

Reflecting on Zimbabwe's constitution-making process

"A constitution is not the act of a government, but of a people constituting a government" – Thomas Paine

"The Constitution, like the Bible, has some good words. It is also, like the Bible, easily manipulated, distorted, ignored and used to make us feel comfortable and protected. But we risk the loss of our lives and liberties if we depend on a mere document to defend them. A constitution is a fine adornment for a democratic society, but it is no substitute for the energy, boldness and concerted action of the citizens." – Howard Zinn

After the violence, and political struggle of the last decade, and thirty years of one-party rule, Zimbabwe has embraced coalition government and the multi-party sharing of power. Establishing the conditions for the sharing of that power, the Global Political Agreement (GPA) was fostered by the 'quiet diplomacy' of former South African President Thabo Mbeki and the Southern African Development Community (SADC). Since the adoption of the GPA, and as it dictated, Zimbabwe has undergone a participatory constitution-making process the culmination of which is a new draft constitution for its people to adopt or reject by referendum, lead by the Constitutional Parliamentary Select Committee (COPAC). The following report will provide an outline of this process, the constitutional inheritance against which it was undertaken, and the successes, failures, and prospects of participatory constitution-making in Zimbabwe. We will briefly examine some general issues of constitutional law and theory prominent in discussion of Zimbabwe's constitutional change, alongside key historical and legal issues that provide the backdrop for this change. We will then cover the constitutional drafts available to Zimbabwe in recent years and their backgrounds, and finally the workings of the process itself.

1. Constitutions and Constitution-making

Whilst it is not our task to engage in any extended debates over the nature and content of constitutions and the processes by which they are made, we cannot engage in discussions of the Zimbabwean experience without making clear the range of views with which we may understand the issues. There are differing and contentious views as to what a constitution should do – is a constitution solely about limiting the power of governments, or might it have any number of purposes? There are also differing and contentious views as to how constitutions are and should be made – can we expect any more from constitution-making processes that they represent the negotiations and bargains made by elites at points of crisis in a country's history? A brief examination of these questions, and questions like them, will be necessary.

A. What should constitutions do?

As John Rawls, the most significant political philosopher of the 20th century, laconically stated, “[i]deally a just constitution would be a just procedure arranged to insure a just outcome”.¹ That is, a constitution lays down the rules by which ordinary legislation and politics are to be carried out. It is designed so as to insure, on the basis of what we think justice requires, what will be the most desirable outcome. The just constitution will be the one “more likely than any other to result in a just and effective system of legislation”.²

More prosaically, as Anthony King has stated, a constitution is “the set of the most important rules and common understandings in any given country that regulate the relations among that country’s governing institutions and also the relations between that country’s governing institutions and the people of that country”.³ This description of a constitution is sufficiently wide to include that of the United Kingdom, for example, a country which famously lacks a unitary written or codefied constitution in the manner of the United States, but which nonetheless, through its various ordinary laws, conventions, and historical documents such as the 1215 Magna Carta and the 1689 Bill of Rights, has precisely this system of foundational rules and understandings.

We may remember the words of Howard Zinn cited above: democracy is about more than just constitutional law. Law lecturer at the University of Kent Alex Magaisa, for one, argues that we need not mere constitutionality – the idea that government legitimates its actions by appeal to constitutional law – but *constitutionalism*.⁴ This, as C.L. Ten recounts, “usually refers to various constitutional devices and procedures, such as the separation of powers between the legislature, the executive and the judiciary, the independence of the judiciary, due process or fair hearings for those charged with criminal offences, and respect for individual rights, which are partly constitutive of a liberal democratic system of government”.⁵ Critical to this approach will be devices such as bicameral legislatures, comprising of both a Lower and Upper House, judiciaries empowered to strike down legislation it deems unconstitutional, or the removal of the executive from involvement in the legislature, so as to reduce the possibility of legislative dominance by the executive or other kinds of political grouping.

These requirements tend to constitute a particular view as to what constitutions should do: as Lovemore Madhuku similarly claims, “[t]he purpose of a Constitution is for society to limit the power

¹ 1999, p.173.

² 1999, p.194.

³ 2007, p.3.

⁴ 2011.

⁵ 2007, p.493.

of politicians”.⁶ This is not the sole conception of a constitution’s purpose, of course: a classical view is that it represents a ‘social contract’ between the government and the governed, such that the people dictate to the government the terms under which it will accept its democratic reign. In addition, the South African constitution has given us what has been called ‘transformative constitutionalism’, a vision of a constitution laying down not only the limitations on government power but, even more importantly, the legitimation for far-reaching egalitarian and poverty-eradicating reform. Indeed, it is to the detriment of these alternative conceptions that a ‘limited government’ view of constitutions is too singularly pursued. Moreover, we must be wary of an all too casual deployment of the term ‘separation of powers’ and ‘limited government’. There remains serious questions as to whether strong separation between the branches of government, as in the U.S. where its executive and legislature are very strongly separated and its judiciary has the power to invalidate legislation, leads to minority capture of individual branches of government and preserves the status quo, no matter how unjust.⁷ Indeed, whilst we may hope to restrain the power of wayward executives, the same surely holds for the judiciary: handing very strong powers to invalidate legislation to judges may be touted by some as the pinnacle of good constitutionalism, but countries such as India may now be suffering from a massively empowered and *too* independent judiciary whose views on human rights are often seriously debatable.⁸ Moreover, legal philosophers such as Jeremy Waldron continue to not implausibly claim that in fact it is positively undemocratic to permit judicial power of this kind, on the assumption that a country’s elected legislature has the greatest democratic pedigree of all branches of government.⁹

We may note, however, that critical to the perceived legitimacy and success of any constitution appears its reflection of a nation’s history and its people’s collective experiences. As Lovemore Madhuku rightly states,

“the content of a Constitution must be determined by the political experience of the people in that country. People must have a sense of the meaning of what they are putting in there. So you can’t just get a Constitution from the library. The Constitution must come from the spirit and the hearts of the people”.¹⁰

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http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec_code=090707constdex§or=DEMG&year=2010&range_start=271&intMainYear=2010&intTodayYear=2012

⁷ See Dahl, 2003.

⁸ See Rajogopal, 2007.

⁹ See Waldron, 2006.

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http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec_code=090707constdex§or=DEMG&year=2010&range_start=271&intMainYear=2010&intTodayYear=2012

Therefore, it is not difficult to see why many in Zimbabwe advocate this view of 'limited government' constitutionalism. Indeed, Kim Scheppele uses the notion of 'aversive constitutionalism' to understand responses of this kind: "certain cross-constitutional examples may loom large in constitution builders' minds because they provide examples of what not to do, of what to refuse in the strongest terms".¹¹ In other words, constitution makers may look not only to their new constitutional provisions to lay down a transformative vision for the nation's future, but also to mark a decisive break with its past. We may note the Constitution of South Africa once more, which strongly rejects the former institution of apartheid, a response that permeates the document as a whole: the constitution's preamble demands that its people "Recognise the injustices of our past", "Honour those who suffered for justice and freedom in our land", and "Heal the divisions of the past". We may also think of more specific constitutional measures that play this role: as Scheppele states, "making federalism an unamendable part of the German Basic Law in article 79 was not just something that the occupying allied force insisted upon, it was also something that the domestic constitutional drafters were convinced they should include because they believed that the suspension of federalism was a primary cause of the Weimar Constitution's failure".¹²

In general, constitutional provisions may be advocated and adopted for the decisive break from the past that they represent, adopting multiple perceived safeguards against the repeat of previous regimes. Moreover, those in Zimbabwe advocating such a constitution may have an insight into the elements of their country's political culture that particular constitutional arrangements may best keep in check. As Cass Sunstein notes, "[c]onstitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce most harm through that country's ordinary political processes".¹³ Whilst, for example, constitutional provisions for a very strong judiciary may often be inadvisable, it may nevertheless remain the best course of action in historical circumstances such that strong executive power in combination with a particular political culture has lead to abuse. The call of some Zimbabweans for strong limitations on government power in any new constitutional settlement may not be as strongly aversive as the examples of South Africa or Germany, but nonetheless they indicate a clear trend in constitution making: the recognition of a deplored past and the perceived constitutional means for its rejection.

B. How should constitutions be made?

¹¹ 2003.

¹² 2003.

¹³ 1991, p.385.

The circumstances of constitution-making are multifarious and complex. This may permit little of great generality to be said of them without going into excessive depth. But some features appear clear. As Elster remarks, “new constitutions almost always are written in the wake of a crisis or exceptional circumstance of some sort”.¹⁴ As he recounts, these range from socio-economic crisis, revolution, regime collapse (or fear of it), defeat in war (and resultant military occupation), the creation of a new state, and liberation from colonial rule.¹⁵ Constitution-making can ensure the settlement of revolutionary wars, but can also ignite them: as Elster writes, “the making of the first French constitution was *not* an effect of the French revolution, but rather its cause: The economic crisis caused the constitution-making process, which eventually turned into a political revolution”.¹⁶

Again, it is difficult to say in brief anything informative and general on the circumstances conducive to *good* constitution-making. But there are a number of things to be worried about. Most generally, there is the significant potential of individuals and groups to capture the process in the service of their own interests. This may be in branches of government lobbying for greater extension of their own powers, or in minority groups aggregating greater power than their numbers or proportions would permit. In this regard, Elster’s analysis gives us two basic paradoxes of constitution-making. The first paradox is “the fact that the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making”.¹⁷ The crises in which a constitution is made may push parties into the kind of behaviour that good constitution-making abhors. Short-term bargains may be made which negotiate between powerful interest groups at the expense of the country’s future. The second paradox is that “the public will to make major constitutional change is unlikely to be present unless a crisis is impending”.¹⁸ This crisis must provide each party with sufficient time-limited incentive to engage with others and on terms sufficiently acceptable to all. Without this, parties may feel little impetus to make concessions in the face of disagreement or to reach a compromise solution, instead of simply leaving the process to wither and die. Peter Russell remarks that “[a] country must have a sense that its back is to the wall for its leaders and its people to have the will to accommodate their differences”.¹⁹ These paradoxes may uncomfortably interrelate: the circumstances that provoke parties into ultimate constitutional agreement may be just those circumstances which make good constitution-making less likely.

¹⁴ 1995-6, p.370.

¹⁵ 1995-6, p.371.

¹⁶ 1995-6, p.371.

¹⁷ 1995-6, p.394.

¹⁸ 1995-6, p.394.

¹⁹ 1993, p.106.

One popular analogy for ‘limited government’ constitutionalism, as Elster recounts, is the idea that “constitutions are chains imposed by Peter when sober on Peter when drunk”; but “[i]f constitutions are typically written in times of crisis, it is not obvious that the framers will be particularly sober. The French constitution makers of 1791, for instance, were not famous for their sobriety, and the document they produced, which eschews bicameralism as well as judicial review, contains few devices for restraining majorities that are swept by passion”.²⁰ Indeed, these apparently pervasive features of constitutions – the need for bargaining, negotiated settlement, group interest compromise, and the like – undermine a view of constitutions that too strongly pushes their status as reflective of higher moral law. In short, they may just as strongly reflect short-termism and the realities of conflict resolution as a grand vision for a country’s moral frontiers. This need not be a debilitating problem, but is rather a counsel of realism and the recognition of the limits of constitution-making.

