation and monitoring mechanisms of those issues that it has called for in Zimbabwe.

The date for elections has always been elusive since the commencement of the GPA. As early as 2010, ZANU-PF was calling for elections. In 2013, ZANU-PF insisted on an election by June 29, 2013 upon the expiry of the term of the current Parliament. The Constitutional Court ruling of May 31 2013 led to the President proclaiming an election date of July 31. The dates as well as the decision-making consideration by the Court were both challenged by political players and some citizens. SADC recommended that the political parties find consensus on some pre-election reforms, with the assistance of SADC facilitators and then approach the Constitutional Court for a possible extension of the election date.

It is the democratic right of the electorate to know the timing of elections. Ordinarily, such timing must not be decided through legal processes but political platforms. Seeking legal recourse in determining the election date is an indicator of the political polarisation existent in any society. Though approaching the courts affords the "rule of law" to take precedence, the failure of the political system to find consensus on election dates implies the weaknesses of political democratic decision-making.

We now turn to the details of the empirics to substantiate our argument that if an election were held by the 31<sup>st</sup> of July 2013, the likely outcome is a prolonged transition.

## 1.0 Barometer Indicator 1: Media reforms

### 1.1 Barometer Source

The GPA- considered media reforms as key to a democratic transition and that has been translated into the new Constitution. Section 61 of the new Constitution upholds the freedom of expression and freedom of the media. It notes that: (1) Every person has the right to freedom of expression, which includes—(a) freedom to seek, receive and communicate ideas and other information; (b) freedom of artistic expression and scientific research and creativity; and (c) academic freedom. 2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.

### 1.2 Prevailing issues

Journalists in Zimbabwe continue to be victims of threats, violence, detentions and harassment by state agents and other political parties. The operating environment continues to be restrictive and intimidating.

Firstly, outside the state, Political parties seem to be purveyors of Journalists intimidation and harrasment. Of note is the assault of The Zimbabwe Independent reporter, Herbert Moyo who was assaulted at the MDC-T party headquarters on 7 June 2013<sup>1</sup>, while covering a demonstration of party supporters around their primary election. In another mirror incident, 5 Journalists were detained at ZANU PF Headquarters on June 21, while covering a ZANU PF protest over their primary process. Of the detained 5 were released on realisation that they were from the state media while, Wendy Muperi and Wonai Masvingise were only later rescued through the intervention of Information Minister, Webster Shamu. The incidents followed on other media freedom related infractions including but not limited to the Confiscation and burning of Newsday Copies in Mbare by suspected ZANU PF supporters on the 18<sup>th</sup> of June 2013, the abduction and assault of Paul Pindani on June 14 in chinhoyi by suspected ZANU PF assailants, the assault of Chronicle Journalist, Mashundu Netsianda, in Bulawayo on the 8<sup>th</sup> of June 2013 by suspected MDC- T security personnel, among other incidents in June. The Zimbabwe Independent Editor Dumisani Muleya and Chief Reporter Owen Gagare were arrested on 7 May 2013 and charged with contravening the Criminal Law (Codification and Reform) Act for allegedly publishing falsehoods on the MDC negotiations with the military and police service chiefs.<sup>2</sup> These are not good signs ahead of the harmonised elections.

Second, the operating environment remains restrictive due to the existence of POSA and AIPPA that infringe on freedom of expression.

Third, the public broadcaster, Zimbabwe Broadcasting Corporation (ZBC), and the state-owned newspapers such as The Herald, The Chronicle, The Sunday Mail *et cetera* continued to favour (ZANU PF). State controlled media continued to use hate language and propaganda against those deemed to be against the interests of the ZANU PF ruling elite, continuing to exacerbate political polarisation in a country heading toward elections.

Fourth, most Zimbabweans living in the margins or rural areas continue to be deprived of access to credible information 'due to the limited number and reach of licensed information channels, especially in the broadcasting sector'.<sup>3</sup>

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<sup>1</sup> MDC T intensifies assault on Journalists. [Available]

[http://www.herald.co.zw/index.php?option=com\\_content&view=article&id=81873:mdc-t-intensifies-assault-on-journalists&catid=37:top-stories&Itemid=130#.Ubb\\_N51wZjo](http://www.herald.co.zw/index.php?option=com_content&view=article&id=81873:mdc-t-intensifies-assault-on-journalists&catid=37:top-stories&Itemid=130#.Ubb_N51wZjo)

<sup>2</sup> Zimbabwe Independent Editor, Chief Reporter Arrested. [Available] <http://bulawayo24.com/index-id-news-sc-national-byo-29860.html>

<sup>3</sup> *Defending free expression and your right to know*. MMPZ Statement: World Press Freedom Day 2013

In the period covered by this Barometer there was no evidence of change of political culture to respect the freedoms of journalists. There were no signs that AIPPA, POSA and the Criminal Law Codification (and Reform) Act were to be amended to conform to the dictates of the new Constitution. These legal reforms will also require transformation of state media regulatory authorities, such as the disputed Broadcasting Authority of Zimbabwe, and the boards of ZBC and the state-owned newspapers.

However, it should be noted that the independent print media continued to operate without overt threats of closure. These include the Daily News, Newsday, The Zimbabwe Independent, The Standard, but some of the newspapers such as The Zimbabwean and The Daily News are perceived to be largely partisan toward MDC T, and this contributes to cultivating a polarised environment which makes it difficult for free flow of ideas.

On the Broadcasting arena, Star FM and ZiFM were relatively balanced in their programming, though their newscasts have been adjudged to have a slant towards ZANU PF. The stated balance is a good sign for democracy if they can maintain such, going into the elections.

### 1.3 Effects on democratisation

Respecting the constitution is a cornerstone of democracy and it has played a significant role in cementing the transitions from authoritarian states to constitutional democracies especially in Eastern Europe.<sup>4</sup> The conduct of the media in Zimbabwe has an effect of validating the thesis that the country might have a constitution without constitutionalism. This is a major hindrance to a democratic transition. For example, section 61 (4) of the constitution unequivocally states that all state-owned media of communication must— (b) be impartial; and (c) afford fair opportunity for the presentation of divergent views and dissenting opinions. According to section 61 (5) Freedom of expression and freedom of the media exclude— (b) advocacy of hatred or hate speech. Continuous violations of the constitution with impunity do not augur well for Zimbabwe's democratic transition.

