A DATE WITH MUGABE?
THE TIMING OF THE NEXT GENERAL ELECTION
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4th April 2013

“We cannot go beyond March next year,” [Mugabe] told a September 2011 meeting of his Zanu PF. “I will definitely announce that (election) date. It does not matter what anyone would say. Once I announce the date, everyone will follow”.¹

Introduction

Since the advent of the Inclusive Government (popularly known as the Government of National Unity – GNU) there has been considerable confusion over when the next general election will be held. The confusion has been compounded by various inaccurate claims as to what Zimbabwe’s Constitution does and does not mandate in this regard. The most recent addition to the many conflicting pronouncements, all of which claim to be authoritative on the matter, appeared as a comment in the ZANU PF controlled Herald daily newspaper.² The editorial averred that a new Parliament must be elected before the 29th June, 2013 and that a failure to do so would be “unconstitutional” and would sully the fact that “one of our proudest traditions is consistently holding elections as and when they were due”. In so doing The Herald echoed statements to a similar effect made by others, most notably the Minister of Justice, Patrick Chinamasa.³

Elections Two Years From The Start of the GNU?

From the commencement of the GNU on 11th February 2009⁴ a central part of the MDC-T’s political rhetoric was to portray the GNU as a transitional arrangement, pending the adoption of a new constitution, which would lead to free and fair elections thereafter. The Inter-Party Political Agreement (popularly known as the Global Political agreement – GPA) set a 19 - 20 month timetable for the constitution making process. Accordingly, in this scheme of things, the transitional government would last approximately two years.⁵ For this reason it came to be

¹Mugabe Loses Grip http://www.dailynews.co.zw 07.10.12.
²Comment: The Constitution is Sacred The Herald 02.04.13.
³Elections by June 29th: Chinamasa The Herald 21.03.13.
⁴This date is difficult to determine with any certainty. Morgan Tsvangirai was sworn into office on the 11.02.09, shortly before the Constitutional Amendment establishing the framework for the GNU was made law. 35 Ministers (4 more than the constitutionally prescribed 31) were sworn into office on the 13.02.09 and 19 Deputy Ministers (4 more than the constitutionally prescribed 15) were sworn in to office on the 19.02.10.
assumed that the GNU had a two year life span. In fact, the GPA provides a start date – the day of signature – and no end date. The existence of the GNU and GPA are coterminous.\(^6\) Thus the GNU likewise has no specified end date.

The GPA, despite assertions to the contrary, contained no requirement that elections were to be held once the constitution making process was completed. Furthermore, the GPA also does not provide that the GNU is to be a transitional arrangement terminating after the creation of democratic conditions leading to free and elections. It was merely implicit that the GNU would come to an end with the next general election.\(^7\)

Notwithstanding the opened ended nature of the GNU, in June 2010, an article appeared on ZANU PF’s website titled “Elections Inevitable”, maintaining that there was no reason why Zimbabwe should not go to the polls “when the Inclusive Government expires next year”. The annual ZANU PF National People’s Conference of December that year resolved that “at the expiry of the term of the global political agreement with two MDC formations on 15 September 2008 and the inclusive government born there from on 13 February 2009\(^8\) .... the country must hold harmonised elections without fail”.

The notion that the GNU expired in February 2011 and that elections would then be a legal necessity, continued to be advanced in The Herald, quoting Mugabe in October 2010 and January 2011, stating that the GNU could not be extended beyond a few months after its expiry.\(^9\) When the expiry date arrived, the press reported that all parties were considering a six month “extension”.\(^10\)

**Elections at the End of the Constitution Making Process?**

The alleged expiry date of the GNU came and went without elections, as did the purported six month extension. Mugabe’s statement that the GNU “could not be extended” was quietly forgotten. The timetable for the making of a new constitution was likewise abandoned.

However, by the end of 2011, it had become generally accepted the timing of elections was now linked to the completion of the Constitution-making process politically, strengthening the false perception that this was legal requirement. With the process beset by bickering, financial constraints, and consequent repeated delays and stagnation, Mugabe’s statements throughout the second half of 2011, that elections would be held in March 2012, were thus met with considerable scepticism.

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\(^6\)Paragraph 1 of Schedule 8 to the Constitution.