But what about the notion of participatory constitution-making? It is a relatively recent and rare phenomenon: one of the most prominent constitutions of the world, that of the U.S., was stitched together by a group of wealthy, white male elites and huge sections of society were permitted no role in its creation, with First Americans, black people, and women remaining completely excluded. But participatory constitution-making is not a phenomenon unique to Zimbabwe. It has been pursued in Albania, Eritrea, South Africa, and Uganda, and to lesser extents in India, Iraq, and Nigeria. As the U.S. Institute of Peace states,

“Clearly, there is an emerging trend toward providing for more direct and far-reaching popular participation in the constitution-making process, not only through the election of a constituent assembly or voting in a referendum on the proposed constitutional text, but also in the form of civic education and popular consultation in the development of the constitution. Some scholars refer to this as “new constitutionalism.” Aspects of this approach have been employed around the world in recent years, including in Europe, Africa, Latin America, and Asia.”²¹

The value of greater participation of citizens in any area of government may seem axiomatic: any other view may seem to tend towards undemocratic elitism. But if we accept that participation is a substantial good, there may remain significant limits to the benefits it constitutes or brings. As Moehler notes, “[p]articipation is beneficial if citizens are well-informed, involvement is meaningful, cleavages cut across one another, civil society is robust and pluralistic, institutions are tailored to fit circumstances, and parties and other representative institutions are well developed. If these fortuitous circumstances are absent, participation can be harmful for democracy”.²²

²⁰ 1995-6, p.383.

²¹ 2005, p.7.

²² 2008, p.22.

Moehler states the perceived benefits of participatory constitution-making: "In addition to ensuring constitutional legitimacy and knowledge, participatory constitution-making is said to...strengthen democratic attitudes, encourage public consensus, facilitate citizen engagement, and build support for state institutions".²³ However, as Moehler notes, even where participation is real and beneficial, it may be "no panacea for democracy and stability. For example, seven years after the constitution-making process ended, Eritrea has still not put its constitution into effect and remains one of the least democratic and most oppressive countries in the world".²⁴ We may have further worries, in this regard: "those countries that are least predisposed to stable and peaceful democratic governance are the most likely to adopt the participatory model in hopes of ameliorating their deficiencies".²⁵

Moreover, there are real worries as to the role a participatory constitution-making process can play in situations of protracted, deep political conflict whose resolution demands far more than a constitutional settlement through public participation. We may wonder as to the efficacy and efficiency of the sizeable resource expenditure a participatory constitution-making process may represent, especially in light of possible concerns over the constitution's longevity: will the participatory process result in a constitution for the future, rather than a constitution for the resolution of current political strife? Worse, in such cases, some claim that "the lengthy period required to foster mass participation prolongs the phase of transitional rule, distracts attention from other important democratization and development issues, and legitimizes the entrenchment of the regime overseeing the process."²⁶ Some claim that these problems, alongside the logistics of constitution making and the diverse and multiply-interested sectors of society involved, coalesce to generate a constitution that is "cumbersome, inconsistent, and difficult to interpret", with those involved, largely being ordinary citizens with little grasp of constitutional issues, being vulnerable to undue influence and manipulation by their leaders.²⁷ We must bear these worries strongly in mind as we proceed.

2. Constitutional Change since 1979

Before examining Zimbabwe's recent constitution-making process, we must recount its citizens' constitutional inheritance. Beginning with the end of the liberation war in 1979, we must briefly chart the constitutional changes and difficulties that Zimbabweans have encountered since independence.

²³ 2008, p.32-3.

²⁴ 2008, p.34-5.

²⁵ 2008, p.35.

²⁶ 2008: 33.

²⁷ 2008: 33-4.

A. The Lancaster House Constitution 1979

As with many post-colonial states at independence, Zimbabwe's constitution was born out of political settlement, hard-fought negotiations, and the tentative victory of a bloody liberation struggle. The constitution that was agreed in Lancaster House, as part of the ceasefire agreements and various pre-independence arrangements, was bound to lack legitimacy in the eyes of many. It was, for one, negotiated under the auspices of a former colonial power, the United Kingdom, and, far from representing the unalloyed victory of independence, was awash with concession and compromise. But, as we have seen, this should often be expected: the Lancaster House Constitution represents a classic example of the circumstances of constitution-making and their potential results.

Moreover, such concession and compromise may be critical necessities for successful transition and change. We may take the issue of land as an instructive example. Lecturer at the London School of Economics Sue Onslow recounts what she describes as the "conventional popular history in Zimbabwe – that the government was blocked from carrying out far-reaching land reforms due to the constitution agreed at the Lancaster House conference that could not be altered for a decade".²⁸ In her view, the Lancaster House Constitution was "a successful constitutional 'fudge'".²⁹ Whilst it was ultimately the case that it "entrenched protection for property rights for the first ten years of Independence", it was also the case that "[t]hereafter, the Zimbabwe Parliament would be able to alter the Constitution in accordance with its own legislation", a possibility complemented by the US commitment to help fund the land reforms which independence leaders Robert Mugabe and Joshua Nkomo intended to pursue.³⁰ With no clear alternatives to keeping the ZANU-PF and ZAPU leaders around the negotiating table with those of the former Rhodesian government and their allies, the Lancaster House settlement was "a pragmatic arrangement. Its greatest achievement was its restoration of peace without necessarily resolving all of the country's existing problems".³¹

It cannot be disputed, however, that the legitimacy of the settlement was ultimately disputed, making the need of a 'home-grown' and 'Zimbabwean' constitution all the more apparent. However, this is for reasons not limited to the perceived disconnect between Zimbabwe's national history and its constitutional inheritance but, as we shall briefly examine below, owing to the significant constitutional change Zimbabwe has undergone since independence.

B. Constitutional Amendments since 1979

²⁸ 2009, p.41.

²⁹ 2009, p.73.

³⁰ 2009, p.73.

³¹ 2009, p.74.

The Lancaster House Constitution has been amended 19 times since independence. This may indicate a number of things. It is chiefly cited to note the fact of Parliamentary dominance by ZANU-PF and its capacity to alter the constitution through an amendment process, whose vote they could dominate by Parliamentary majority. Not counting the amendments properly viewed as part of the original document, the U.S. constitution has faced fewer amendments (17) in over 6 times the length of time (214 years to Zimbabwe's 33).

Zimbabwe's amendments have come, for instance, in the form of pre-empting or nullifying Supreme Court rulings on the constitution's requirements. Much constitutional debate rages as to the democratic credentials of judiciaries empowered to determine much of the way in which a country is run, despite being a small group of legal professionals and often failing to be representative of wider society: there may always remain legitimate differences of opinion over what human rights require, and which many believe should be settled by elected representatives rather than the judiciary. We have already noted that a real concern for excessive executive power should also translate into a concern for excessive powers within other branches of government which may exhibit their own flaws and difficulties, such the judiciary. This is then aside from further issues as to how amendments take place, such that fewer amendments over time may in fact be less democratic than more: the U.S. constitution is notoriously difficult to amend, for example, in ways that many deem highly undemocratic, and which over time prohibits the people from fully determining how they want their country to be governed.³² These are clearly complex matters whose examination cannot be undertaken here. But they are worth bearing in mind when we consider the legitimacy of constitutional amendments by Parliament.

However, this is separate from the question has to whether the amendments Parliament may have legitimately pursued were in fact to the detriment of its citizens or contrary to democratic ideals: Parliaments may have certain powers, as a matter of democratic right, which it nonetheless wields contrary to democracy or human rights. In 1987, with the 7th Amendment, then Prime Minister Mugabe replaced the non-executive Presidency and the role of Prime Minister Zimbabwe had enjoyed since independence with an executive Presidency with significantly expanded powers, such as the power to call and dissolve Parliament at will, as we will discuss in later sections. The 9th Amendment in 1989 abolished the upper chamber of Parliament, the Senate: many democracies employ bicameralism to provide certain checks and balances on legislative and executive power. Whilst there removal is not always a serious concern, the absence of other checks and balances or the prevalence of certain political cultures may serve to generate real problems.

³² For example Dahl, 2003, pp.160-1

Former Chief Justice Anthony Gubbay cites the period of 1991-2000, for instance, as comprising of constitutional amendments “to the Declaration of Rights to the disadvantage of the individual”.³³ In 1991, the 11th Amendment added two key provisions to s.15(1) of the Constitution which provided that corporal punishment inflicted on males under 18 cannot be held inhuman or degrading, and which overruled a decision of the Supreme Court, *Stave v A Juvenile*.³⁴ The amendment also specifically permits execution by hanging, a provision which Gubbay states was designed to pre-empt an impending decision by the Supreme Court on the constitutionality of execution by hanging.³⁵ The amendment also concerns property rights and land reforms issues: it further altered s.16 to require “fair compensation payable within a reasonable time” in the event of state expropriation of land, instead of the previous “adequate compensation payable promptly”, and, as Gubbay notes, “removed the right of an expropriatee to challenge in a court of law the fairness of any compensation awarded”.³⁶ In 1993 Parliament further amended s.15(1) so as to nullify a Supreme Court judgment, *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General, Zimbabwe and Others*³⁷, that held that inordinate delay in completion of a death sentence constituted inhuman treatment. The 16th and 17th Amendments concerns land issues once more. The former, passed on 19th April 2000, is summarised by Gubbay: “[w]hereas previously the owner of agricultural land compulsorily acquired for resettlement of people had to be compensated, the amendment spelt out that such obligation no longer pertained; it was the exclusive responsibility of the former colonial power to do so”.³⁸ The 17th Amendment, however, passed on 14th September 2005, “effectively vests the ownership of land, compulsorily acquired for resettlement purposes in conformity with the land reform programme, in the state”.³⁹ Moreover, it ousted the jurisdiction of the Supreme Court in matters of land acquisition.

On the basis of the above, therefore, Magaisa’s warnings are well-made: “one must be wary of an approach where the constitution is used simply to clothe otherwise arbitrary conduct with legality and legitimacy. It makes a mockery of the protections available in the Bill of Rights if they can be abrogated at the whim of the state with a view to covering legal shortfalls through later constitutional changes”.⁴⁰

C. The 2000 Constitutional Referendum

³³ 2009.

³⁴ 1990 (4) S.A. 151 (Zimbabwe Supreme Court).

³⁵ 2009.

³⁶ 2009.

³⁷ 1993 (4) S.A. 239 (Zimbabwe Supreme Court).

³⁸ 2009.

³⁹ 2009.

⁴⁰ 2009.

A review of the Constitution had been previously undertaken in 1999: a 400-member Constitutional Commission appointed by President Mugabe set out to reach a new constitutional settlement and move on from Lancaster House. Much like the current outreach process, the Commission consulted with the public as to its views on a new constitution for around four months, and submitted its findings to the President, who from the beginning had stated that whilst views on a new constitution were to be collected from wider society, the ultimate constitutional drafting and choice of provisions was to be an elite affair undertaken by the ruling party.⁴¹

As Kersting recounts, “[t]his Commission was boycotted by a coalition of civil society organizations under the umbrella of the National Constitutional Assembly (NCA), an NGO which had been formed in 1997. The NCA criticized the Constitutional Commission as partisan and lacking independence”.⁴² The NCA itself undertook its own outreach process and civic education campaign in an attempt to garner what it hoped would be the public’s real views, independent of the ZANU-PF-dominated process it took the Commission to be pursuing.⁴³ The results of the parallel processes were ultimately translated into two separate drafts. The Constitutional Commission presented its draft to the public by a nationwide referendum in February 2000, and it faced a resounding rejection.