This has been exacerbated by the perception that some independent newspapers such as the Zimbabwean and the Daily News – in a bid to counter state media, have become biased toward the MDC T. The News Day, The Standard, The Zimbabwe Independent, while hailed as largely balanced, have also been faulted for having a slant towards the MDC. All the above, has served to increase political polarisation.

Democratic elections entail the free formation of voter preferences. For this to happen, there is need for citizens to have access to plural sources of information and there is also need for candidates to have equal access to the public space.<sup>5</sup> Otherwise, 'unless parties and candidates enjoy free and fair access to the public space, the will of the people as expressed at the ballot box will be little more than the echo of structurally induced ignorance'.<sup>6</sup> Harmonised elections held under the current hostile and restrictive media environment will undermine a democratic transition and might result in a discredited election.

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<sup>4</sup> See, e.g., Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L. L. 35, 35 (1995); Krisztina Morvai, *Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 32; Special Report: *Retroactivity Law Overturned in Hungary*, E. EUR. CONST. REV., Spring 1992, at 7, 7–8.

<sup>5</sup> *Countering electoral manipulation: strengthening Zimbabwe's chain of Democratic Choice*. Crisis in Zimbabwe Coalition. 2013

<sup>6</sup> Schedler, A. 2002. The menu of electoral manipulation. *Journal of Democracy*, 13 (2), 36-50.

## 1.4 Barometer Indicator Scorecard

Barometer Score Card Code: **Green** - High Implementation Score; **Orange** - Medium Implementation Score; **Red** – Low Implementation Score

EVALUATION COMPONENT	SCORECARD CODE	NOTES
IMPLEMENTATION PROGRESS		<ul style="list-style-type: none"> <li>• The new Constitution upholds the fundamental tenet of freedom of expression and of the media</li> <li>• Independent newspapers continue to operate</li> <li>• ZiFM and Star FM continue to be relatively balanced and non-partisan</li> <li>• However: hostile operating environment for journalists characterised by violence, intimidation, arrests and fear persist</li> <li>• No efforts to align laws that affect the media in line with the new Constitution</li> <li>• No political will to transform media regulatory bodies</li> <li>• No expansion of independent broadcasting and other electronic media of broadcasting.</li> <li>• State owned media remains partisan</li> <li>• Polarisation of the media</li> </ul>

## 1.5 Likely scenario

If the state takes no action, it is most likely that the harassment of journalists will intensify as we head toward the next watershed election. The state owned media will continue to be partisan and not afford fair opportunity for the presentation of divergent views and dissenting opinions. Even ZiFM and StarFM, due to their ownership, may be “persuaded” to start being overtly partisan. This is at the centre of ZANU PF’s campaign strategy.<sup>7</sup> On the other hand, independent newspapers such as The Daily News will also continue to be biased toward the MDC which will increase polarisation. In addition, legislative reforms are unlikely as the tenure of Parliament comes to an end on 29 June 2013. This is exacerbated by the fact that there is no political will by the incumbent to align POSA, AIPPA and the Criminal Law Codification (and Reform) Act to the new Constitution. State licensing of independent electronic media seem unlikely before the next harmonised election. However, on the other hand, as a way of window dressing and in order to appease SADC and election observers, it is likely that a few weeks before the next election the opposition candidates and other civil society organisations will be afforded regulated campaign time on state television. This will not have a major impact, given the constraints of time.

<sup>7</sup> Pre-Election Detectors: ZANU PF’s attempt to re-claim political hegemony. Crisis in Zimbabwe Coalition. 2013

## 1.6 Recommendations

- Civil society must initiate training workshops for key editors on the tenets of the new Constitution, and journalists on the SADC Guidelines for reporting in elections.
- A challenge in the Constitutional Court against media houses that continue to violate the constitution, and to compel the responsible Minister to implement the agreed reforms as stipulated in the GPA and SADC resolutions.
- SADC must insist on media reforms as a key determinant of the democraticness and legitimacy of the harmonised elections
- State must ensure that those who victimise, harass or assault journalists are held accountable
- The Zimbabwe Election Commission (ZEC) must monitor the media to ensure impartiality
- The SADC recommended inter-ministerial committee to monitor the media with powers to curb hate speech must be operationalized and strengthened.

## 2.0 Barometer Indicator 2: The agent of choice: voter registration and 'aliens'

### 2.1 Barometer Source

Section 6 (3) of the Sixth Schedule of the new Constitution states that "the Registrar General of voters, under the supervision of the Zimbabwe Electoral Commission, must conduct a special and intensive voter registration and voters roll inspection exercise for at least 30 days after the publication day."<sup>8</sup> Inter-alia to this is Section 43 (2) of the Constitution which provides that 'every person who was born in Zimbabwe before the publication date (22 May 2013) is a Zimbabwean by birth if one of his or her parents was a citizen of a country which became a member of the Southern African Development Community established by the treaty signed at Windhoek in the Republic of Namibia on the 17th August, 1992'.

### 2.2 Key prevailing Issues

The ZEC managed to implement the voter registration and inspection exercise despite political pressure. The exercise started on 10 June 2013 and ends on the 9th of July 2013. The major change is that an affidavit from the registration centres can now substitute the proof of residence which was a major impediment to many who wanted to register to vote.<sup>9</sup> People born in Zimbabwe of parents from any SADC country, who were previously classified as 'aliens', can also change the status of their citizenship. The application to change the citizenship status is free of charge. In order to effect this change of citizenship, the applicant must bring a national identity document if any, an original Zimbabwean birth certificate and proof of residence.<sup>10</sup>

In practice, some former 'aliens' are finding it difficult to register to vote, as the Registrar General's office is referring them to Harare, to renounce their citizenship and to have fingerprints taken in person for classification in the bureau. The officials are reportedly serving about 50 applicants a day.<sup>11</sup> On the other hand, the voter registration and inspection exercise was supposed to be ward-based but it became district-based due to lack of funds. The Registrar General, Mr Tobaiwa Mudede, explained, 'the ward based exercise is impossible not because of anything, but shortage of money'.<sup>12</sup> This makes it difficult for people to register to vote.