\(^7\) It is possible that the omission was deliberate with both political parties wishing to keep their options open in this regard. However, ZANU PF has since alleged that the MDC had sought a two year time frame during negotiations and that ZANU PF had wanted five year time frame – see Mugabe in GNU Tight Corner The Zimbabwe Independent 11.02.11.

\(^8\) See fn 4 on the date of commencement of the GNU.

\(^9\) No GPA or Inclusive Government Extension: President Mugabe The Zimbabwe Guardian 15.10.10 Politburo To Discuss GNU Lifespan Zimbabwe Independent 21.01.11.

\(^10\) Elections in August? Financial Gazette 10.02.11.
However, it was obvious that the draft new constitution was unlikely to be finalized by this date and the annual ZANU PF National People’s Conference studiously ignored their resolution of the previous year on the matter. The Conference resolutions of 2011 thus simply referred to polls “to be held in 2012.”

Undeterred by the fact that his previous definitive pronouncements as to election dates had not come to pass, Mugabe continued to claim, from early 2012, that elections were imminent. Since the lack of tangible progress on the new constitution was apparent to all, Mugabe sought to give these pronouncements some credibility by stating that the elections would be held with or without a new constitution, and an attempt was made to de-link the process from elections.

However, SADC, the “guarantors” of the GPA, indicated that it would not countenance elections without the completion of the constitution-making process. Many believed that Mugabe would not defy SADC on the issue, and Mugabe’s threats to call for an election without the new constitution were treated accordingly and were increasingly ignored.

The fact that, since 2010, Mugabe had been stating that election dates were soon to be announced, without the dates actually being set, led some to postulate an ulterior motive behind the pronouncements. Given Mugabe’s advanced age and concomitant health problems, many within ZANU PF have doubted that Mugabe would be fit and able (if still alive) to contest the next presidential election. These doubts were underscored after the SADC meeting in Zambia in January 2011, when pictures of an extremely frail Mugabe clinging to a golf cart for support appeared in the press. Mugabe was too weak to walk unaided and compelled to rely on the cart. The question mark that thus appeared over Mugabe’s candidacy in the next election had the potential to widen the already deep fissures in ZANU PF caused by the race to succeed Mugabe as party leader. Mugabe’s repeated statements that an election was imminent, that he would thus be around for elections, and be the ZANU PF candidate to contest it, could thus be viewed as merely a means of managing the succession issue within ZANU PF, and were made without any actual intention of proclaiming the dates.

It should be noted that although the Constitution requires Mugabe to secure the Prime Minister’s consent before dissolving Parliament ahead of a general election, and the MDC President, Morgan Tsvangirai, indicated he would not give such consent before the constitution-making process was completed, Mugabe’s failure to announce election dates despite claiming that he would do so, is unlikely to have been on account of this legal nicety.

At the end of the year, in mid-December 2012, the ZANU PF Annual People’s Conference resolutions “not[ed] that the GPA and the Inclusive Government, legally and constitutionally,

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12 ‘Let’s Delink Copac Constitution From Elections’ The Sunday Mail 06.05.2012. In this article Jonathan Moyo correctly points out that there is no legal requirement or provision in the GPA that a new constitution must be in place prior to elections, but incorrectly seeks to argue that court proceeding pertaining to by-elections – see below – legally oblige Mugabe to call elections before the end of March 2013.
13 ‘Using Old Constitution a ‘Violation’ of the GPA: Analysts’ The Zimbabwe Mail 07.01.13.
14 20.1.3(p) of Schedule 8 to the Constitution as read with Section 115(1).
15 Mugabe had previously ignored constitutional provisions requiring that he secure the Prime Minister’s consent when appointing governors, judges and ambassadors.
ought to have come to their end after the expiry of the two years reckoned from the inception of the Inclusive Government” and “implore[d] the GPA parties to conclude the constitution making process before Christmas this year, failing which the Head of State and Government and Commander-in-Chief of the Defence Forces should in terms of the law issue the relevant Proclamation dissolving Parliament and fixing a date for the holding of the harmonised elections under the current Constitution.”

The resolution was not implemented. Political considerations, SADC pressure, the need to finalise the constitution-making process, and the constitutional requirement to gain Tsvangirai’s consent meant that the determination of the election date did not lie solely with Mugabe.