This appears to have been for various reasons. As Eddie Cross claims, “[t]he State appointed a Commission that was sent out to hear the views of the nation only to have those views distorted in the final draft in a way that would have perpetuated the rule of the Zanu PF elite. In the subsequent campaign, conducted by an arrogant and supremely confident Zanu PF, they completely underestimated the strength of public opinion”.⁴⁴ Similarly, Lloyd Sachinkonye notes:

the credibility of the CC exercise was thrown into serious doubt when its draft omitted and misrepresented some of the citizens’ views on what the new constitution should contain. For instance, consistent sentiments had been expressed in public hearings as well as in other submissions that the extensive powers of the President should be reduced considerably, that the size of the Cabinet should be significantly reduced to about 15 posts, and that an independent electoral commission should be appointed. When most of these and other recommendations were ignored or fudged, the public and voters were not amused. To complicate matters, the President unilaterally inserted certain provisions including those on land reform.⁴⁵

But the highly politicised nature of constitution-making in Zimbabwe was clear at this point also. It appeared also that the 2000 constitutional referendum was a proxy for the public’s dissatisfaction with ZANU-PF rule, largely as a result still worsening economic catastrophe facing the country. It was

⁴¹ Sachinknoye, 2011, p.9.

⁴² 2009, p.8.

⁴³ Sachinkonye, 2011, p.10.

⁴⁴ <http://www.sokwanele.com/thisiszimbabwe/archives/4310>

⁴⁵ 2011, p.11.

with this electoral shock to ZANU-PF that the ruling party's tolerance for opposition markedly decreased.

D. The 19th Amendment: The Global Political Agreement

After the violence of the 2008 run-off election in which hundreds were killed, and thousands coerced, beaten, arrested, and tortured, the MDC and ZANU-PF negotiated an apparent settlement to the conflict. This was the Global Political Agreement (GPA), forming Zimbabwe's second ever Government of National Unity (GNU), after the brief GNU lead by Bishop Muzorewa in 1978 as the first attempt at a handover from white minority oppression to a compromise regime. The GPA laid down a number of requirements for political change and countrywide reform, including giving priority to the restoration of economic stability and growth, the promotion of equality, national healing, cohesion, and unity, and permitting freedom of political activity across the country. But, importantly, this included by Article VI the requirement of a new constitution through a participatory constitution-making process.

The requirements of the GPA, however, were unconstitutional as they stood: for one, it mandated the office of a Prime Minister, something that been abolished years earlier. Therefore, the GPA was appended to the Constitution in the form of the 19th Amendment, and as Professor Greg Linnington has noted, will be valid as long as the GPA subsists.⁴⁶ Nonetheless, the arrangement permits of power-sharing between the parties to the GPA, with requirements that Prime Minister Tsvangirai be consulted prior to President Mugabe's appointments of senior officials or the dissolution of Parliament. However, much of the GPA's requirements pertaining to power-sharing, for example, have been repeatedly broken, as monitors have consistently documented from the beginning of the GNU.⁴⁷

E. The Need for Change

We have noted that successful democracies are about far more than constitutional law. Government and state failure is about far more than that as well. Certainly, constitutional law, in laying the rules by which governments must act, will play a crucial role in permitting or facilitating abuses of power: it should, critically, define what such abuses are. As we have noted, the current constitution permits a sizeable concentration of power in the executive, and many will note the inimical role this has played in Zimbabwe's recent constitutional history. But various extra-constitutional features of Zimbabwe's political and civic culture have made this possible. We may note, for instance, that since

⁴⁶ <http://www.theindependent.co.zw/opinion/33935-whither-zim-after-constitutional-impasse.html>

⁴⁷ For example, <http://www.sokwanele.com/zigwatch>

independence, or more specifically since the assimilation of ZAPU into ZANU-PF in 1987 after the mass killings of Gukuruhundi, successive ZANU-PF governments have often lacked sufficiently powerful political oppositions to contest their policies and provide a key check on the wielding of executive power. As Norman Kersting writes in his preface to a collection of essays on prospects for Zimbabwe's constitutional change, "there has to be a cultural change towards consensual politics and real reconciliation. This change seems to be more difficult than institutional change".⁴⁸ As Werner Patzelt states, it is imperative that a country's political culture be "truly based on political pluralism and on treating opponents as competitors, not as enemies" (2009: 204), alongside an effective media and civil society in further ensuring accountability and checks on power. Indeed, the role of these institutions in providing accountability and a limit to state control – and its manifest lack in much of Zimbabwe's recent history – can hardly be overstated.

Where effective opposition has arisen, as in the last decade or so, it has not been the constitutional law that has failed: rather, it has been the willingness of the ruling ZANU-PF to resort to violence and its capacity to ignore human rights and constitutional requirements on government. Anthony Gubbay recounts the series of court orders issued to prohibit farm invasions in the early 2000s which were simply ignored by those involved and denounced by the ZANU-PF government, and the direct targeting of members of the judiciary to ensure rulings consistent with ZANU-PF policy.⁴⁹ As he notes, "during the eight-year period preceding the recent formation of the coalition government in Zimbabwe, the avowed policy of the executive was to appoint as judges to both the Supreme and High Courts, persons known to be sympathetic to its political ideology".⁵⁰

The U.K.'s constitution, famously, fails to limit the power of its governments to anywhere near as much as the U.S. constitution. But it is not simply credible to claim that the U.S. enjoys greater fulfilment of human rights as a result. Indeed, the opposite may appear true: the US continues to score very poorly for its inequality, lack of women's representation, incarceration rates, and its welfare state provision, for example.⁵¹ More interestingly, it would seem that in some cases the inverse relationship holds: a country with one of the best human rights and equality records in the world, Sweden, relies less on its judiciary or the guarantees of its constitution to enforce human rights and ensure representative government, but more on features of its political culture that appear to generate greater respect for human rights and equality.⁵²

⁴⁸ 2009, p.6.

⁴⁹ Gubbay, 2009.

⁵⁰ Gubbay, 2009.

⁵¹ Dahl, 2003: 191.

⁵² Lijpart, 1984 and 1999.

Magaisa gives a good example of otherwise desirable legal powers open to the Zimbabwe government but which, owing to the prevailing political culture, tend to be used in undesirable ways: he cites the Presidential Powers (Temporary Measures) Act, “which allows the Executive President to make temporary laws subject to parliamentary approval at a later stage. Properly used, it could be a useful legal instrument – such as in situations of extreme emergency – but experience has shown that it is too prone to abuse. It has, for example, been used at critical times such as election periods when the freeness and fairness of the elections have been compromised since the person making the laws is also a contestant” (2011). These worries as to the interplay of constitutional law and political culture extend across party divides: Morgan Tsvangirai successfully amended his party’s constitution to permit him another term as leader, alongside identical moves by other high-profile political figures such as Zimbabwe Congress of Trade Unions (ZCTU) President Lovemore Matombo and NCA chairperson Lovemore Madhuku.⁵³ We must therefore remain wary of undue focus on constitutional reform to the detriment of far wider political and civic activism in the enforcement of rights and accountable, responsible government. Such caution may be counselled, for instance, when considering the power of Bills of Rights to protect a country’s citizens from its government. Without far wider political, legal, and civic reform, a set of constitutional rights cannot be relied upon for this protection. This is not to downplay their potential as rallying cries for political change, and their use in as one measure among many of ensuring responsible, accountable government where the conditions are right. But we must remain acutely aware of when those conditions fail to obtain, and the necessity of alternative action when this is so.

It is nonetheless clear, however, that there remain a variety of features of the current constitution that demand change. As Werner Patzelt counsels, Presidential systems can present “a clear risk that the office and the actual role of a strong president become starting points for regime transformation towards autocracy”: a system involving a directly elected executive President localises much political power in one person and those politically attached to him or her.⁵⁴ Without, for example, “(a) an effective system of checks and balances, (b) undisputed rule of law, (c) free and critical public opinion, and (d) a fair and democratic electoral system”, such systems will have a ‘winner takes all’ character, leading to strong incentives to use whatever means are available to gain state control and to retain it against opposition.⁵⁵ Under these conditions, a President is all too likely to “to expand

⁵³ <http://bulawayo24.com/index-id-news-sc-national-byo-4036-article-Mugabe,+Tsvangirai,+Madhuku+and+now+Matombo+clings+to+office.html>

⁵⁴ 2009: 187.

⁵⁵ 2009: 187-8.

and intensify personal rule, adopt authoritarian measures to repress systems of competitive politics and effective opposition, and restrict free political activity at all levels of society.”⁵⁶

Indeed, as Lia Nijzink states, there is evidence to suggest that “powerful presidents are an important reason why modern Parliaments in Africa are generally regarded as weak institutions”.⁵⁷ As she notes, “[e]specially in the African context where neo-patrimonialism and 'big man' rule are more than just minor legacies from a distant past the balance of constitutional powers between Parliaments and presidents seems crucial if Parliaments are to exert any influence on law-making or hold strong executives to account”.⁵⁸ There are a variety of constitutional means by which the Zimbabwean President can exert – under the right conditions – disproportionate and dangerous control over political life in the country. For example, as Nijzink states, “in the current Zimbabwean constitution the President has unrestricted powers to name the cabinet”, and “Zimbabwe under the current Constitution is one of the 20 countries in which the president can dismiss cabinet and individual ministers at will”.⁵⁹

As Ndulo states, the “executive's involvement in these areas can lead to control of the subject institutions and the perception that the other organs of government are subordinate to the executive.”⁶⁰ Nijzink also notes that under the current constitution Parliament may take a vote of no confidence in the President to remove him or her from office, but the latter can simply dissolve the former in response.⁶¹ This is then exacerbated by the constitution's failure to provide effective mechanisms to curb the power of the President, leaving him or her free to widespread control over other branches of government. As we have noted, this may be through coercion of members of the judiciary or a politicised appointments process controlled either as a matter of law by the President or by bodies over whom the President has *de facto* political control. This may also hold true of the legislature: the President's party may hold a majority in the legislature and through an effective system of party discipline push his or her legislative program through with little to no real opposition. Moreover, the current constitution explicitly gives legislative authority not only to Parliament, but also to the President. The same worries may arise in respect of other presidential powers: the current constitution permits presidential appointment of key public servants, such as police and army commanders, after consultation with the relevant agencies. The same is the case in

⁵⁶ Ndulo, 2009: 208.

⁵⁷ 2009: 160.

⁵⁸ 2009: 161.

⁵⁹ 2009: 176.

⁶⁰ 2009: 209.

⁶¹ 2009: 177.

respect of the President's power to appoint all members of the senior judiciary after consultation with the Judicial Service Commission.

A crucial change, therefore, would be a move towards a more Parliamentary system in which an executive Prime Minister (with or without a non-executive President) is appointed by Parliament, the members of which are elected by the people. The apparent loss in democracy resultant on the choice of executive devolving away from the people and to members of the legislature seems, therefore, simply an appearance: such a system ensures greater accountability and scrutiny of the executive's actions by Parliament, with the executive serving at the behest of its members – and so the electorate – rather than the other way around. This represents a foundation stone in many well-functioning democratic systems, such as Norway or Sweden.

Many have called for constitutional guarantee of government accountability for the human rights violations of the past, whether the atrocities of the Gukurahundi period or more recent electoral violence.⁶² Anthony Gubbay cites s.311 of the Constitution as key in this regard: "the President has a right to grant a pardon, amnesty or clemency, to convicted prisoners. There are no set criteria upon which this power is exercised, and in the absence of such, abuse has been inevitable".⁶³ As he recounts, members of the CIO have been pardoned for political violence, such as pardon for the politically-motivated murder of opposition electoral candidate Patric Kombayi by a CIO member and ZANU-PF member. Gubbay also notes the issuance of Clemency Orders in 1998 to pardon all those guilty of gross human rights violations during the Gukurahundi period, and their use to pardon those responsible for human rights violations during the 2000 constitutional referendum and Parliamentary elections.