The Zimbabwe government is also applying pressure on ZEC to disqualify some civil society organizations to conduct voter education such as the Electoral Institute of Southern Africa (EISA) and Crisis in Zimbabwe Coalition for alleged close links to the Movement for Democratic Change.<sup>13</sup> The allegations were based on messages on the organisations' pamphlets such as 'feya-feya' (free and fair) and 'Register to make a difference. Do not be left out.' In the current voter registration and inspection exercise civil society has not been accredited by ZEC.<sup>14</sup>

It is important to note that ZEC had another mobile voter registration between 29 April and 19 May 2013 which failed to meet standards consistent with democratic tenets. It was characterised by the arrest and harassment of civil society organisations that carried out voter information and education programs. For example, on May 14 2013, the Election Resource Centre was charged with contravening Section 40 (C) (1) (g) of the Electoral Act for allegedly conducting a voter education

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<sup>8</sup> Zimbabwe Constitution

<sup>9</sup> Mobile voter registration commences today. <http://www.zbc.co.zw/news-categories/top-stories/32917-mobile-voter-registration-commences-monday.html>

<sup>10</sup> ibid

<sup>11</sup> Pers.comm with YIDEZ Director, Sydney Chisi.

<sup>12</sup> RG defends district based voter registration, *The Chronicle*, 11 June 2013.

<sup>13</sup> <sup>13</sup> NGO Voter education scam exposed:

[http://www.herald.co.zw/index.php?option=com\\_content&view=article&id=81881:ngo-voter-education-scam-exposed&catid=37:top-stories&Itemid=130#.UbXVSJ1wZjo](http://www.herald.co.zw/index.php?option=com_content&view=article&id=81881:ngo-voter-education-scam-exposed&catid=37:top-stories&Itemid=130#.UbXVSJ1wZjo)

<sup>14</sup> Pers.comm with YIDEZ Director, Sydney Chisi

exercise without authority or permission from the Zimbabwe Electoral Commission. Even in the aftermath of the mobile voter registration exercise, on 28 May 2013, some Zimbabwe Election Support Network (ZESN)'s workers were summoned by the police, their offices were searched and voter education material confiscated. It was on allegations that ZESN had conducted voter education from the 13th to the 17th of May 2013 without the approval from ZEC.<sup>15</sup>

The initial voter registration exercise was also marred by limited voter education, inadequate information about voter registration centres, practical constraints such as slow service and early closure of registration centres. Some of the mobile units did not have the full package that is birth-certificates and national identity cards. As a result most independent observers classified the process as a sham.<sup>16</sup> There was also skewed distribution of voter registration centres with more centres in the ZANU PF strongholds. This contributed to the fact that perceived opposition strongholds had less registered voters compared to ZANU PF strongholds. For example, Bulawayo registered 5 068, Matabeleland South 9 403 and Harare 11 525 (these are perceived opposition strongholds). In perceived ZANU PF strongholds, Mashonaland East, 35 266 new voters registered, Mashonaland West, 31 570 registered and in Mashonaland Central 29 635 voters registered.<sup>17</sup> A total of 204 041 new voters were registered between 29 April and 19 May 2013.<sup>18</sup>

### 2.3 Effects on democratisation

As Schedler argues, democracy assigns equal participation to all full members of the political community.<sup>19</sup> The normative premise of democratic choice is inclusion. Legal apartheid is not viable anymore. In modern democracies, universal suffrage is a key tenet. The removal of legal restrictions, that formally disenfranchised a significant population of Zimbabweans, called 'aliens', is an important step toward democratisation. The respect of the new Constitution in holding the 30 day voter registration and inspection is another important milestone in building a constitutional democracy. Elections can only be democratic if the tenet of universal suffrage is respected. Efforts to control the election through assigning who can vote and who cannot vote can only undermine democracy. In addition, voter registration gives credence to the voters' roll. Manipulated or discredited voter registration process also results in a discredited voters' roll and consequently an undemocratic election. Yet a free and fair election is an important step toward democratisation.

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<sup>15</sup> Police in Hwange summon ZESN and confiscate civic education material, *The Zimbabwean* : 29 May 2013

<sup>16</sup> CSO's JOINT STATEMENT ON THE JUST ENDED MOBILE VOTER REGISTRATION EXERCISE. Harare 21 June, 2013.

<sup>17</sup> Shortened version of 'Pre-Election Detectors, ZANU PF's attempt to reclaim political legitimacy' for a RHODES HOUSE Presentation on 5 JUNE 2013 in Oxford, United Kingdom. By Dr Phillan Zamchiya

<sup>18</sup> *ibid*

<sup>19</sup> Schedler, A. 2002. The menu of electoral manipulation. *Journal of Democracy*, 13 (2), 36-50.

## 2.4 Barometer Indicator Scorecard

Barometer Score Card Code: **Green** - High Implementation Score; **Orange** - Medium Implementation Score; **Red** – Low Implementation Score

EVALUATION COMPONENT	SCORECARD CODE	NOTES
IMPLEMENTATION PROGRESS		<ul style="list-style-type: none"> <li>• ZEC called for a new mobile voter registration and inspection in line with the new Constitution</li> <li>• The previously so called ‘aliens’ now have a constitutional right to vote</li> <li>• However; voter registration is district-based rather than ward-based</li> <li>• Government determined to exclude vocal civil society organisations in conducting voter education</li> <li>• The political environment is regulated by draconian laws such as POSA and AIPPA</li> <li>• Exclusion of civil society in formal voter education processes</li> <li>• ZEC faces practical and financial constraints</li> </ul>

## 2.4 Likely scenario

The Government will complete the 30 day voter registration and inspection as required by the new Constitution. The voter registration and inspection exercise is likely to end on a peaceful note, reminiscent of the political environment that prevailed during the referendum. Beneath the peaceful environment there are likely to be subtler techniques of manipulating the process. These include systematic discriminatory practices despite the universal laws about registration. There is likely to be long queues in urban areas due to population growth and inadequate voter registration centres. Techniques to manipulate the process can be through delays by the registration officers, unprofessional conduct such as closing the registration centres early, hostility and arrogance towards registrants, inadequate materials at voter registration centres such as the affidavit, birth certificates and national identity cards and inadequate equipment such as cameras and generators. This might again result in skewed voter registration outcomes as in the first voter registration exercise that showed that in the ZANU PF strongholds there were more new registered voters. Civil society organisations not authorised by ZEC will find it difficult to educate the citizens to register. Another problem is that citizens who want to participate as candidates will have to register 24 hours before the nomination court sits. So if the election date is going to be on or before 31 July as ruled by the Constitutional Court it means that some aspiring candidates might not be able to participate. Another related problem is that, under current circumstances, the nomination court will sit on 28 June 2013, before the compilation of a new voters’ roll which will discredit the process.