The draft new constitution was only put to the citizenry for acceptance (successfully) on 16th March 2013. As the failure to finalise the constitution making process had been viewed as the major stumbling block to calling elections, the successful referendum re-ignited the debate as to the timing of the elections and highlighted the significance of a sub-plot relating to elections which had been running since 2008.

**By-Elections as a Determining Issue?**

At the inception of the new Parliament, one of the ZANU PF members elected in March 2008 had died. The Electoral Act requires that, once such a vacancy arises in Parliament, the President must announce the dates for a by-election within 14 days of being informed thereof. He did not do so. Mugabe’s prior stated enthusiasm for the democratic process did not appear to extend to by-elections. The President also failed to call by-elections when further seats fell vacant, three of which vacancies were occasioned in 2010 by the expulsion of three MDC members for “crossing the floor”. The three former MPs instituted legal proceedings to compel by-elections.

Although Zimbabwe’s High Court had previously ruled that the President is obliged to comply with the provisions of the Electoral Act pertaining to by-elections, and a clear precedent had been set in this regard, Mugabe did everything possible to avoid this legal obligation. Through a series of spurious procedural objections and manifestly futile appeals, the President managed to delay the inevitable court order for two years. Eventually, in July 2012, the Supreme Court dismissed the absurd assertion that by-elections need not be held if the government is financially constrained, and ordered that the President should remedy his breach of the Electoral Act by the end of August, 2012.

Rather than comply with the Supreme Court Order, Mugabe approached Justice Chiweshe at the 11th hour with an urgent application seeking permission to delay the implementation of the Supreme Court order and to be given until 1st October, 2013 to proclaim the by-election dates.

Justice Chiweshe was appointed as Judge President of the High Court without the consent of the Prime Minister, as constitutionally required. He was head of the Zimbabwe Electoral Commission when the results of the March 2008 presidential election (which Mugabe lost) were

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16Chapter 2:13 section 39(2).
17Members lose their seat if the political party concerned informs the Speaker of the House that the members no longer represent its interests and is provided for in section 41(1)(e) of the Constitution.
curiously and controversially delayed for five weeks and when the results of the of the clearly fraudulent run-off election of June 2008 (which Mugabe “won”) were announced within less than 24 hours of the poll. Seven weeks after these events, Mugabe awarded Justice Chiweshe the “Grand Order of Merit” Medal\textsuperscript{18} at Zimbabwe’s annual “Heroes and Defence Forces Day” commemorations. As Judge President, Justice Chiweshe has the power to allocate cases to Judges\textsuperscript{19} and he has allotted many cases which have political significance to himself for adjudication.

The application was granted. There was, however, to be no compliance with the new date. Once again waiting until a mere three days before the deadline, a second application was made to delay the Supreme Court order, the idea being, the Affidavit filed on Mugabe’s behalf by Justice Minister Patrick Chinamasa averred, “\textit{to subsume the holding of By-Elections in the Harmonised Elections to be held in the last week of March 2013.}”

The Supreme Court order was one giving the President a practical period of time within which to remedy his breach of the Electoral Act. It was not general authority to delay by-elections. The Electoral Act does not give the court the power to override the will of the legislature in this regard. The Electoral Act also does not (as is sensibly provided for in many other jurisdictions) place a moratorium on by-elections when a general election is pending. Justice Chiweshe, however, granted an order allowing the President to postpone the proclamation for the date of the by-elections until the end of March 2013, accepting the argument which had been explicitly rejected by the Supreme Court, that Government did not have the financial resources to hold the by-elections.\textsuperscript{20}

By the time of Justice Chiweshe’s ruling, a further 27 vacancies had arisen in Parliament in this two and a half year period. Mugabe did not proclaim by-election dates to fill any of these seats. In September 2012, the Zimbabwe National Youth Service Graduate Association was also granted an order compelling the President to announce elections dates pertaining to other outstanding by-elections by the 1\textsuperscript{st} October. The Justice Minister again sought, and was granted, a similar postponement for the calling of these by-elections on behalf of the President.\textsuperscript{21}

Mugabe clearly never had any intention of complying with the Electoral Act and calling the by-elections. By use and abuse of the judicial process, and with the connivance of the court, the President’s legal obligations and the wish of the legislature were subverted.