There have been widespread calls for the recognition and protection of a variety of other important human rights in the new constitution. Some advocate firm entrenchment of the right to strike so as to better protect Zimbabwe's workers against draconian legislation such as the Public Order and Security Act, which threatens fines and imprisonment for striking workers.⁶⁴ The organisation, Gays and Lesbians of Zimbabwe (GALZ), have stated that the current constitution-making process gives the country the opportunity "to bring the constitution into compliance with its international human rights obligations and explicitly prohibit discrimination on the basis of sexual orientation and gender

⁶² <http://www.theindependent.co.zw/local/27185-villagers-want-former-presidents-liaible-for-crimes.html>

⁶³ Gubbay, 2009.

⁶⁴ <http://www.newsday.co.zw/article/2010-09-08-sweeten-posa-labour-practitioner>

identity”.⁶⁵ This has been opposed by ZANU-PF, with Grace Mugabe, the First Lady, claiming that “Satan will have defeated us” if Zimbabwe accepts such rights in its new constitution.⁶⁶

Woman of Zimbabwe Arise (WOZA) and other groups have strongly advocated the protection of women’s rights and the entrenchment of gender equality in the new constitution, with many condemning President Mugabe’s claims to a constitutional right to polygamy.⁶⁷ In its presentation to COPAC during the outreach process, WOZA advocated a right to sexual and reproductive choice, and rights to equality within Zimbabwe’s civil and customary law, such that “[w]omen and men shall have equal status and capacity in civil and customary law, including, among others, full contractual rights, and the rights to acquire and hold rights in property, the rights to inheritance and the right to secure credit and citizenship”.⁶⁸ WOZA also presented what it viewed as constitutional necessities for the protection of the rights of the disabled, such as right “to accessible social amenities and public buildings” and a right to education befitting their needs.⁶⁹

Alongside others demanding strong protection of socio-economic rights, the Zimbabwe Association of Doctors for Human Rights in its submissions to COPAC has advocated a strong right to health within the new constitution, demanding justiciable rights to “the underlying determinants of health (or living conditions necessary for good health) such as safe water, adequate sanitation, adequate nutrition, healthy working conditions and environment and access to health-related information”.⁷⁰ There remain further outstanding constitutional issues, such as the rights of children, minority language rights, the rights of prisoners, provisions regarding property rights, issues regarding rights to religious belief and the separation of church and state, and media freedom. As mentioned above, there may also be calls to bring Zimbabwe’s constitution into conformity with much of the world on the issues of the death penalty and corporal punishment of minors.

The question of citizenship in the constitution remains a much-contested issue, in addition. WOZA’s submissions to COPAC advocated a right to multiple citizenship within the constitution, a suggestion that has been much-contested by those sympathetic to ZANU-PF who have campaigned against dual citizenship for many years, presumably hoping to nullify the most likely anti-ZANU-PF votes of Zimbabwe’s sizeable diaspora. The final constitutional issue of significance is that of devolution.

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http://www.kubatana.net/html/archive/sexual/120517galz.asp?spec_code=090707constdex§or=DEMGG&year=0&range_start=1&intMainYear=0&intTodayYear=2012

⁶⁶ *The Herald*, 3rd July 2010.

⁶⁷ <http://www.thestandard.co.zw/local/25951-gender-activists-attack-mugabe.html>

⁶⁸ 2010: 4.

⁶⁹ 2010: 8.

⁷⁰ <http://www.zadhr.org/news-and-updates/100-zadhrs-submission-on-the-new-zimbabwean-constitution.html>

Many have called for strong provisions constitutionally entrenching the dispersal of government power across Zimbabwe's provinces. Those in Matabeleland have been particularly vocal on this issue,⁷¹ with many taking the constitutional entrenchment of devolution to a critical step towards what is felt to be the government's enduring neglect of the region, sentiments echoed by Deputy Prime Minister Mutambara.⁷² Following this have been demands for community rights over resources, an issue made all the more prominent since the discovery of vast tracts of alluvial diamond mines in Marange.⁷³

4 The Suggested Drafts

Zimbabwe has before it multiple draft constitutions. The most recent is that drafted by COPAC after the outreach process in 2010, and it currently awaits a second drafting – we will discuss this later. Each has arisen in specific political circumstances, some with more overt political purposes than others, and with forming a guide to the kinds of government which Zimbabweans may want to avoid or embrace.

A. The Kariba Draft

As noted, the draft that was rejected by referendum in 2000 preserved the features of the former constitution which many had felt demanded alteration. This trend continued with the Kariba Draft, which Kersting claims "closely follows the 2000 Draft of the Constitutional Commission".⁷⁴ It was drawn up in secret negotiations in Kariba in 2007 between the two MDC formations and ZANU-PF. Lovemore Madhuku comments on the problems with the Kariba Draft: "Everything that is objectionable in the current Constitution is reproduced in the Kariba Draft...why would anyone call this a new Constitution? For example, Section 27(2) of the current Constitution says that the President takes precedence over all other people in the country...Then I looked at Kariba, thinking that anyone writing a new Constitution wouldn't even think to reproduce this clause. But there it is, Section 79(2) in the Kariba Draft".⁷⁵ ZANU-PF Justice Minister Patrick Chinamasa decries claims of partisanship: "That document is not a ZANU-PF document. It's a document of all parties, ZANU-PF,

⁷¹ <http://www.theindependent.co.zw/local/26995-mat-region-lobbies-for-devolution-of-power.html>

⁷² [http://www.newzimbabwe.com/news-2917-](http://www.newzimbabwe.com/news-2917-Devolution%20global%20best%20practice%20AGO/news.aspx)

[Devolution%20global%20best%20practice%20AGO/news.aspx](http://www.newzimbabwe.com/news-2917-Devolution%20global%20best%20practice%20AGO/news.aspx)

⁷³ <http://www.newsday.co.zw/article/2010-08-05-include-local-community-rights-in-new-constitution>

⁷⁴ 2009: 10.

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http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec_code=090707constdex§or=DEMG&year=2010&range_start=271&intMainYear=2010&intTodayYear=2012

MDC-M and MDC-T”.⁷⁶ This echoes claims made by ZANU-PF that all parties accepted this draft in embracing the terms of the GPA in 2009: the Kariba Draft is stated to have ‘acknowledged’ by all parties in Article 6 of the GPA, but parties dispute the meaning and implications of this acknowledgement. Despite it being rather unclear why Article 6 would have been included in the GPA were the GPA to have already fixed on a draft constitution prior to undertaking the constitution-making process that that Article mandated, ZANU-PF supporters and members have maintained that the constitution-making process is moot in light of this supposed acknowledgement.

As Nijzink states, both “[t]he current situation and the Kariba draft leave Zimbabwe with the current highly presidentialised hybrid which is not conducive to the emergence of a strong Parliament”.⁷⁷ For example, it continues to permit Presidential appointments of Cabinet (Art.101(1)) and leaves the President with the ability to dissolve Parliament at will (see Part VII of Kariba Draft). By Art.144 the President can be vested with legislative powers by a Parliamentary majority vote. The President will also continue to play a central role in the appointment of the judiciary under the Kariba Draft, alongside a similarly strong role in the appointment of the Police Commissioner and army commanders and without needing Parliamentary approval. Most tellingly for the ZANU-PF hand in the Kariba Draft is the fact that a two-term limit is imposed on the President which only applies prospectively, and so President Mugabe’s multiple terms served hitherto are excluded from the rule (see Art.81). Similarly telling is Art.85, which appears to entrench immunity from prosecution upon leaving office for acts done in a person’s capacity as President.

B. The NCA Draft

As noted above, the NCA Draft was written as part of the country’s previous constitution-making process, producing its draft after the referendum in 2001. Nijzink states the innovations of the NCA Draft:

“The draft of the National Constitutional Assembly is radically different from [the Kariba Draft]. First, it provides for a ceremonial non-executive President and seems to create a parliamentary system in that it creates the position of the Premier who is fully accountable to Parliament, is him/herself an MP and is required to appoint most of his cabinet from amongst MPs (with up to 3 cabinet ministers being allowed from outside Parliament). However, the NCA draft surprisingly demands that the Premier be directly elected. This is a fairly unique design that has only ever been implemented in one country in the world, Israel, and for only a few years. It creates the risk of major deadlock between Premier and Parliament because both have separate electoral mandates but the Premier still depends on Parliament for his continued survival”.⁷⁸

⁷⁶ <http://www.theindependent.co.zw/local/27283-copac-process-a-circus-madhuku.html>

⁷⁷ 2009: 184.

⁷⁸ 2009: 181.

The dangers of a directly-elected, 'Presidentialised' executive are clear, as the foregoing has established. A directly-elected Prime Minister, therefore, should be hardly less worrying in its latent dangers than the current Presidential system. Moreover, many are certain that a far stronger Parliament is necessary to provide an effective check on executive power, but adopting too fine a balance between the new and the old may present serious risks of its own. Crucially, Parliament alone has the power to dissolve itself, and by a 2/3 majority vote, whilst it also has the power to pass a vote of no confidence in a Minister, or in the Premier with a qualified majority. But the risk of deadlock between Premier and Parliament may render the inclusion of these key provisions a pyrrhic victory in the fight against 'Presidentialism'. Nonetheless, unlike the current constitution, the NCA Draft (also the Kariba Draft also) provides that the executive is not permitted a legislative veto unless the executive thinks a Bill unconstitutional, in which case it returns to Parliament and can be forced through despite the executive veto if it garners a 2/3 Parliamentary majority. The legislative process becomes, in these drafts, largely a matter for the two chambers of Parliament acting in concert, with no legislative power vested in the executive. Also, the NCA Draft greatly diminishes the executive's role in judicial appointments, it being largely a matter for the non-executive President acting on the Prime Minister's and other's advice deciding between candidates suggested by the Judicial Services Commission. The Draft is silent, however, on the subject of the appointment of police and military positions.

It has been stated that, in contrast to the Kariba Draft which contains little of substance on the topic of devolution, the NCA Draft "contains perhaps the most elaborate provisions on devolution", providing for "a system of provincial governments with a provision for an elected executive Governor and a provincial assembly—chapter 13 and local governments—chapter 14 that separates urban from rural areas".⁷⁹ In respect of other issues, the NCA Draft only abolishes the death penalty in respect of crimes except what it describes as 'serious murder', although it provides for a public consultation procedure by which the continued constitutionality of the death penalty is to be deliberated and determined (Art.14(3)). It has a fairly comprehensive list of human rights included within its Bill of Rights, in addition.

C. The Law Society Draft

The Law Society Draft was drawn up after a year of internal deliberations, public consultations, and involvement of national and international expert opinion, whilst taking the provisions of past constitutional drafts into account. It mirrors some of the NCA Draft's central features, such as

⁷⁹ Olowu, 2009, p.119.

providing only for a non-executive President but in addition its unique, but problematic, vesting of executive functions in a directly-elected Prime Minister whilst attempting to provide for a far stronger Parliament. It abolishes the death penalty, and provides for an extensive Bill of Rights, although it fails to include reproductive rights for women and sexuality rights. The draft also requires civilian and Parliamentary control over the security services, and what Josephat Tshuma, the Law Society President, in his foreword to the Draft, has stated to be “extensive devolution of power to the provinces, with each province having its own elected governor and legislature and its own public service and police service.” Indeed, the devolutionary arrangements are very similar in content to the more expansive proposals of the NCA Draft.

5. The Outreach Process

A. A People-driven Constitution?

We have already noted the ways in which constitutions are made, and the hopes and risks of popular participation in that process. But how did Zimbabwe undertake its process of participatory constitution-making? The process had an inauspicious beginning. On 13TH July 2009, all parties met in Harare for the first All-Stakeholders Conference to outline the constitution-making process. The first problem to arise was administrative: out of 4000 delegates invited, only 200 were certified, leaving many waiting overnight outside the conference centre to ensure certification.⁸⁰ The conference then descended into chaos as both MDC and ZANU-PF supporters begun chanting slogans and singing songs, with speakers unable to begin the conference by virtue of bottles thrown at them and the intensity of the noise made.