## 2.6 Recommendations

- ZEC must effectively supervise the Registrar General's office and the national logistics office as it collates the newly registered voters
- Civil society working with Joint Monitoring and Implementation Committee (JOMIC) must advocate to independently monitor the collation of newly registered voters to avoid electoral manipulation through illicitly adding or deleting names.
- Civil society should deploy experts to study the voters' roll, verifying constituencies' voter demographics. This must be based on comparison of the voters' roll as of June 10 2013 and the one after the closure of mobile registration on July 9 2013.
- Civil society must produce a coordinated report on the voter registration process and use it as a basis for election monitoring. However, if the report points to gross violations of citizens' rights to participate, it is important for civil society to inform SADC of the development. An election under such a condition would deprive citizens of their constitutional right to vote.
- SADC facilitation team working with JOMIC must be allowed to independently evaluate the voter registration process and submit a report to the mediator.
- There is need for transparency and accountability in voter registration, hence the public and all political parties should be provided with full information, satisfied with the poll register before elections can be held
- Government must urgently and adequately fund ZEC

### **3.0 Barometer Indicator 3: Alignment of Old Laws with the new Constitution**

#### **3.1 Barometer Source**

Schedule 6, part 2, under section 3.1(e) of the new Zimbabwe Constitution specifies that upon the commencement of the new Constitution, Chapter 7 of this Constitution, relating to elections shall immediately come into force, except Sections 158, 160 and 161. This has necessitated the need to amend the Electoral Act to align it to the new Constitution.

#### **3.2 Key prevailing Issues**

On 11 June 2013, the Zimbabwe Cabinet unanimously agreed to adopt proposed amendments to the Electoral Act meant to align it to the new Constitution. Some of the key issues addressed in this realignment process are: the creation of the Proportional Representation (PR) structural component of the election process; instructing that election results be posted outside polling stations with candidates getting duplicate copies of those results before being transmitted to the ward collation center and then the national collation center; scrapping of section 57 of the Electoral Act compelling voters to show their ballot to ZEC officials after having voted; and ensuring ZEC's ultimate responsibility for voter registration through supervision of the Registrar General's office.

The issues of alignment of the Electoral Act to the new Constitution have been caught up in the debate around the Constitutional Court ruling specifying that elections be held by 31<sup>st</sup> July 2013. Having endorsed the alignment at cabinet level, the due process was expected to have parliament sitting to pass the amendments to the Electoral Act. On 13 June 2013, President Mugabe announced a 31 July election date, in compliance with the Constitution court ruling case number CCZ1/13. The Presidential Powers (Temporary Measures) Act Chapter 10:20 was invoked to "fast track" the enactment as a way of attaining the declared election date.<sup>20</sup> Arguments have been raised on the application of Presidential Powers (Temporary Measures) Act, while circumventing the role of Parliament<sup>21</sup>, which still has life until 28<sup>th</sup> June 2013. Others have insisted that the President can only "make regulations but not enact an Act of Parliament"<sup>22</sup>, which remains the preserve of parliament. Counter arguments have also been made supporting the invocation.<sup>23</sup>

At the SADC summit held in Maputo on 15 June, the regional bloc endorsed a decision to ensure that Parliamentary role be observed in the enactment of the Act as there is ample time before its dissolution at the end of June 2013.<sup>24</sup> The summit also endorsed the decision for Parliament to review the AIPPA and the POSA, in line with the new Constitutional provisions.<sup>25</sup>

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<sup>20</sup> Letter written by President Robert Mugabe to Prime Minister Morgan Tsvangirai, 13 June 2013

<sup>21</sup> Press statement by Prime Minister Morgan Tsvangirai, 13 June 2013

<sup>22</sup> Alex T. Magaisa, Mugabe can't amend Electoral Act, 11 July 2013

<sup>23</sup> Lovemore Madhuku, as quoted in, Gilbert Nyambabvu, Storms brews over Electoral Act amendments, New Zimbabwe, 11 July 2013

<sup>24</sup> Report of the SADC Facilitator, President Jacob Zuma, presented at the SADC Extra-ordinary summit, Maputo, 15 June 2013

<sup>25</sup> Ibid

### 3.3 Effects on democratisation

The transparency of the election process remains a key determinant of the quality of the election.<sup>26</sup> In this case, the amendments to the Electoral Act that have an effect on transparent vote counting at polling centres and the transmission of the results to the wards and then national collation centres is a marked improvement in the quest for strengthening democratic elections in Zimbabwe. Candidates are also empowered by retaining duplicate copies of the results, which is also crucial in reducing the possibility of disputes arising from concealed vote counting processes.<sup>27</sup>

One of the major hindrances to democratic elections in Zimbabwe, on the background of the 2000, 2002 and 2008 elections is voter intimidation. Intimidation is about creation and application of perceptions as it is also about its actual prevalence. By ensuring that voters do not have to hold up their ballot paper, after voting, and show it to ZEC officials, this serves to build confidence in the secrecy of the process. It also limits the perceptions of voter intimidation inside the polling stations. The other clauses of the amendments to the Electoral Act are aimed at strengthening the role of ZEC in managing the electoral processes. Independent and powerful Electoral Management Bodies (EMBs) are also a key tenet of democratic elections.<sup>28</sup> With regards to all these amendments, there is a positive impact on the democratisation process.

The challenge is around the use of the Presidential Powers (Temporary Measures) Act to effect the amendments. Parliament should be allowed to exercise its due responsibility, and the bill should be introduced to the house before its dissolution on 28<sup>th</sup> June 2013. The application of the Presidential Powers (Temporary Measures) has created a precedence that undermines the democratic mandate of parliament which reflects negatively on the efforts for the democratisation process. The recommendation by SADC to review AIPPA and POSA in line with the new Constitution is a positive development for the democratisation process in Zimbabwe. Since their enactment in 2002, the laws have been employed to restrict media freedoms as well the right to freedom of assembly.

### 3.4 Barometer Indicator Scorecard

Barometer Score Card Code: **Green** - High Implementation Score; **Orange** - Medium Implementation Score; **Red** – Low Implementation Score

EVALUATION COMPONENT	SCORECARD CODE	NOTES
IMPLEMENTATION PROGRESS		<ul style="list-style-type: none"> <li>• Cabinet endorsement of amendments is a positive development given the polarisation that GPA parties have often exhibited in discussing election related processes.</li> <li>• The quality of amendments proposed has a positive impact on democratic elections</li> <li>• The amendments also seek to strengthen the role of ZEC in the election process by giving it more oversight powers and influence.</li> <li>• The recommendation by SADC to restore Parliamentary role and</li> </ul>

<sup>26</sup> Deepening Democracy: A strategy for improving the integrity of elections worldwide, Global Commission on Elections, Democracy and Security, September 2012.