The role of the judiciary is to ensure that the executive complies with the will of the legislature. This is a fundamental aspect of the doctrine of the separation of powers, and when it is not applied, the executive is allowed to ride rough shod over the will of the people expressed through the legislature. Rather than act as a check on executive power through its power of judicial review, in this instance the judiciary did the opposite. The order of Justice Chiweshe, in effect, annulled the possibility of the by-elections and assisted the President in ensuring that the

\textsuperscript{18} The award has no connection with the “Grand Order” referred to in the famed Harry Potter novels.

\textsuperscript{19} Justice Chidyausiku claimed this authority for the Judge President (removing it from the Registrar) when he was in this position, before his appointment as Chief Justice.

\textsuperscript{20} The President of the Republic of Zimbabwe v Bhebhe, Mguni and Mpfou HC 11222/12 at p4.

\textsuperscript{21} Granted by Justice Chiweshe on 16.10.12.
intention of the legislature would not be fulfilled. It held that it was reasonable to further delay by-elections which ought to have been held three years previously and to allow them to be subsumed in the general elections. The electorate in 27 constituencies (16 in the House of assembly and 11 in the Senate) has been denied representation in Parliament as a result of the President’s actions, and with judicial approval.

An additional effect of these legal rulings was to further confuse matters relating to the timing of elections. Since Mugabe had applied for, and apparently had been granted an exemption from holding by-elections on the basis that general elections would be held before the 31st March, 2013, it was assumed that this now set the timetable for the poll, with some going so far as to assert that it was now a legal requirement that the election be held before 31st March, 2013.22

The latter claim was incorrect. Although the undertaking had been given on oath in an affidavit, the court did not order that a general election be held before the 31st March, 2013 and it is doubtful that it could have done so. The order related to by-elections only. The President cannot by contract limit his constitutional powers, and, similarly, the statement that he would call a general election before the 31st March, 2013, albeit in a solemn affidavit, could not override the powers granted to the President in the Constitution and Electoral Act and be held to be legally binding.

Mugabe again did not announce the poll dates as required. On the last working day of March 2013 an application was filed by the Justice Minister, on behalf of the President, seeking yet another postponement. The fact that the purpose of the original Supreme Court order had been granted to give Mugabe a reasonable and practical period within which to remedy a breach of the Electoral Act had by now been lost. The application was effectively one to postpone by-elections on the basis of an impending general election – in other words, one to ask the court to write into the Electoral Act a provision which is not there, a stipulation that by-elections need not be held when a general election is pending.

Seemingly unembarrassed in asking for a delay for the third time, unembarrassed by the fact that the request would delay the implementation of the Supreme Court order by what would be nearly a year, and unembarrassed by the fact that the previous sworn statement that a general election would be called by March 2013 had proved false (and upon which basis the postponement apparently had been granted), the court’s indulgence was again sought in requesting a further delay on the basis that a general election would now be called by 29th June, 2013. The difference with this third application for a postponement was that Chinamasa tried to deal with the fact that the court had been misled into thinking that a general election would be held before the 31st March 2013 by obsequiously inserting into the draft order sought, a ruling that the postponement be made conditional upon holding a general election before the 29th June, 2013. In seeking to make the date of the general election a part of the court order, the intention was to show the court that the President was prepared to make the date legally binding, unlike the averment in the previously sworn statement to this effect.

This approach by Chinamasa immediately threw up several anomalies.

22 See Jonathan Moyo Not everyone is Rooting For Elections The Sunday Mail 18.11.12.
Firstly, the condition that Chinamasa inserted into the draft order sought is not one that can be ordered by the court. While the court can order that election dates must be set as provided for in the Act (as in the case of the 14 days set by the Electoral Act to proclaim by-elections), it cannot order a general election on or before a date which is not prescribed by the Electoral Act or the Constitution. This difficulty was brought to the fore when the Prime Minister sought to join the proceedings, citing the constitutional requirement that he must effectively be consulted before election dates are set (see above), and a court order requiring an election before the 29th June, 2013 would breach this constitutional provision. It was thus made clear that there are constitutional and other legislative provisions that must be complied with when determining the date of a general election which cannot be overridden by judicial fiat. There is no basis upon which the court could order Tsvangirai to give his consent to a date for a general election, the more so when the application before the court was one in which the President was seeking to extend the time within which the court would condone his failure to call by-elections as required by the Electoral Act.

Chinamasa tried to deal with this problem in statements outside the court by disingenuously suggesting that it is a constitutional requirement that a general election is held before 29th June, 2013 and that the date is thus prescribed by law.