It was reported that the disruption was undertaken by war veterans groups orchestrated by ZANU-PF senior officials such as Youth Minister Saviour Kasukuwere. Sightings were also made of well-known ZANU-PF militant Joseph Chinotimba.⁸¹ The National Association of Non-Governmental Organisations in Zimbabwe release a statement on the day condemning the failure to provide sufficient security for the event, whilst stating that “visible partisanship of the police [in the disruption] is a matter of great concern”. The NCA described the events as “predictable”.⁸² President Mugabe, Prime Minister Tsvangirai, and Deputy Prime Minister Mutambare all condemned the disorder, although they declined to order an inquiry into its causes, instead seeking continuation of

⁸⁰ <http://www.voanews.com/content/a-13-2009-07-13-voa31-68819532/413365.html>

⁸¹ <http://www.swradioafrica.com/news140709/conf140709.htm>

⁸² <http://www.thezimbabwean.co.uk/human-rights/22746/nca-statement-on-the-disrupted-gallq-stakeholders-conference.html>

the conference.⁸³ With an additional police presence, the conference was able to continue the following day.

The Independent Constitution Monitoring Project (ZZZICOMP) – an organisation jointly run by NGOs Zimbabwe Election Support Network (ZESP), Zimbabwe Peace Project (ZPP), and Zimbabwe Lawyers for Human Rights (ZLHR) – report into the outreach process described its basic mechanism as follows:

“The process was divided into various processes such as the outreach process, data uploading process, thematic committee discussion, drafting, 2nd All stakeholders conference, report to parliament and referendum. This process is based on observations of the outreach process where people's views were collected on the 17 thematic talking points agreed by the parties in the Government of National Unity (GNU). The consultation process was scheduled to take place in 2009, however due to consensus problems in the GNU the process began in June 2010, a year later than scheduled.”⁸⁴

By comparison to the attempted reforms of 2000, the new process was Parliament-, rather than President-, led. COPAC convened 4700 meetings of Zimbabwean citizens across the country, reaching around 1.6 million people,

There remain questions as to the political role, or politicisation, of the outreach process itself. It has taken place in the shadow of Zimbabwe's next major political event, the country's looming elections, debate continues as to the need for the completion of the constitution-making process prior to the next election. Some have stated that “Zanu PF was using the constitution-making process to try and recapture its lost support and manage Mugabe's succession”, ensuring that Mugabe dies in office by forcing through, for example, a two-term Presidential limit but which only comes into effect prospectively.⁸⁵ Regardless, it may have been clear from the highly politicised constitutional referendum of 2000 that much the same electioneering would occur throughout the outreach process.

This divided purpose for the constitution-making process should provoke an urgent call for clarity: Lovemore Madhuku asks, “Do we want a new Constitution, that reflects the values that we want? Or do we simply want some document which we can use for the next election? The NCA and the ZCTU has said to the MDC, if the current process is said to be simply the writing of an interim Constitution, whose purpose is to live to the next election, and you make it clear that it's not a people-driven Constitution, it's just a transitional arrangement, fine, no one will have a problem with that – we'll

⁸³ <http://www.swradiofrica.com/news140709/sanity140709.htm>

⁸⁴ 2010, p.3.

⁸⁵ <http://www.thestandard.co.zw/local/25283-mugabe-succession-challenge-vexes-constitution-outreach.html>

be like where we were with Lancaster”.⁸⁶ Despite what historically appears a difficulty in reaching constitutions that fully represent and further citizens’ views and interests, rather than ‘transitional arrangements’, Madhuku’s claims nonetheless may ring true: the current constitutional process may simply be too prone to manipulation and politicisation to generate anything of lasting value.

This is precisely what Madhuku and the NCA have claimed throughout the constitution-making process, and with the NCA has pursued a campaign to veto whatever constitution the current process generates. It launched its ‘Take Charge’ campaign in July 2010 claiming to “expose the fraudulent process currently underway and led by politicians from ZANU PF and MDC. The NCA has consistently and unapologetically reiterated its position that any draft constitution which is a product of a flawed process, as the current COPAC/Kariba process (which is worse than the rejected Chidyausiku make-believe of 1999/2000), will be rejected by the people of Zimbabwe”.⁸⁷ Madhuku points out, moreover, a legal worry that many may have felt as to the capacity of the process to generate bipartisan, sufficiently non-politicised results: “In our law for a draft to go to a referendum it must be presented to the referendum by the president, not the prime minister and not the inclusive government. It is the president acting alone. Don’t listen to all they say that a discussion will be done. The president of our country, which we all know will not send to a referendum a draft which does not reveal the views of his party, will make the decision”.⁸⁸ We will return to some of these worries below.

Some see significant extra-constitutional benefit in the outreach process which its detractors may have missed. As Jesse Majome, COPAC Spokesperson, states, “I do not think that any process at all by which Zimbabweans actually sit down under a tree or in a hall and stand up to say their views about how they want Zimbabwe to be run is a wasted process. That process itself is actually another means to national healing”.⁸⁹ Shari Eppel of *Solidarity Peace Trust* has made the same point in her thoughts on the Matabeleland outreach meetings: “These remote communities had never before had an official delegation, including members of parliament, sit and listen to them without judgement for hours on end, simply asking questions and writing down what they said. MPs and other ‘important’ people might on rare occasions have appeared previously, but this would have mostly been in the context of political rallies, where people would have been lectured at, and given the usual false promises. COPAC allowed ordinary folk to turn the tables, to lecture and pronounce

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http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec_code=090707constdex§or=DEMG&year=2010&range_start=271&intMainYear=2010&intTodayYear=2012

⁸⁷ NCA Press Release, 23rd July, 2010.

⁸⁸ <http://www.theindependent.co.zw/local/27283-copac-process-a-circus-madhuku.html>

⁸⁹ <http://www.theindependent.co.zw/local/27283-copac-process-a-circus-madhuku.html>

back at officials for once in their lives, and to criticise those who make false promises and abuse them" (2010).

Despite whatever perceived benefits the process has brought, there have been serious problems with the undertaking of the process itself. There were numerous reports of failure to receive appropriate resources, funds, and hotel bookings, as the *Daily Agenda* reported on the 28th June: outreach teams were stranded in Hwange without fuel or allowances, and lacked basic resources necessary for outreach meetings such as cameras and voice recorders. Fuel shortages have led to cancellation of outreach meetings,⁹⁰ and on the 6th September *The Chronicle* reported a COPAC team being kicked out of a hotel in Bulawayo for failing to pay their bills. There have been repeated and public worries over the funding provided United Nations Development Programme, its chief donor, over multiple issues, such as the UNDP's refusal to provide a \$200000 bill COPAC owed to the Zimbabwe Broadcasting Commission (ZBC), the way in which the UNDP was said to furnish the process with funds,⁹¹ and the country's ultimately successful lobbying efforts for an additional \$8 million to fund the remainder of the process.⁹² In studying these kinds of participatory processes, Moehler claims that there is real benefit to be gained in the powerful civic engagement and education that they can constitute.⁹³

Strikes and other disputes have pervaded the process, with reportage claiming that the process was at times "on the verge of collapse" over drivers, technicians, and other workers threatening to strike owing to delays in payment.⁹⁴ Resignation, and threats of resignation, were given by MPs of both ZANU-PF and MDC over poor pay, working conditions, and delays in payment, although co-chairperson Douglas Mwonzora continued to deny the truth of these claims.⁹⁵ Delays in outreach meetings arriving to some areas of the country have been said to spark tensions, said to have increased the potential for violence pre-empting the arrival of the outreach teams.⁹⁶ The contract of COPAC's coordinator during the outreach process, Peter Kunjeku, was not renewed after the public consultation concluded, with co-chairperson Douglas Mwonzora stating that COPAC was unhappy about a number of features of the process and which many had described as chaotic.⁹⁷

⁹⁰ <http://www.voanews.com/zimbabwe/news/politics/Zimbabwe-Chipinge-East-Outreach-Meetings-Canceled-101094364.html>

⁹¹ <http://www.theindependent.co.zw/local/27593-copac-demands-cash-control.html>

⁹² <http://www.newsday.co.zw/article/2010-08-05-undp-gives-copac-8m-shot-in-the-arm>

⁹³ 2008.

⁹⁴ <http://www.swradioafrica.com/News220710/Outreach220710.htm>

⁹⁵ <http://www.timeslive.co.za/sundaytimes/article578974.ece/Constitution-in-the-balance;>
<http://www.financialgazette.co.zw/top-stories/5018-legislators-quit-copac-outreach.html>

⁹⁶ <http://www.theindependent.co.zw/local/27491-hre-outreach-delay-heightens-tension.html>

⁹⁷ <http://www.financialgazette.co.zw/top-stories/6689-copac-boss-fired.html>

There have also been allegations of overriding greed on the part of those participating to the process: the Zimbabwe Congress of Trade Unions notably accused the outreach of being a “money-making venture” on the basis of the much-publicised haggling over participants’ expenses, and its being illegitimately controlled by political parties rather than being a “national affair”.⁹⁸ MPs were embroiled in a supposed car hire scam, in which they loaned their cars to COPAC members for the purposes of the outreach process despite, according to COPAC, the cars being owned by the government anyway.⁹⁹ Petty crime has also been reported within COPAC meetings, such as the dismissal of an outreach rapporteur for the theft of an audio recorder, alongside reports of a stolen, but later recovered, laptop the previous week.¹⁰⁰ One outreach rapporteur was stated to have lied about a burglary in an attempt to keep a laptop loaned to him for the duration of meetings.¹⁰¹ Somewhat more lurid allegations have been levelled against members of COPAC, ranging from fistfights between members, such as assault allegations against Beauty Zhuwao, the wife of President Mugabe’s nephew, Patrick Zhuwao,¹⁰² to one COPAC member apparently revealing his genitals during a meeting and being arrested for public indecency, although the charges were later dropped.¹⁰³

COPAC has repeatedly denied the significance and veracity of criticism on these bases, with co-chairperson Douglas Mwonozora claiming the media to be obsessed with “bad news” and “how much workers have been paid”.¹⁰⁴ There have also been allegations as to the control which COPAC has attempted to secure over the outreach process, particularly through blockage of media scrutiny. Crisis in Zimbabwe Coalition reported in late June that the newspaper publication of COPAC’s meeting schedule would be discontinued in early July. This was alongside previous reports of monitors of the process being barred from outreach meetings and even arrested.¹⁰⁵ Further reports surfaced as to COPAC’s banning of civic education classes prior to outreach meetings.¹⁰⁶

More difficulties came with public disputes between COPAC and ZBC, where the latter had reportedly banned debate of the outreach process on its radio stations, prior to which its station

⁹⁸ <http://www.swradioafrica.com/news080710/zctu080710.htm>

⁹⁹ <http://www.theindependent.co.zw/local/27291-outreach-mps-bid-to-make-quick-buck-backfires.html>

¹⁰⁰ www.swradioafrica.com/news120710/raporteru120710.htm

¹⁰¹ <http://www.voanews.com/zimbabwe/news/Zimbabwe-Constitutional-Revision-Data-Tampering-Hoax-99486904.html>

¹⁰² <http://www.newsday.co.zw/article/2010-09-12-zhuwaos-wife-beats-up-mp>

¹⁰³ <http://www.theindependent.co.zw/local/27585-bizarre-stunt-fuels-further-acrimony-in-copac-outreach.html>; <http://www.voanews.com/zimbabwe/news/Zimbabwe-Manicaland-Constitutional-Outreach-Team-Back-to-Work-100136369.html>

¹⁰⁴ <http://www.thezimbabwean.co.uk/news/34011/copac-blasts-media.html>

¹⁰⁵ Crisis in Zimbabwe Coalition Press Release, 29th July 2010.