<sup>27</sup> <http://aceproject.org/ace-en/topics/vc/onePage> [accessed on 12 June 2013]

<sup>28</sup> Electoral Management Design: The International IDEA Handbook, International Institute for Democracy and Electoral Assistance, 2006

		<p>for the review of POSA and AIPPA are positive for the democratisation agenda in Zimbabwe.</p> <ul style="list-style-type: none"> <li>• However; the invocation of the Presidential Powers Act, in light of the existence of Parliament creates a dent on the democratisation process.</li> <li>• Implementation of the SADC recommendations however still has to take shape.</li> </ul>
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### 3.5 Likely scenario

Although the enactment process of the Electoral Act is contentious, the amendments will likely result in improved public confidence in the electoral process as transparency and secrecy of the vote will be enhanced. It is however not clear to what extent these amendments will also enhance voter turnout, which has in the past been dependent on public confidence in the protection and the secrecy of their vote.<sup>29</sup> The vote counting process will also reduce the likelihood of voting process disputes, especially after the outcome has been announced. The new framework will enhance chances of parallel tabulation of votes by different stakeholders, which will allow for quick noting of discrepancies in results tallying and announcement. In other words, ZEC will not have a monopoly of collation and results publication, as the legal provisions now allow for checks and balances through access to electoral results and information by other parties. The law though still gives them monopoly on announcement of results, and illegalises anyone else's efforts. The foregoing has a significant and positive impact on the democratisation process.

ZANU-PF is however likely to resist the implementation of the SADC recommendations given the party's public position that; further legal reforms to AIPPA and POSA are now not necessary until after the election. However, through SADC facilitation team, there is a likelihood of a political consensus being addressed in order to go to elections with an agreeable framework by the parties; and somehow acceptable to civil society.

### 3.6 Recommendations

- Voter education programs must emphasise on the improved transparency of the vote counting process as well as the enhanced secrecy of the voter's choice, this has potential to trigger a high turnout on polling day.
- ZEC must immediately take charge of every election process and ensure where necessary, that its supervisory role is not compromised or prejudiced.
- Civil society organisations must use the availability of results outside polling stations as a vigilance enhancing opportunity to safeguard against possible manipulation of final results. The consensus expressed by Cabinet in endorsing the amendments to the Electoral Act must be translated to the pursuance of all other outstanding election related processes, including the election road map.
- Civil society must amplify its engagement with the SADC facilitation team in order to ensure that negotiations for implementation of the Maputo recommendations; are not left to chance or the political parties to negotiate on their own. This is against a background of the delays that have been experienced in the past wherever SADC has left crucial GPA issues to the parties to implement on their own. Given the time limit, SADC has to facilitate implementation, as highlighted in the SADC facilitator's report at the Maputo summit.

<sup>29</sup> Low voter turnout anticipated, *Zimbabwe Independent newspaper*

## 4.0 Barometer Indicator 4: The Role of SADC

### 4.1 Barometer Source

The Global Political Agreement (GPA), in its preamble notes that the signatories submit themselves, “to the mandate of the Extraordinary Summit of the Southern African Development Community (SADC) held in Dar-es-Salaam, United Republic of Tanzania, on 29th March 2007 and endorsed in Lusaka on 12th April 2008 and in the AU Summit held in Sharm El-Sheikh, Egypt from 30th June to 1 July 2008”<sup>30</sup>. This preamble clause ensures that the GPA parties, for the purpose of discharging the instruction of the agreement to its end, which must be marked by a democratic election, submit to the role of SADC which is articulated through the facilitation team.

### 4.2 Key prevailing Issues

Since the signing of the GPA in 2008, the role of SADC has evolved. From a regional bloc that was divided on how to tackle the Zimbabwe crisis, there has been a more concerted and consolidated position in approach.<sup>31</sup> This is reflected by how the SADC communiques were previously inarticulate, as compared to how they are now more emphatic on the required specific pre-election preparations in Zimbabwe. Since the Livingstone summit of 2011, SADC has been consistent in its communiques. At its meeting of the Troika for Politics, Defence and Security Cooperation meeting held on the 9<sup>th</sup> of March 2013, SADC called for decisive implementation of the following before elections: security sector realignment, deployment of SADC officials to work with JOMIC, credible voters’ roll, an election road map to be in place a month after the referendum (by 16 April 2013); resolution on observers and monitoring of elections; and fund raising for the elections.<sup>32</sup>

SADC’s work in Zimbabwe has however been complicated by ZANU-PF’s calls for the regional bloc to respect the country’s sovereign right to determine certain election related processes.<sup>33</sup> This has caused complications for SADC’s speedy implementation of some of its demands. Issues related to the SADC facilitation team’s work with JOMIC and attempted mediation around the Constitutional Court’s election ruling, have all been interpreted as meddling in the internal matters of a sovereign member state.<sup>34</sup> Although mandated by the GPA, it has also become difficult for SADC to distinguish just how much it can flex its muscle in pushing Zimbabwean authorities to fully implement their obligations. This has also been complicated by the lack of a common understanding of the role of the “guarantor” by all stakeholders.<sup>35</sup>

In an attempt to move Zimbabwe toward a credible election, SADC called for a special summit on Zimbabwe’s election on 15 June 2013. SADC was clear and emphatic in its call for building mechanisms for credible elections. SADC recommended that: an inter-ministerial committee be formed to oversee media reforms; SADC deployments to JOMIC be effected; the election road map agreed to in 2011 be completed and implemented; SADC facilitation team take part in JOMIC meetings rather than merely receive reports; that there be a public directive by the President to the security sector chiefs to abide by constitutional provisions; that security chiefs make public proclamation on their willingness to abide by constitutional provisions; that AIPPA and POSA be reviewed through Parliament to conform to new Constitution; that an approach be made to the

<sup>30</sup> Global Political Agreement (GPA), 15 September 2008

<sup>31</sup> Zimbabwe: Election Scenarios, Africa Report No. 202, International Crisis Group, 6 May 2013

<sup>32</sup> SADC Troika of the Organ on Politics, Defence and Security Cooperation communique, Pretoria, 9 March 2013

<sup>33</sup> Fungai Kwaramba, SADC wasting time: Zanu PF, *Daily newspaper*, 7 June 2013

<sup>34</sup> Mugabe has no power to invite election observers - MDC-T, *Zimbabwe Mail*, 10 June 2013

<sup>35</sup> Implementing Peace and Security Architecture (II): Southern Africa, Africa Report No. 191, International Crisis Group, 15 October 2012

Constitutional Court to seek an extension of election date to allow for further reforms; and that SADC considers early deployment of observers for the Zimbabwe elections. Given the history of SADC, these recommendations reflect a more consistent and fervent approach to ensuring credible, free and fair elections in Zimbabwe.