“It is imperative to have the elections by June 29 because we will no longer have a Parliament by then and a country cannot be run without Parliament,” he said.

“The life of Parliament will not be extended and without it you cannot make laws hence the elections should have been (sic) held by the end of June.”

The basis for this assertion (which Chinamasa must have known was false, and hence the careful way in which he chose his words) is that the life of Parliament is five years, calculated from the day the president enters office. Since the President entered office on the 29th June 2008, Parliament automatically stands dissolved five years later, on 29th June 2013. However, it is incorrect to imply that it would be unconstitutional for there to be no Parliament thereafter. The constitution provides:

**A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament...**

The latest date for a general election is thus 29th October, 2013 and Parliament may stand dissolved for this four month period. Matters had not been improved when the leader of the MDC, Professor Welshman Ncube, who as a constitutional law expert usually gets these things

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23 *Elections By June 29: Chinamasa* The Herald 21.03.13.
24 Section 63(4) of the Constitution.
25 Section 58(1). The full section reads “A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.”
right, stated that the period was 90 days and not four months.\textsuperscript{26} The 90 period was subsequently repeated as fact by several publishing houses.\textsuperscript{27}

The MDC formations prefer an election closer to the October date. Accordingly, some viewed Chinamasa’s inclusion of the June date in the court order as an attempt to create an excuse to hold elections before 29th June 2013, in accordance with the stated preference of ZANU PF. If the order was granted, ZANU PF would inform SADC and meet the MDCs’ objections by stating that the election date has been set in order to comply with the court order and Mugabe had no choice in this regard.

However, there is a second and more egregious anomaly which requires examination. An amendment to the Electoral Act (which became effective the day Justice Chiweshe sat to hear the application for the postponement to the 31\textsuperscript{st} March, 2013) extended the time limits for a poll once the President proclaims the election dates.\textsuperscript{28} The nomination court must sit no less than 14 and no more than 21 days of the proclamation and the elections must be within not less than 42 and not more than 63 days of the sitting of the nomination court. Hence Mugabe could comply with the 31\textsuperscript{st} March deadline and announce an election date 84 days after the proclamation, making the election date the 23\textsuperscript{rd} June, 2013.

This significance of this is twofold. Firstly, when Chinamasa filed an affidavit stating the President was willing, able, and intended to hold a general election at the end of June, this amounted to an admission that the President could have proclaimed the dates for a general election within the time limit set by the court in the previous application (the 31\textsuperscript{st} March, 2013), but did not do so, thus rendering him in contempt of court – an aspect which Justice Chiweshe will no doubt ignore.

Secondly, in granting the President until 31\textsuperscript{st} March, 2013 to proclaim the dates for the by-elections, Justice Chiweshe allowed the effective date for the by-elections to be as late as the 23\textsuperscript{rd} June 2013, a mere six days before Parliament dissolves. There would then be no House of Assembly in which those who were elected in by-election could sit. The previous order by Chiweshe had thus already made the by-elections pointless.

The draft order sought by Chinamasa, inserting the condition that a general election be held by 29\textsuperscript{th} June, 2013 is thus extremely odd. If the order is granted, then the general election would be held before the 29\textsuperscript{th} June, 2013. But if the order for a postponement is refused and the President is ordered to comply with the earlier deadline as nearly as possible and announce the election dates forthwith, Mugabe will say that the by-elections must be subsumed in the general election and announce that date as being the 29\textsuperscript{th} of June, 2013. Grant or refusal, win or lose, the result is the same. Without bringing the court application, Mugabe could already state that he is complying with the earlier court ruling and claim judicial authority for an election on the 23rd

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\textsuperscript{26} Interview with W.Ncube SWRadio 21\textsuperscript{st} March 2013.  
\textsuperscript{27} For example, Associated Press – ZANU PF Door-to Door Terror Begins 03.04.13.  
\textsuperscript{28} The amendment contained several errors, not least of which is the failure to repeal the original time limits. It is necessary to read the introduction to the amending Bill to determine the meaning of the Act – compare subsection 38(1)(a) with Section 38(1)(b).
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June, 2013. This undermines the MDC conspiracy theory noted above. So why bring the application?