¹⁰⁶ <http://www.zimeye.org/?p=20420>

Spot FM had aired programs largely devoted to discussing the merits of the Kariba Draft.¹⁰⁷ ZBC was also accused of airing pro-ZANU-PF advertisements on its stations,¹⁰⁸ whilst COPAC was unable to fund airtime for its own advertisements owing to what it viewed as the prohibitively non-subsidised commercial fees ZBC charged.¹⁰⁹

Other opposition parties, such as the Zimbabwe Development Party and ZANU-Ndonga, have accused the process of failing to be sufficiently inclusive, with ZANU-Ndonga Chair Reketai Mushiwokufa Semwayo claimed that they had been permitted insufficient numbers of party members to participate in the constitution-making process to have any influence over the result representative of his party.¹¹⁰ Perceived lack of inclusion has extended to other groups, including those whose very failure to achieve proper representation is widely considered central theme of the constitutional debate. Chief Nondo of Mbembesi in Matabeleland North allegedly instructed villagers to boycott outreach meetings if they lacked Xhosa speakers, stating that the failure to take minority language into account was a violation of their rights.¹¹¹ Two Ndebele-speaking COPAC members reportedly walked out a meeting over a disagreement as to whether it was to be conducted in Shona or their native tongue.¹¹²

As we will see, mobilisation of youth remained a formidable means of garnering support for party policies in the constitutional process, but there remained reports that youths avoided the process,¹¹³ and complaints were made as to the failure to include children in the process or give proper consideration to their rights.¹¹⁴ Associations representing groups of people with disabilities threatened to veto the draft constitution if their concerns as to the inclusion of disability rights were not met,¹¹⁵ and reports remained as to the failure of the process to properly include people with disabilities.¹¹⁶ Whilst there remained groups such as Zimbabwe Women Lawyers Association engaged in civic education focusing on women's rights,¹¹⁷ *The Chronicle* loudly reported various highly regressive, anti-women suggestions within the outreach process ranging from the

¹⁰⁷ <http://www.zimeye.org/?p=19575>

¹⁰⁸ <http://www.voanews.com/zimbabwe/news/Tension-In-Zimbabwe-Over-Pro-Mugabe-Radio-TV-Spots-99133614.html>

¹⁰⁹ <http://www.thezimbabwean.co.uk/news/33148/zbc-wont-air-constitution-jingles.html>; <http://www.newsday.co.zw/article/2010-08-04-zbc-rejects-adverts>

¹¹⁰ <http://www.thezimbabwean.co.uk/news/32375/opposition-parties-threaten-constitution.html>

¹¹¹ *The Chronicle*, 23rd July 2010.

¹¹² <http://www.newsday.co.zw/article/2010-09-03-copac-members-quit-outreach-meeting-over-language>

¹¹³ <http://www.financialgazette.co.zw/national-report/4815-youths-opt-out-of-constitution-outreach.html>

¹¹⁴ <http://www.newsday.co.zw/article/2010-08-05-children-sidelined-in-constitutionmaking>

¹¹⁵ <http://www.thezimbabwean.co.uk/news/32736/association-threatens-no-vote-if-disabled-needs-are-left-out.html>

¹¹⁶ <http://www.newsday.co.zw/article/2010-09-01-constitutionmaking-process-sidelines-the-disabled>

¹¹⁷ <http://www.financialgazette.co.zw/national-report/4561-aggrieved-women-pounce-on-constitution-making-process.html>

constitutional permission of marital rape¹¹⁸ and a prohibition on ‘revealing dress’.¹¹⁹ Similarly regressive steps were claimed to be needed at outreach meetings in suggestions as to the criminalisation of homosexuality, arising alongside and part of ZANU-PF’s championing of the issue as means of garnering support for the Kariba Draft. During public meetings with ZANU-PF supporters in Mashonaland West, for example, villagers were told that a vote for anything but the Kariba Draft entailed a vote not only for constitutional sexuality rights but the promotion, or even state enforcement, of homosexuality.¹²⁰

B. Intimidation and Violence in the Outreach Process

In addition to its not insubstantial array of difficulties catalogued above, the constitutional outreach process has been benighted by violence, intimidation, and harassment. There remain issues as its exaggeration or misreporting, and not least of all the apportionment of blame for some of the disruption caused. But it is clear that the process has not been typified by free, unforced discussion and deliberation, and rather, as many claim, grimly presages the conduct of future elections.

The process began amidst reports of the opening of army bases within rural areas, reminiscent of those employed during the 2008 election run-off violence, alongside the participation in the outreach teams of individuals heavily implicated in the commission of that violence.¹²¹ Reports surfaced as to the alleged militarisation of areas of the country through which the outreach progressed, whether through the mobilisation of ‘war veterans’, Zimbabwe National Army soldiers, or youth activists.¹²² MDC-T delegates complained in late June that “200 uniformed soldiers marched in the Chikangwe and Chiedza suburbs of Karoi” to disrupt an outreaching meeting, vandalising a car and singing, “Nyika yakauya neropa – we got our independence via the spilling of blood” until “[o]ver a hundred people who had come for the meeting were forced to go back home”.¹²³ Soldiers were reported to be patrolling Masvingo and Mashonaland, allegedly sent by the Joint Operations Command (JOC) – the body of senior military leaders widely viewed as having orchestrated much of the 2008 run-off election violence – to provide support for ZANU-PF’s view advocacy of the Kariba Draft.¹²⁴ On 12th July *MDC Today* reported threats of death made by ZANU-PF supporters against MDC members in Hurungwe East were the latter to attend outreach meetings in the area, alongside

¹¹⁸ *The Chronicle*, 3rd July 2010.

¹¹⁹ *The Chronicle*,

¹²⁰ <http://www.theindependent.co.zw/local/27107-villagers-coached-to-back-kariba-draft.html>

¹²¹ <http://www.swradioafrica.com/news210610/outreach210610.htm>;

<http://www.swradioafrica.com/News280710/Pointless280710.htm>

¹²² <http://www.thezimbabwean.co.uk/news/33311/zim-heads-for-more-violence-.html>;

<http://www.swradioafrica.com/news040810/soldiers040810.htm>

¹²³ <http://www.swradioafrica.com/news240610/soldiers240610.htm>

¹²⁴ <http://www.swradioafrica.com/news250610/joc250610.htm>

alleged intimidation of participants of outreach meetings in Mwenezi, Masvingo, by a ZANU-PF-aligned Zimbabwe National Army Major and a contingent of uniformed soldiers armed with AK-47 rifles. CIO involvement in the Hurungwe area was also alleged, with ZANU-PF supporters across the area reportedly coercing villagers to support the Kariba Draft.¹²⁵

Secret service interference in the process was also alleged: Central Intelligence Organisation (CIO) officers were reported in *MDC Today* on 7th July to have threatened villagers in Shamva, Mashonaland Central, with disappearance if they failed to support the Kariba Draft in outreach meetings. On the 22nd July *MDC Today* reported CIO-led intimidation by ZANU-PF-aligned youths leading to low turnouts at outreach meetings in Mazowe South, Mashonaland Central. In August, the CIO was stated to be operating in Manicaland,¹²⁶ alongside those from the National Youth Service, known as the Green Bombers.¹²⁷

There were multiple reports as to the role of youth activists in the disruption of meetings or the enforcement of views sympathetic to ZANU-PF. Youth stationed outside a COPAC venue in Goromonzi North were reported by *MDC Today* on 8th July to have refused entry to those perceived to be unsupportive of the Kariba Draft, alongside similar activity in Mutasa South, Manicaland and in Mudzi South, Mashonaland East. Another screening incident 24th August reported by *MDC Today* where villagers in Kwekwe, Midlands North, who lacked ZANU-PF membership cards were refused entry to outreach meetings.¹²⁸ *MDC Today* also reports 31st August MDC members being refused entry to meetings in Masvingo South. Screening of this kind was also reported, where individuals deemed unable to advocate views sympathetic to ZANU-PF had been refused entry to outreach meetings on the basis of being 'not from the area', despite their own claims to the contrary.¹²⁹

Jabulani Sibanda, a well-known war veteran leaders, was reported by *MDC Today* 30th July to be harassing people. He was implicated in an alleged arson attack on an MDC member's home, and villagers refused to participate in outreach meetings until he left the area.¹³⁰ The General Agricultural and Plantation Workers Union of Zimbabwe raised its concerns as to the levels of

¹²⁵ <http://www.zimeye.org/?p=19575>

¹²⁶ <http://swradioafrica.com/news130810/sms130810.htm>

¹²⁷ <http://www.thezimbabwean.co.uk/news/world-news/33386/boycotters-assaulted-.html>

¹²⁸ See also *Zimbabwe Telegraph*, 24th August 2010.

¹²⁹ ZZZICOMP Press Release, 12th August 2010.

¹³⁰ <http://www.voanews.com/zimbabwe/news/Zimbabwe-Constitution-Committee-Moots-Conflict-Management-Panels-100357519.html>; <http://www.voanews.com/zimbabwe/news/Zimbabwe-Constitution-Process-Resumes-After-war-Veterans-Leader-Sibanda-Leaves-Masvingo-100451654.html>

intimidation and harassment in rural areas,¹³¹ with farm workers said to be particularly vulnerable to intimidation and coercion by war veteran groups.¹³²

Allegations were made as to the role of traditional leaders in enforcing ZANU constitutional interests. Chiefs in Hurungwe were reported to demand weekly roll-calls of villagers to alert local elites as to villagers' travel plans to rural and urban areas, alongside recommendations to shun constitution-related advice from teachers and other professionals, and were warned against being "misguided" in respect of the outreach program and to eliminate the "poisoned influence" of agitators (*RadioVop*, 25th June 2010). The MDC-T accused the President of the Chiefs Council, Chief Fortune Charumbira, of abusing his position as a senior COPAC delegate through his efforts to lobby on behalf of ZANU-PF at outreach meetings.¹³³ *MDC Today* also reported on 6th July the hospitalisation of their Mutare Ward Secretary after speaking at an outreach meeting and suffering assault by the village head and other ZANU-PF members.