### 4.3 Effects on democratisation

The GPA mandate indicates that GPA signatories acceded to the role of SADC in the agreement. With the GPA being instrumental in creating conditions that will allow a credible and conclusive election, SADC's role cannot exclude any key processes that are consequential to the quality of that election. SADC's role is therefore to ensure the adoption and implementation of processes that must allow for a democratic transition, from this coalition to a substantive and democratically elected Zimbabwe government. In the past, the challenges faced by SADC in exercising its full mandate have led to a slow adoption of reforms necessary for democratic transition.<sup>36</sup>

SADC has also lacked effective implementation mechanisms, even on those issues that the bloc has called for action. This is limited by the intergovernmental status of the regional bloc, which unlike supranational bodies, does not allow for full intervention in the affairs of member states, unless by invitation of the affected member state. This provides a classic case of the lack of clarity in situations where intergovernmental bodies have to facilitate implementation of agreements such as the GPA in member states, who themselves have seemingly functional and constituted governments. Whereas it is the sovereign democratic right of the member state to self-governance, such latitude can also be exploited by the member state authorities to either quash or inhibit a democratic transition.

Although SADC processes have been considered by others to be slow yielding, the progressive role and collective action that the regional bloc has achieved since 2008 is commendable. This creates the potential for SADC to maintain some influence on how elections will proceed, with possibility to positively impact the broader democratisation process. Continued insistence on its demands, especially those from the 9<sup>th</sup> of March 2013 meeting of the Troika for Politics, Defence and Security cooperation; and the 15 June 2013 Maputo recommendations; will be beneficial to this intended democratisation process.

### 4.4 Barometer Indicator Scorecard

Barometer Score Card Code: **Green** - High Implementation Score; **Orange** - Medium Implementation Score; **Red** – Low Implementation Score

EVALUTATION COMPONENT	SCORECARD CODE	NOTES
IMPLEMENTATION PROGRESS		<ul style="list-style-type: none"> <li>SADC has become more collective in its approach on Zimbabwe, the regional bloc has allowed the facilitator to lead the process while they support that role.</li> <li>SADC has become more courageous in outlining the conditions the regional bloc wants to see prevailing before an election is held.</li> <li>However; SADC needs to work on mechanisms of enforcing the</li> </ul>

<sup>36</sup> Resistance and Denial: Zimbabwe's Stalled Reform Agenda, International Crisis Group, Africa Briefing No.82, 16 November 2011

		<p>recommendations to ensure the credibility of elections in Zimbabwe.</p> <ul style="list-style-type: none"> <li>• SADC's role is complicated by the lack of clear understanding of the role of the "guarantor".</li> <li>• SADC has faced some "push backs", especially from ZANU-PF on cases considered to be of a sovereign nature, the regional bloc has not been clear on how to move ahead in such circumstances.</li> </ul>
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#### 4.5 Likely scenario

Although at times some political parties in Zimbabwe express disregard for SADC's calls and insistence on implementation of certain reforms, they all still regard the regional bloc as important in the country's transition. All the parties are desperate to win an election which SADC ultimately endorses. In that regard, there is a limited extent to which they can disregard SADC and discount the regional bloc's mandate in Zimbabwe. Given the time limits, and the tension among GPA parties, it is however unlikely that all the reform demands that SADC has called for will be implemented in full before the elections. Even though some may be implemented, there is no ample evidence that such implementation will immediately and significantly change the political environment. SADC's influence may lead to a "barest minimum" set of reforms, which will likely allow elections to go ahead. Those elections will be undemocratic but might somehow be sanitised as credible and peaceful. Should that ensue, SADC will endorse the election outcome and influence the political players to accept the outcome. The risk of any of the political parties defying a SADC endorsed election outcome is minimal, which makes the regional bloc's role a key factor in the country's pre and post-election political transition.

#### 4.6 Recommendations

- SADC must continue to insist on the demands it has made as pre-conditions for an election and not allow a situation where an election is held without their implementation.
- Political parties must allow SADC to take the lead role in Zimbabwe's political transition without incapacitating or complicating its role.
- Civil society must continue to engage with SADC and its facilitation team as a way of aiding the regional bloc's efforts in seeking Zimbabwe's democratic transition
- SADC facilitator must continue to hold diplomatic consultative meetings with regional leaders in order to preserve and build upon the collective momentum that has prevailed over the past few years especially in addressing the Zimbabwean crisis.
- The African Union (AU), which gave SADC the mandate to negotiate and facilitate the GPA in Zimbabwe must play an active role in supporting and coordinating with SADC to ensure there is both regional and continental pressure on Zimbabwean political players to comply with the agreement and hold credible elections.
- SADC and the AU must deploy adequate election observers in Zimbabwe to cover the whole country as a matter of urgency.

## 5.0 Barometer Indicator 5: Election Timing

### 5.1 Barometer Indicator Source

Although the GPA does not specifically state its period of existence and its termination mechanisms, a democratic election is seen as the most viable way of instituting this. There is a Constitutional provision of a five-year term limit on Parliament, which stipulates that Parliament expires on 28<sup>th</sup> June 2013. Although the Constitution allows for elections to be held within a period of four months from the time of dissolution of Parliament, the exact date of the election has become contentious and subject to legal debate and political Machiavellianism.