One possibility, then, is just the opposite to that suggested by the MDC, that there is no intention of holding the election by the end of June - otherwise Mugabe would have already announced the date and cited compliance with the March deadline as a reason for so doing. Having failed to comply with the March deadline, Mugabe needed to make the application to court to avoid being held in contempt. The 29th June, 2013 undertaking was simply a further attempt to lure the court into believing that there is no need for by-elections as a general election is pending. If so, either the application had not been thought through, or neither Justice Chiweshe nor Chinamasa have done their arithmetic. At the time of writing, a ruling is awaited from Justice Chiweshe on the issue, but he is likely to come to the slow, and what ought to be embarrassing, realisation that his earlier grant of a postponement has already rendered the by-election irrelevant on account of the dissolution of Parliament on the 29th June, 2013. The same factors should also make it clear that the President is in contempt of the earlier ruling. It is likely, however, that Justice Chiweshe will simply now treat the application as one to postpone, not the date of the by-election, but the proclamation thereof to one that must be made before the 29th June, 2013, and grant the application without adverting to the implications thereof.

It should also be noted that the draft constitution was gazetted on 28th March, 2013. It thus could be passed into law by the second week of May, 2013.30 Section 58(3), which will become effective immediately the Constitution becomes law, provides that no by-elections need be held nine months before a general election. Mugabe’s by-election problem will thus be solved by simply making an application to the court adverting to this new provision.

Nonetheless, the by-election court application and assertions that elections must be held by the 29th June, 2013 have been seized upon by ZANU PF supporters, further embroiling the issue.31

The New Constitution and Elections.

The Herald added considerable grist to the mill by way of an editorial comment on the 2nd April, 2013, entitled “The Constitution is Sacred”. The editorial claimed that the proposal to have elections after the 29th June, 2013, but before 29th October, 2013, was “unconstitutional”.

The life of the Seventh Parliament ends at midnight on June 29 by which time a new Parliament should have been elected. We are thus left wondering at the motives of some people who want our country to go for over four months without a legislature and hold elections around October.

The editorial built upon an article which had appeared in the Herald the previous day which cited section 158(1) of the draft constitution, part of Chapter 7 of the Bill. The section changes the timing of an election upon the dissolution of Parliament at the end of its five year life span from a period of four months after the dissolution to a period of 30 days prior to the dissolution. Since Chapter 7 will come into effect the moment the Bill becomes law (the bulk of the provisions

29 The Bill must be gazetted for 30 days prior to being considered by Parliament.
30 Parliament reconvenes on the 7th May, 2013.
31 Polls Must Be Held By June 29th The Herald 29.03.12.
become law when the President enters office after the next election), the argument presented was that the four month period in the current constitution would be superceded by this provision and that a new Parliament should thus be in place by the 29th June, 2013. The Herald portrayed attempts to apply the October deadline as a “scandalous” subversion of the constitution by the MDC component of the GNU and an adulteration of the “proud tradition of holding elections as and when they are due”.

These two articles in the Herald have not only continued the confusion around the timing of the general election, but they are also replete with misstatements of the law and deep ironies. In the same editorial we are told:

*It is scandalous that to this day, close to 40 constituencies do not have representation in Parliament following the death or expulsion of legislators over the past five years.*

Since the subtext of the Herald articles is an attempt to defend the President’s and Chinamasa’s desire to uphold the proud tradition of holding elections as and when they are due, several important aspects were elided. If the Herald’s argument was correct - that the provisions of the new constitution are to apply - then it is already the case that elections cannot be held “as and when they are due”. On this argument, elections must be held by the 29th May, 2013, that is 30 days prior to the dissolution of Parliament. But the current Electoral Act provides for a minimum of 14 days for the sitting of the nomination court prior to elections and minimum of 42 days after the sitting of the nomination court for the poll. Even if Mugabe were to proclaim the election dates today, the 29th May, 2013, deadline would not be met. The Herald thus carefully avoids mentioning the 29th May, 2013, as the last possible constitutional date for elections.

Furthermore, in the same breath that the Herald lauds the “proud tradition” of “holding elections as and when they are due”, the Herald decries the failure to hold elections in the now “40 constituencies” as and when they were due to fill the vacancies that have arisen in Parliament. It also carefully avoids mention that this “scandalous failure” is due to the machinations of the President, Justice Minister Patrick Chinamasa and the rulings of Justice Chiweshe detailed here, as these are the same individuals who are supposed to have upheld the “proud tradition”.