Violence was reported to continue right until the final meetings of the COPAC process in Harare, which, as stated earlier, the tensions in which were thought to be all the more heightened in the waiting.¹³⁴ It ultimately lead to the suspension of meetings, with more harassment and interference by war veteran leader Joseph Chinotimba and others and the arrest of 83 members of WOZA during their march for International Peace Day.¹³⁵

Reports also surfaced as to the complicity of the COPAC members in harassment and intimidation. On the 23rd July *MDC Today* also reported that COPAC members had stopped police from arrested ZANU-PF supporters who had assaulted an individual after having spoken during an outreach meeting in Chikomba West, Mashonaland East. This was after it had been alleged that police themselves had refused to arrest ZANU-PF officials said to have assaulted an MDC official during an outreach meeting, and were deliberately arresting villagers speaking out during outreach meetings,¹³⁶ allegations which surfaced across the outreach process.¹³⁷ Ministers and MPs were also implicated in the harassment and intimidation.¹³⁸

¹³¹ <http://www.voanews.com/zimbabwe/news/Zimbabwe-Farm-Worker-Union-Says-Intimidation-Widespread-101005299.html>

¹³² <http://www.thezimbabwean.co.uk/human-rights/33618/farm-workers-face-outreach-backlash-.html>;
<http://www.newsday.co.zw/article/2010-08-13-farm-workers-denied-voice-in-new-constitution>

¹³³ <http://www.swradioafrica.com/news060710/chief060710.htm>

¹³⁴ <http://www.swradioafrica.com/pages/crisis200910.htm>

¹³⁵ <http://www.voanews.com/zimbabwe/news/Harare-Residents-Demand-Answers-Over-Outreach-Cancellations-103462219.html>

¹³⁶ <http://www.swradioafrica.com/News200710/Assaulted190710.htm>;
<http://www.swradioafrica.com/News290710/harassment290710.htm>

Reports also surfaced as to the harassment of teachers, a key theme of the last decade's violence. *MDC Today* reported on 30th June that war veterans and ZANU-PF members in Bubi district of Matabeleland attempted to get a teacher fired for being member of the MDC. The Progressive Teachers Union of Zimbabwe spoke out against the perceived victimisation in respect of teachers brought before a magistrate's court for having allegedly assaulted a ZANU-PF member, whilst they claimed the converse.¹³⁹

Douglas Mwonzora, the COPAC co-chairman, stated, "we condemn [interference in the process] in the strongest terms and urge political parties to restrain their supporters...We also urge members of the army and CIOs to stay away from this process and allow the people of Zimbabwe to contribute their views freely without fear or intimidation" (*RadioVop*, 27th June 2010). The MDC-T later demanded that the army stop attending outreach meetings and withdraw from the rural areas.¹⁴⁰ MDC-T deputy national organising secretary Morgan Komichi also insisted that "Zanu PF stop coaching people on what to say when the outreach teams visit them as this a betrayal of a national cause; that of coming up with a constitution embodying the real views of the people." Indeed, there were many reports of heavily scripted responses to the outreach process, either from ZANU-PF supporters willingly preparing or adopting statements containing views sympathetic to ZANU-PF or those coerced into making them. A Crisis in Zimbabwe Coalition press release of 25th June reported the reciting of scripts allegedly written by political parties – indicating both were at fault – at outreach meetings.¹⁴¹ Reports as to this kind of behaviour continued to surface into July.¹⁴² Claims were made as to the use of prayer undertaken prior to the beginning of outreach meetings to intimidate opponents.¹⁴³

The violence and intimidation led Amnesty International to conclude that "Zimbabwe could be hit by a new wave of political violence, following a spate of attacks on human rights activists by supporters of President Robert Mugabe's Zanu-PF party in the past week".¹⁴⁴ This followed reports of ZZZICOMP monitors being beaten with logs after being taken to a farm in Makonde District of Mashonaland

¹³⁷ <http://www.swradioafrica.com/news060910/mdct060910.htm>

¹³⁸ <http://swradioafrica.com/news170810/wave170810.htm>

¹³⁹ <http://www.voanews.com/zimbabwe/news/Zimbabwe-Teachers-Become-Targets-At-Constitution-Outreach-Meetings-99777299.html>

¹⁴⁰ <http://www.thestandard.co.zw/local/25467-mdc-t-wants-security-forces-barred-from-outreach-meetings.html>

¹⁴¹ <http://www.newsday.co.zw/article/2010-06-29-integrity-of-outreach-under-spotlight>

¹⁴² <http://www.swradioafrica.com/news080710/outreach080710.htm>

¹⁴³ <http://www.newsday.co.zw/article/2010-08-19-prayers-used-to-intimidate-teams>

¹⁴⁴ <http://www.amnesty.org/en/news-and-updates/attack-activists-sparks-fears-new-wave-zimbabwe-violence-2010-06-29>

West on 27th June, sustaining head injuries, alongside reports several abductions and arrests of other monitors in Mutare and Mashonaland East.

ZZZICOMP monitors faced further battles with members of COPAC: joint chairman and ZANU-PF member, Paul Mangwana, accused the above NGOs of a “hidden agenda” and seeking to discredit the outreach process. Mangwana, a member of ZANU PF, said: “These people from non-governmental organisations must be arrested. They are peddling lies about the process...Why should we be monitored? We believe they have a hidden agenda to tarnish the process”.¹⁴⁵ Co-chairman Douglas Mwonzora and MDC member nonetheless stated afterwards that “observers are free to participate as long as they identify themselves to the committee and secure accreditation” and stated that he was unaware of any calls for arrests.¹⁴⁶ However, it was elsewhere reported that on that day both Douglas Mwonzora and ZANU-PF COPAC co-chairperson Paul Munyaradzi ‘gave permission’ for the arrest of outreach meeting monitors for their interference with the process.¹⁴⁷

Independently, ZANU-PF spokesman Rugare Gumbo also claimed that NGOs were deliberately sabotaging the outreach process on behalf of the West.¹⁴⁸ *The Herald* reported Gumbo to have claimed that organisations such as ZPP and ZESN were “foreign-sponsored”, whilst also dismissing their reports of violence within the outreach process.¹⁴⁹ The same newspaper sought to support claims of this kind in stating that “it is important that we safeguard [the new constitution] from foreign influence so that we have a genuinely home grown supreme law that reflects our wishes and aspirations”.¹⁵⁰ The *Chronicle* reported claims that the presence of NGO monitoring groups is “intimidating people”, with some demands at outreach meetings that they be ejected from venues.¹⁵¹ *The Herald* reports Senator for Chivi-Mwenezi Josaya Hungwe as stating that the reports of violence “are an act of mischief by those who peddle them and as a party we believe that those behind such allegations have a hidden agenda because there has never been any form of disturbances during the outreach programmes. We want to make it clear that those who have been making those allegations want to create unnecessary panic because they are not happy with what has been taking place on the ground”.¹⁵²

¹⁴⁵ *ZimOnline*, 5th July 2010.

¹⁴⁶ <http://www.voanews.com/zimbabwe/news/politics/Zimbabwe-No-Plans-to-Arrest-NGOs-97810219.html>

¹⁴⁷ <http://www.swradioafrica.com/news050710/outreach050710.htm>

¹⁴⁸ <http://www.voanews.com/zimbabwe/news/Zimbabwe-ZANU-PF-Says-West-Sabotaging-Constitution-97688999.html>

¹⁴⁹ *The Herald*, 8th July 2010.

¹⁵⁰ *The Herald*, 9th July 2010.

¹⁵¹ *The Chronicle*, 2nd July.

¹⁵² *The Herald*, 21st July, 2010.

Nelson Chamisa, MDC spokesperson, suggested 23rd July debate needed into MDC's continued participation in outreach process, given the intimidation and violence.¹⁵³ He later stated his unhappiness with the intimidation and violence, and threatened that the MDC would veto any constitution that did not truly reflect "the will of the people".¹⁵⁴

Some MDC officials dismissed reports of violence,¹⁵⁵ whilst COPAC co-chairperson Jesse Majome questioned the objectivity of media reports on the process: "Both public and private media have failed dismally to live up to our expectations as Copac as stories reported do not in any way reflect the correct picture in the whole constitution-making process. "We have not received good support from the media as we expected them to. They have given precedence to challenges faced by Copac and never reported about positive things".¹⁵⁶ Indeed, for all its criticisms ZZZICOMP's final report stated "COPAC teams in the main, made visible and concerted efforts to ensure that debate was conducted in a manner that could be conducive to inclusiveness, credibility, transparency, and accessibility in an outreach program that was conducted in a highly polarized and emotionally charged political atmosphere, where the constitutional outreach process was seen as another window of opportunity to settle the unfinished business of the 2008 June Elections".¹⁵⁷ Many stated the outreach 'on track', with substantial areas of the country reporting no illegitimate interference in their deliberations and discussions.¹⁵⁸ Indeed, this was very much the case across most of Matabeleland, with very few reports of harassment and intimidation, although evidencing multiple scheduling problems, frequent cancellation of meetings, and some of the lowest turnout to meetings nationwide.¹⁵⁹

ZZZICOMP's findings at the conclusion of the process, however, were largely negative:

"Findings show that to a great extent, the operational framework for constitutional outreach consultations was inhospitable to open debate. At most meetings in both rural and urban areas, debate was generally subdued, with the outreach process under the control of various political parties. Although MDC T presence was visible at most venues, overall, ZANU PF appeared to be more dominant and even dictated the content of most proposals. The likelihood of producing a constitutional draft that primarily reflects ZANU PF proposals, as enunciated in its fliers, remain high, if not certain."¹⁶⁰

¹⁵³ <http://swradioafrica.com/News230710/MDCT230710.htm>

¹⁵⁴ <http://www.newsday.co.zw/article/2010-08-29-mdct-threatens-no-vote-campaign>

¹⁵⁵ *Zimbabwe Guardian*, 10th August 2010.

¹⁵⁶ *The Chronicle*, 7th September 2010.

¹⁵⁷ ZZZICOMP *Final Report*, p.35.

¹⁵⁸ <http://www.voanews.com/zimbabwe/news/Zimbabwe-Constitution-Minister-Says-Outreach-on-Course-99865614.html>

¹⁵⁹ See ZZZICOMP *Final Report: Shadowing the Constitution Outreach Process*.

¹⁶⁰ ZZZICOMP *Final Report*, p.58.

It made its wider constitutional concerns clear: “outreach consultations appear to have been reduced to a contest between the ideological positions of ZANU PF and the MDC T, a situation that is likely to skew constitutional outcomes towards declared party positions and to sideline views of other stakeholders in the process. This scenario should be viewed with utmost concern as party interests usually have a short-term perspective, rather than the inter-generational and nonpartisan focus expected in a constitution making process”.¹⁶¹

The violence and coercion has been suggested by some to foreshadow the conditions under which future elections will be held. University of Zimbabwe lecturer Dr John Makumbe has stated that ZANU-PF “still harbour the same evil designs because they still have the same fears and interests in Mugabe’s continued tenure of office. There is nothing on the ground to indicate that they will not behave in the same violent manner as they did in 2008”.¹⁶² Another academic, Joseph Kurebwa, states that “[t]he cases of violence being reported during the outreach programme could be seen as the beginning of a wave of violence as we move to elections next year”.¹⁶³ Whilst predictions as to the timing of elections thus far have failed to hold true, it may remain difficult for some to see past the evidence of the outreach process to any less pessimistic view as to their ultimate conduct.

How should we assess Zimbabwe’s constitution-making process from the above evidence? We may recall the problems we found in participatory processes earlier on. Zimbabwe’s political conflict seems too deep and broad to find much of a solution via such means. It may be that a constitution-making process wrongly distracts from the real negotiations and conflicts to be had in other spheres. Instead, we may worry that the country will be left with another transitional agreement awaiting substantive political change. Many may then question the expense and exertion with which such a short-term arrangement has been purchased. Worse, the process may constitute an instrument for further political stasis, participatory processes sometimes serving only to legitimise and prolong the status quo in a veneer of democratic reform. Moreover, given the understandable constitutional ignorance of much of the public, alongside the multiplicity of political interests engaged, the results of the process may be unlikely to yield a constitution in which much faith can be placed. Of course, the people’s views may well be ultimately disregarded in favour of constitutional design by political and legal elites. But then the costly public participation would appear nugatory. We may have wondered, regardless, as what role the public could have played: with the manipulation and violence

¹⁶¹ ZZZICOMP *Final Report*, p.59.

¹⁶² <http://www.swradioafrica.com/News100910/Elections100910.htm>

¹⁶³ <http://www.financialgazette.co.zw/national-report/4743-constitutional-outreach-points-to-bloody-elections.html>

that the process has exhibited, it is unclear to what extent the public can truly engage with this constitution-making moment in their nation's history.