### 5.2 Key prevailing Issues

From as early as 2010, ZANU-PF began calling for elections meant to officially terminate the GPA.<sup>37</sup> The MDC formations or parties on the other hand have been insisting that election timing be subject to the development and implementation of an election road map. Given the pressure by ZANU-PF on the need for early elections, the GPA political parties' negotiators agreed to an election road map outline on 6<sup>th</sup> July 2011, which was later endorsed by SADC. This roadmap still had outstanding issues, but pursuance of possible agreement on those issues was shelved between 2011 and March 2013, as the constitution making process took precedence. In the aftermath of the enactment of a new Constitution, debate has once again shifted to the election roadmap, although this time around parties to the GPA seem to have different positions on its necessity. Whereas the MDC parties insist on completion of the election roadmap and revisiting those issues outstanding from 2011, ZANU-PF argues that the new Constitution now has precedence and overrides any issues in both the election roadmap and the GPA, which are outstanding. ZANU-PF contends that these issues are instead now covered under clauses of the new Constitution. This has sustained the contentions around how to approach the pending election, as well as the timing of that election. In March 2009, SADC took a crucial position and demanded that key reforms be instituted prior to holding an election.

On the 31<sup>st</sup> of May 2013, the Constitutional Court of Zimbabwe, constituted under the new Constitutional clauses, gave a ruling that President Mugabe needed to announce an election date which must fall before 31<sup>st</sup> July 2013. This development led to the issue of election timing evolving from being merely political into a legal matter, further complicating any dissent to the indicative election timing period as adjudged by the courts. On 13 June 2013, President Mugabe proclaimed that the elections would be held on 31 July. He justified his actions on the need to comply with the Constitutional Court ruling. In his public response, the Prime Minister, questioned the feasibility of the proclamation in light of the need to consent to and implement outstanding election-related reforms and the completion of a consensual election road map before the election.

Arguments were posited against both the Constitutional Court ruling and the presidential proclamation. The Prime Minister argued that the election timing did not allow for the constitutional provision of 30 days of voter registration, then 14 days of the sitting of the Nominations court, and then another 30 days after the sitting of that court.<sup>38</sup> He also questioned what he termed as "unilateral and flagrant breach of the Constitution"<sup>39</sup>, as the 8<sup>th</sup> schedule of the Global Political Agreement indicates that such decisions have to be made in consultation with other GPA principals, which in this case did not happen. The Prime Minister vowed he would not accept the election date proclamation. The MDC led by Welshman Ncube also argued that the Constitutional Court, under transitional mechanisms of the new Constitution, will only be constituted once the next President is installed, after elections, making the ruling legally inconsequential.<sup>40</sup> There was also an expression of concern on whether the GPA parties would find consensus on outstanding reforms and election road map issues,

<sup>37</sup> ZANU-PF Annual People's Congress Resolutions, Mutare, 19 December 2010.

<sup>38</sup> Owen Gagare, Zanu PF hardliners push for elections, *Zimbabwe Independent newspaper*, 7 June 2013

<sup>39</sup> Press statement by Prime Minister Morgan Tsvangirai, 13 June 2013

<sup>40</sup> Priscilla Misihairabwi-Mushonga quoted in MDC Statement on Constitutional Court ruling, 3 June 2013

and implement them within the time leading to 31 July, taking into consideration that this is a quest that has been elusive for the last four years.<sup>41</sup>

The court ruling has now been challenged by two other citizens. Maria Phiri argues that as a citizen who is considered as “alien” in Zimbabwe it will take her up to 12 August 2013 to go through due processes to eventually be allowed to vote. The July 31, 2013 date therefore prejudices her from being part of the electorate. Mr Nixon Nyikadzino, filed an application with the Constitutional Court indicating that there are no mechanisms to address issues around possible election violence and electoral malpractices which is likely to predispose his Constitutional right to freely and fairly participate in the election. The Constitutional Court became the battle ground in an attempt to address the election time contention. At its summit held on 15 June 2013 in Maputo, SADC asked the GPA parties to resolve outstanding reform issues with the assistance of the facilitator. The parties were then further asked to approach the Constitutional Court, through the Minister of Justice and Legal Affairs, to request for a postponement of the election date, to allow for both reforms and legal timelines for the pre-election processes.

### 5.3 Effects on democratisation

Like we have argued before in our previous barometer reports, the publication of election dates is a democratic right of every citizen, who must be able to project and know when they are expected to choose their leaders. Although it is commendable that ordinary Zimbabweans have resorted to the Constitutional Court to seek redress on the lack of clarity on election dates, this also reflects the failure by the country’s political leadership in finding consensus on key political processes. This reflects the existence of a highly politically polarised society, which has to seek legal intervention on matters that should otherwise be resolved at a political level. Highly polarised societies are less prone to democratic practices and each political group in such a society seeks to out-compete the other, usually through undemocratic practice. Political polarisation has a climax level, beyond which it begins to undo rather than build democratic infrastructure in a society. Given Zimbabwe’s GPA period, which was intended to rebuild the “centrality of issues relating to the rule of law, respect for human rights, democracy and governance”<sup>42</sup>, it is worrisome that this goal has not been fully achieved in the lifetime of this agreement. This may tend to negatively affect the full embrace and operationalization of democratic tenants, before the election, during the election and even in the post-election period.

The over-reliance on the judiciary in political matters also puts political pressure on it. The objectivity of a judiciary system becomes clouded where “high stake” political matters, which the political platform fails to resolve, are referred to it. “High stake” political matters referred to the judiciary at times lead to political interpretation of the final court decision, whether seen in the right or wrong context. Societies that have a high political polarisation therefore create political strain on the judiciary, regardless of whether the courts make judicious or non-judicious rulings.

The multiple interpretation and application of the legal instruments, and the confusion caused, is testimony of the complication of the transitional mechanisms from the old to the new Constitution. It is also indicative of the fragility of both constitutionalism and the rule of law. The lack of clarity on provisions and transitional mechanisms has led to:

1. challenges against the Constitutional Court ruling on election date;
2. disagreements on application of Presidential Powers (Temporary Measures) Act;
3. contestation on the Presidential proclamation of the election date without consultations; and
4. the setting of an election date that contravenes other constitutional obligations to time lines of the election process.

A democratic society must have a common understanding of legal instruments and constitutional provisions and these must be applied with transparency and without prejudice of those it seeks to protect, cater for or serve.

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<sup>41</sup> Crisis Coalition of Zimbabwe interview with a Zimbabwe Political Analyst, Johannesburg, 13 June 2013

<sup>42</sup> Global Political Agreement preamble, 15 September 2013.