But most importantly, in its eagerness to construct a conspiracy by the MDCs to constitutionally delay elections, the Herald fails to mention that section 158(1) of the draft constitution refers to the five year life of Parliament as being five years calculated from the time the President enters office in terms of section 94 of the draft constitution (the current President entered office in terms of section 28(5) of the extant constitution), and that the elections must take place 30 days prior to the dissolution of Parliament in terms of section 143 of the draft constitution.

The dissolution of Parliament on 29th June 2013 will be in terms of section 63(4) of the extant constitution.

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32 This number is doubtful. As of December, 2012 there were by-elections required in 11 Senate seats and 18 House of Assembly seats, with an additional three non-constituency vacancies in the Senate.
Neither section 94 (from which the five year period is to be calculated), nor section 143 (pertaining to dissolution) of the draft constitution, will come into effect until after the elections. It is thus patently obvious that section 158(1) is not intended to have, and cannot have, any application to the impending general election. However, since section 158 is part of Chapter 7 of the draft, and this Chapter will come into effect the moment the draft becomes law, it was deemed prudent - lest anyone sought to ignore the obvious (a caution which the Herald itself provided justified) and claim that section 158 was to be effective immediately - to spell this out in the draft. This change, which merely emphasized the existing provisions, did not affect the substance of the constitution in anyway, and could be held to have been entirely unnecessary, became the pivot around which the Herald developed its conspiracy theory.33 The result however has been to continue the election date saga, leaving some with the impression that it would be unconstitutional to hold elections after the 29th May, 2013, and doubly so if they are held after 29th June 2013.

The President’s Power to Make Law All by Himself

One final issue relating to the timing of elections remains. The new constitution will (re)introduce provisions relating to a system of proportional representation in elections. The Electoral Act will need to be amended accordingly. Thus, it seems, at first glance, that elections cannot take place until Parliament (currently in recess) has passed this necessary legislation into law, and it must do so before automatic dissolution on the 29th June, 2013. The MDC formations would have it that several other pieces of legislation are also required to ensure the integrity of the general election, and that these too must be passed into law by Parliament before dissolution. However, the new constitution will do nothing to remove the President’s power to make Regulations while Parliament is in recess in terms of the Presidential Powers (Temporary Measures) Act.34 The Regulations “may provide for any matter or thing for which Parliament can make provision in an Act”35, and may be made whenever “because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation.”36 They remain in force unless amended or repealed at the next sitting of Parliament.37 Mugabe may choose to use these powers to bring such legislation as he deems necessary into being and does not require a sitting parliament to do so.

Conclusion.

One of the prominent characteristics of the Zimbabwean polity is the heated and protracted disputes around issues which can be resolved by a simple reference to the black and white provisions dealing with the point. This has been the case with regard to the GPA, the indigenisation legislation, and the constitution. The debate around the date for elections is merely more of the same. Despite the dust that has been thrown up around the timing of elections it remains clear that:

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33For this reason, it may have been wise to delay the insertion until the matter came before Parliament which would, in any event have been procedurally correct and would not have opened the door to accusations of impropriety.
34Chapter 10:20.
35Section 2(2).
36Section 2(1)(c).
37Section 4(2).
The five year life span of Parliament ends on 29th June, 2013 (section 63(4) of the Constitution) at which time Parliament will be automatically dissolved.

Parliament may only constitutionally be earlier dissolved with the consent of the Prime Minister first obtained (section 20.1.3(q) of Schedule 8 to the Constitution as read with section 115 thereof).

Elections must be held within four months of the dissolution of Parliament (section 58(1)) of the Constitution.

If Parliament is dissolved on the 29th June, 2013, elections must be held by the 29th October, 2013.

It is also clear that the President was obliged in terms of the Electoral Act (section 39(1) to proclaim the dates for each by-election within 14 days of being informed of a vacancy in the House. He did not do so and has been assisted in this failure to comply with the Act by the courts. In so doing, the principle of the separation of powers has been subverted and the courts have failed to apply their power of judicial review without fear or favour to ensure that the executive acts within the letter of legislation. This power of judicial review is an essential element of a functioning democracy. Zimbabwe’s courts have played no small part in ensuring that Zimbabwe cannot be described as such.
The Research and Advocacy Unit [RAU]

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