6. The COPAC Draft

We finish with discussion of the recently released draft constitution consequent to the completion of the outreach process and various stakeholder meetings thereafter. What does the new draft contain? We might first note one feature that has been lamented by some: the retention of the death penalty by s.4.1(2) (although it must be remembered that its retention remained a fairly well-evidenced desire across the outreach process). This, however, has been counterweighted by the abolition of corporal punishment in its entirety. In respect of its equality provisions, Leopold Amaral notes that "[w]hile the equality clause [s.4.6] is very broad, it does not – unsurprisingly given the vitriolic attacks by President Mugabe and others – include sexual orientation in its catalogue of anti-discrimination grounds".¹⁶⁴ Debate continues, however, as to whether sexuality rights protection can be successfully pursued through other aspects of the provision's wording. Its provisions on media freedom and impartiality, Amaral also claims, chart a far better course for Zimbabwe's thus-far state-dominated media: section 4.12 provides that "broadcasting and other media of communication have freedom of establishment, subject only to licensing procedures that (a) are necessary to regulate the airwaves and other forms of signal distribution; and (b) are independent of control of government or by political or commercial interests'. It further states that 'all State-owned media of communication must...be impartial and afford fair opportunity for the presentation of divergent views and dissenting opinions'.¹⁶⁵

Particularly welcome, Amaral states, are the draft's provisions on the right to housing: "The draft Constitution also makes it clear that no one may be evicted from their home, or have their home demolished without due legal process – a constitutional provision that would prevent another man-made humanitarian crisis like Operation Murambatsvina in 2005, when around 700,000 people were forcibly evicted by the government, had their houses demolished and were not provided with any alternative shelter".¹⁶⁶ In respect of other socio-economic rights, the draft provides "the same level of protection as clauses in the internationally lauded South African Constitution." In respect of disability rights, some have ruefully claimed "that the draft will erode many of the gains of the past two decades since Zimbabwe's Disabled Persons Act of 1992 is more in line with United Nations Convention on the Rights of Persons with Disabilities than the draft Constitution," and "[t]he draft

¹⁶⁴ <http://www.osisa.org/law/zimbabwe/bill-right-past-wrongs>

¹⁶⁵ <http://www.osisa.org/law/zimbabwe/bill-right-past-wrongs>

¹⁶⁶ <http://www.osisa.org/law/zimbabwe/bill-right-past-wrongs>

also limits the enjoyment of these rights – in section 2.12 subsection 2 – to ‘within the resources available to them’”.¹⁶⁷

Dewa Mavhinga of Crisis in Zimbabwe Coalition is buoyant as regards the new constitution: he praised its proposals for reforms such as “the stripping of the presently politicized office of the Attorney General of prosecuting powers to vest those powers in a new Independent National Prosecuting Authority, the imposition of strict terms limits on the president and security chiefs, widespread electoral reforms, the creation of a Constitution Court that will pave way for a revamp of the currently compromised judiciary, the strengthening of Parliament to improve checks and balances on executive power and the development of a comprehensive Bill of Rights with stronger rights of women clearly and specifically including the right to paid maternity leave, right of guardianship of minor children, equality with men and recognition of affirmative action”.¹⁶⁸

However, many have claimed that the current draft is a disappointment in terms of Presidential powers.¹⁶⁹ There remains no age limit for Presidential office, immunity from prosecution remains, and the executive remains in control of defence forces. Nonetheless, as Alex Magaisa notes, the Draft secures a number of not insignificant checks and balances against excessive Presidential power.¹⁷⁰ Powers that now require approval by Parliament or other bodies include the power to grant clemency orders, the appointing of senior public officers, such as high-ranking members of the judiciary and foreign diplomats, the deployment of the armed forces, and declarations of states of emergency. Most significantly, it vests the country’s legislative authority in Parliament alone, leaving the President with only the limited constitutional veto power described earlier. Moreover, the President’s powers to dissolve Parliament have been significantly curtailed.

7. The Future

Stakeholders have recently met at Nyanga to continue discussing the ‘parked’ issues in the constitution: the most contentious issues of the constitutional outreach process, such as devolution and dual citizenship, were left to be finalised at a later date. The results of these deliberations are now surfacing, and it has been reported that the parties have since come to some sort of agreement on devolution. Reports have aired that “[u]nder the deal agreed by the parties, the country’s 10 provinces will each have a provincial assembly made up of Members of Parliament and Senators

¹⁶⁷ <http://www.osisa.org/law/zimbabwe/bill-right-past-wrongs>

¹⁶⁸ http://www.kubatana.net/html/archive/opin/120518dm.asp?spec_code=090707constdex§or=DEMGG&year=0&range_start=1&intMainYear=0&intTodayYear=2012

¹⁶⁹ <http://www.thezimbabwean.co.uk/news/zimbabwe/58166/mdc-fails-to-limit-powers.html>

¹⁷⁰ <http://newzimbabweconstitution.wordpress.com/tag/copac/>

from that area, representatives of local authorities and 10 individuals elected by proportional representation as well as a provincial governor. The provincial assembly will nominate two possible candidates for governor which they will forward to the President who will choose from the two, according to sources familiar with the negotiations".¹⁷¹ However, as the results of the recent negotiations have yet to be published as concrete additions to the draft constitution, the veracity of these reports remains unclear. Paul Siwela, Secretary-General of the strongly pro-devolution/separatist group the Mthwakazi Liberation Front, remains sceptical: "From what we've seen and read in some reports, there is no devolution of power, except a mention of a structure to be created under devolution, which is meaningless and will not change anything. In this structure, there is no mention of a budget, the powers assigned to the structure, or mention of service delivery and accountability".¹⁷²

ZANU-PF's responses to the new draft ranged from reports of its near-total rejection¹⁷³ and an abortive meeting in Harare between ZANU-PF, MDC, and COPAC in which no agreement was reached,¹⁷⁴ to continuing negotiations over parked issues with apparent acceptance of the remainder of the draft provisions. In a 29-page document outlining the changes it sought to make to the current draft, ZANU-PF rejected various features of the new constitution many thought fixed or relatively uncontroversial, including the existence of an independent prosecuting authority and an explicit constitutional permission for the army to participate in politics. These were questions on which ZANU-PF negotiators had previously agreed; progress may have been hampered by widening divisions over these issues within the party. As of the 27th June, the new draft is expected to be released fully in the coming days or weeks.¹⁷⁵ But, thereafter, it remains to be subject to public discussion, and then preparations for a referendum will begin. It is thought that general elections may follow, but estimates place them most likely no earlier than the middle of 2013.

As we have seen, constitution-making is a difficult and opaque exercise at the best of times. Participatory constitution-making, moreover, brings its own unique difficulties with the substantial good that it can bring. Zimbabwe has pursued alternative constitutional arrangements at numerous points in its history, often within the constraints of coercion and political violence. In this respect, the latest stage in its constitutional history is no different, and a counsel of scepticism or pessimism may speak greater truth than any alternative. There are many reasons to question the purposes, process, and results of Zimbabwe's recent constitution-making experience. We now await the

¹⁷¹ <http://www.newzimbabwe.com/news-8350-Parties+strike+devolution+deal/news.aspx>

¹⁷² <http://www.swradioafrica.com/2012/06/29/new-draft-constitution-not-good-enough-for-mfl-says-siwela/>

¹⁷³ 'ZANU-PF shocking new constitution proposals', *RadioVop*, 7th June 2012.

¹⁷⁴ <http://www.swradioafrica.com/2012/06/07/zanu-pf-walks-out-of-copac-meeting/>

¹⁷⁵ <http://www.swradioafrica.com/2012/06/27/new-constitution-a-few-days-away/>

conclusion of the constitution-making process, and whatever the general elections thereafter may bring.

Bibliography

Dahl, R., *How Democratic is the American Constitution?* (2nd Ed.), New Haven: Yale University Press, 2003.

Elster, J., 'Forces and Mechanisms of the Constitution-making Process', in *Duke Law Journal* 45, 1995-6, pp.364-96.

Eppel, S., 'Initial Thoughts on the Matabeleland Constitutional Outreach Experience', *Solidarity Peace Trust*, 1st Nov. 2010, at <http://www.solidaritypeacetrust.org/870/initial-thoughts-on-the-matabeleland-constitutional-outreach-experience/>

Gubbay, A., "The Progressive Erosion of the Rule of Law in Zimbabwe" Lecture at the Bar Council of England and Wales on December 9 2009. Full speech is available at <http://www.newzimbabwe.com/opinion-1806-Gubbay+lecture+on+rule+of+law/opinion.aspx>

Kersting, N., 'Preface', in *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe*, N. Kersting (ed.), Harare: Friedrich-Ebert-Stiftung, 2009, pp.4-6.

– 'Executive Summary', in *Constitution in Transition*, 2009, pp.7-20.

King, A., *The British Constitution*, Oxford: Oxford University Press, 2007.

Lijpart, A., *Patterns of Majoritarian and Consensus Democracies in Twenty-One Countries*, New Haven: Yale University Press, 1984.

– *Patterns of Democracy: Government Forms and Performances in Thirty-Six Countries*, New Haven: Yale University Press, 1999.

Magaisa, A., 'Constitutionality versus Constitutionalism: Lessons for Zimbabwe's Constitutional Reform Process', *Open Society Initiative for Southern Africa*, 2011, at <http://www.osisa.org/openspace/zimbabwe/constitutionality-versus-constitutionalism>

Moehler, D., *Distrusting Democrats: Outcomes of Participatory Constitution Making*, Ann Arbor: University of Michigan Press, 2008.

Nijzink, L., 'The Relative Powers of Parliaments and Presidents in Africa: Lessons for Zimbabwe?', in *Constitution in Transition*, 2009, pp.160-85.

Ndulo, M., 'Democratic Governance and Constitutional Restraint of Presidential and Executive Power', in *Constitution in Transition*, 2009, pp.206-54.

Olowu, 'Decentralization and Local Government in the Zimbabwean Constitution', in *Constitution in Transition*, 2009, pp.101-26.

Onslow, S., 'Zimbabwe: Land and the Lancaster House Settlement', in *British Scholar*, Sept. 2009, pp.44-74.

Patzelt, W., 'Towards a Powerful Parliament in a Viable Constitution: Reflections on Zimbabwean Draft Constitutions', in *Constitution in Transition*, 2009, pp.186-205.

Rajogopal, B., 'Harming the Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective', in *Human Rights Review*, April-June 2007.

Russell, P., *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd Ed., PUBLISHERS 1993.

Sachikonye, L., 'Zimbabwe's Constitution-Making and Electoral Reform Processes: challenges and opportunities', Draft paper prepared for the Conference on 'Legitimacy of Power – Possibilities of Opposition' organised by Department of Political Science and Public Administration, Makerere University and Chr. Michelsen Institute, 2011.

Sunstein, C., 'Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe', in *Constitutional Political Economy* 2, 1991, pp.371-94.

Ten, C.L., 'Constitutionalism and the Rule of Law', in *The Companion to Political Philosophy* (Sec. Ed.), R.E. Goodin, P. Pettit, and T. Pogge (eds.), Oxford: Blackwell Publishing, 2007, pp.493-502.

U.S. Institute for Peace, *Iraq's Constitutional Process: Shaping a Vision for the Country's Future*, Special Report 132, Washington D.C.: U.S. Institute for Peace, 2005.

Waldron, J., 'The Core Case Against Judicial Review', in *Yale Law Journal* 115(6), 2006, pp.1346-406.

WOZA, *A Presentation to the Parliamentary Select Committee (COPAC): An Overview of Responses of WOZA/MOZA members to the Constitutional Outreach Talking Points*, 29th November 2010.

Zinn, H., 'A People's Constitution: Some Truths Are Not Self-Evident', *The Nation* 245, 1st August 1987, pp.87-88.

ZZZICOMP, *Final Report: Shadowing the Constitution Outreach Process*.