## 5.4 Barometer Indicator Scorecard

Barometer Score Card Code: **Green** - High Implementation Score; **Orange** - Medium Implementation Score; **Red** – Low Implementation Score

EVALUATION COMPONENT	SCORECARD CODE	NOTES
IMPLEMENTATION PROGRESS		<ul style="list-style-type: none"> <li>• SADC has recommended the government to seek an extension of the date to allow reforms</li> <li>• Election timing has an effect of legitimising the electoral process</li> <li>• Political parties are negotiating on a joint-application to have the date extended</li> <li>• However; there has been a unilateral and weak application to have the date for polls extended which might complicate the process</li> <li>• SADC might be conclusively bound by the constitutional ruling on the election date</li> </ul>

## 5.5 Likely scenario

Without political pressure, SADC is likely to be bound by Zimbabwe's Constitutional ruling on the election date. Dr Thomas Salamao, the SADC bloc Executive Secretary recently said, "to us [SADC], any court ruling made in any SADC member-state is a supreme decision that has to be respected. If President Mugabe decides to task his Justice Minister to make any application and the court discusses the application and either sticks to the original decision or makes any changes, it means anyone has to abide by that court ruling. Who are we to change that decision? As SADC, we will never create a precedent and will obviously not go against a court order."<sup>43</sup> The African Union Commission Chairperson, Dr Nkosazana Dhlamini - Zuma, also weighed in about the need to respect the judicial ruling.

On the other hand, on 18 June 2013, the Minister of Justice, Patrick Chinamasa, filed a weak application to the Constitutional Court seeking an extension of the poll date. In the application he indicated that President Mugabe had no problems with complying with 31 July 2013, yet the court ruling orders the President and no other respondents. Without a political agreement and horse trading among the three political parties in the inclusive government, the Constitutional Court will not be persuaded to change its election timeline based on Mr Chinamasa's unsound appeal. At the very least the Constitutional Court might extend the timeline by 2 weeks to simply allow the voters' roll to be compiled before the sitting of the nomination court. The two week period is not enough to effect all the changes necessary for a democratic transition.

However, with a solid political agreement among the political parties in government, a withdrawal of Mr Chinamasa's controversial appeal, and a legally convincing joint-application, the Constitutional Court can vary its earlier ruling. This is the best case scenario but one should consider that ZANU PF seems bent on diluting the appeal since it is happy with the current proclamation of 31 July 2013.

The worst case scenario is a situation where ZANU PF keeps alive political talks about the election date as a way to buy time whereas concurrently pursuing an urgent hearing of the matter by the Constitutional Court in a Machiavellian way. Once there is another constitutional ruling to uphold 31

<sup>43</sup> Court appeal ruling final, says SADC. The Herald, 19 June 2013.

July 2013 as the election date, based on Minister Chinamasa's unilateral application that would present more complications to Zimbabwe's transition. Given the fluidity of transitional politics, both scenarios must be factored in for planning. Political engagement will however be crucial in unlocking the election timing logjam and set up possibilities for agreeable election timing.

## 5.6 Recommendations

- SADC must ensure that political engagement on election timing continues and not consider the Constitutional ruling as inflexible, maybe drawing partly on Madagascar as a precedence
- Civil society must lobby SADC and political parties, on behalf of the citizenry, to ensure that the eventual election timing allows for time and mechanisms to address insecurities associated with Zimbabwean elections, before going to the polls.
- Political players are urged to resist the temptation of merely going into elections, but ensure that the elections are held under an environment that ensures a democratic transition.

## 6.0. Conclusion

From our analysis, we conclude that Zimbabwe is not heading toward the 'darker versions' of a transitional outcome which include a precluded, blocked or derailed transition. These scenarios would mean more likely chances of the nation-state backsliding and reversing into closed authoritarian practices reminiscent of the old order. However, if harmonised elections were to be held by the 31<sup>st</sup> of July 2013 as proclaimed by President Mugabe, a more likely outcome is a prolonged transition because of limited time for break-through reforms. Nevertheless, if key recommendations proffered in this edition are implemented before the next harmonised elections, there is a chance for a democratic transition.

As we have observed, the contentious areas stalling a democratic transition in the past two months include partisan state media, a chaotic voter registration meant to informally disenfranchise the citizenry, use of old authoritarian laws which are *ultra vires* the new Constitution, no clear implementation mechanism of SADC's 15 June 2013 resolutions and lack of internal consensus on practical election timing. At this juncture, the political reality is that, in the absence of these key reforms and others identified in our earlier versions of the Barometer, Zimbabwe is heading toward a prolonged transition. However, it is a trajectory that provides an opportunity for democratic progress over time. There is a beam of democratic light in this trajectory.

This is strengthened by our observation that SADC is aware that Zimbabwe is not ready for a free and fair election that will result in an undisputed election as emphasised in President Zuma's report at the recent Maputo SADC summit. This means, even if the incumbent retains the saddle of state power, without implementing these reforms, SADC's exclusive legitimation might not be guaranteed.

As a result, for self-preservation and for political legitimacy and due to consistent external pressure the incumbent will not risk backsliding into closed authoritarian practices characteristic of the darker versions of other transitional outcomes. Rather, the incumbent is most likely to seek stabilisation and even advance some of the democratic gains made during the inclusive government. The challenge will be how the region, international community, civil society and citizenry would re-define and re-strategize their roles to ensure a democratic transition in the long-term without giving up. As Mehler (2013:190) argues, 'proponents of power-sharing usually expect a transitional power-sharing phase to be beneficial in facilitating an immediate transition to democracy'. But we need to think about the implications both on short-term and long-term. Political developments in May and June 2013 signify an evolution that favours greater democracy over time rather than an end of the transition paradigm. Finally, we simplify our case in the table in Fig.2.

**Figure 2: Zimbabwe's Transition Projection as of June 2013**

Possible Transition Outcomes (PTOs)	Transition code	Is this Zimbabwe's trajectory?	Why?
Precluded Transition		NO	Central government is in control No prospects of a civil war No armed conflict
Blocked Transition		NO	Election date proclaimed as 31 July 2013 Election date still being negotiated Elections likely before October 2013.
Derailed Transition		NO	The agency of vibrant civil society, SADC facilitation team and tenacious political parties Political legitimacy difficult to attain The political cost of backsliding and reversals is too high
Prolonged Transition		YES	- Electoral manipulation likely - SADC consensus on legitimacy of poll following violations of its June resolutions unlikely - Transitional period set the tone for democratisation - Significant democratic gains made during the transition - Increases legitimation and acceptability of new regime by the region & international community
Democratic Transition		NO	Manipulation of voter registration processes Contested voters' roll Polarised media and partisan state media No consensus on electoral processes Reluctance to align old laws with the new Constitution No clear implementation mechanism of SADC's break-through June resolutions

-The End-