



# ZIMBABWE'S CONSTITUTIONAL REFORM PROCESS: CHALLENGES AND PROSPECTS

*Gwinyayi A. Dzinesa*

Published by the Institute for Justice and Reconciliation  
Wynberg Mews, Ground Floor, House Vincent, 10 Brodie Road, Wynberg 7800, South Africa  
[www.ijr.org.za](http://www.ijr.org.za)

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First Published 2012  
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ISBN 978-1-920219-41-3

Produced by Compress.dsl  
[www.compressdsl.com](http://www.compressdsl.com)

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The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed, it is a 'mirror of the national soul,' the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government.

- Former Chief Justice of South Africa, Ismail Mohammed<sup>1</sup>

## Introduction

Zimbabwe is currently engaged in a constitution-making process led by a Select Committee of Parliament on the New Constitution (COPAC). The adoption of a new democratic constitution is a key requirement of the Global Political Agreement (GPA) signed in September 2008 by the three political parties represented in parliament - the Zimbabwe African National Union-Patriotic Front (ZANU-PF) led by Robert Mugabe, and the two formations of the Movement for Democratic Change (MDC), namely, the MDC-T led by Morgan Tsvangirai, and the MDC-N led by Welshman Ncube. The GPA, brokered by the Southern African Development Community (SADC), ended the 2007 election dispute between Tsvangirai and Mugabe, and led to the formation of the transitional inclusive government that assumed office in February 2009. The current constitution-making process is the latest in a series of post-independence constitutional-reform endeavours that have been variously led by government, civil-society organisations and political parties. These endeavours had, by 2011, produced three draft constitutions, none of which have been adopted (see ZLHR 2011).

This paper examines Zimbabwe's constitutional-reform process. The first section traces the background to constitutional reform in Zimbabwe. A brief discussion of the Constitutional Commission's draft of 1999/2000 is followed by a description of the development of a draft by the Constitutional Assembly (NCA) in 2001. Then the process leading to the so-called Kariba Draft of 2007 is outlined. The COPAC-led constitutional-reform process, including some of the challenges it has faced, is then examined. This is followed by an overview of how the draft COPAC constitution deals with issues of justice and reconciliation. The final section focuses on prospects for a constitutional referendum in 2012 and for the likelihood of elections occurring thereafter.

## Background

Zimbabwe's constitutional-reform process has been built upon the Lancaster House Agreement of December 1979. This settlement plan, through which Zimbabwe obtained independence in 1980, has been widely criticised as being largely preconceived by the British. Present at Lancaster House were the British government, the Patriotic Front (led by Robert Mugabe's Zimbabwe African National Union [ZANU] and Joshua Nkomo's Zimbabwe African Peoples Union [ZAPU]), and the Zimbabwe-Rhodesia government (represented by Abel Muzorewa and Ian Smith). The negotiations concluded with a ceasefire agreement, arrangements for the pre-independence period, and the so-called Lancaster House Constitution.

The constitution neutralised the visions that the country's liberation movements had for the post-independent state (Mandaza 1986). It guaranteed the white minority 20 seats in parliament, and entrenched land and property rights for 10 years, thereby preventing any immediate attempts at land reform. The Westminster-style constitution provided for a non-executive president, with a prime minister as head of government, a bicameral legislature, an independent judiciary, and an entrenched and justiciable Declaration of Rights. In the past 30 years, the constitution, which essentially represents a symbol of British colonialism, has been amended 19 times, but in a largely piecemeal manner and without any comprehensive national constitutional-reform strategy (ZLHR 2011). Although some of the amendments have addressed the entrenched and compromised provisions of the Lancaster House Constitution, most were engineered by the erstwhile ruling ZANU-PF to enable it to further centralise its power and galvanise executive authority (Hatchard 1991: 79–83; ZLHR 2011: 1–2). In particular, Constitutional Amendment No. 7 of 1987 replaced the system of a ceremonial president and executive prime minister with the executive presidency that exists today. The executive powers of the presidency were entrenched by this and subsequent related amendments.

Essentially, these presidential powers made the country's judiciary and legislature unequal partners of the executive branch of government (Ncube 1991: 171). Thus the president has the ability to significantly influence the legislative branch of the state through: the power to make appointments to the senate; dissolve parliament should it pass a vote of no confidence in him or her;<sup>2</sup> and to revoke an individual's seat in parliament if the parliamentarian concerned ceases to be a member of the political party on whose ticket he/she was elected.

The judicial branch is similarly subject to executive control: the president controls the appointment and removal of judges, commissioners, chiefs of the security services and other public figures, and can therefore unilaterally reconstitute various state bodies in pursuit of personal or partisan ends. A case in point was President Mugabe's unilateral decision to extend the terms of office of the heads of five national security services by two years in February 2012 without consulting his fellow principals in the GPA (Prime Minister Morgan Tsvangirai and Deputy Prime Minister Arthur Mutambara).<sup>3</sup>

The general consensus, particularly since the 1990s, has been that the Lancaster House Constitution is deficient in many respects 'because of its compromised, undemocratic origins and because of the governmental imbalance that had resulted from frequent amendments' (ZLHR, 2011: 2). As a reaction to this, in 1997, a consortium of civic organisations that included churches, human-rights groups, political parties (although crucially not including ZANU-PF), trade unions, women's organisations, youth groups and student movements established the National Constitutional Assembly (NCA) to lobby for a new home-grown constitution for Zimbabwe that would be democratic in its creation and its content. The NCA's constitution-making efforts were largely driven by concerns about the authority of the president which appeared to have no boundary. Sithole (1999) noted that the NCA's creation was more a reaction to the executive presidency created by the constitutional amendments since 1987 than to the Lancaster House Constitution. Recognising the popularity of the NCA's constitutional-reform lobby, the ZANU-PF government then attempted to hijack the debate by establishing the Constitutional Commission in April 1999 to consider issues related to constitutional reform.

## **The Constitutional Commission's draft constitution**

The constitutional reform process initiated by government, and conducted under the auspices of the Constitutional Commission from 1999 to 2000, was inherently flawed in that it was specifically designed to ensure presidential control. In response to the NCA-led

popular movement for a 'people-driven' constitutional-reform process, President Mugabe established the Constitutional Commission, 'apparently with the intention of maintaining control over both the review process and the contents of the new constitution' (Hatchard 2001: 210). He used his powers under the Commissions of Inquiry Act to determine the size and composition of the commission. In addition, the commission's mandate was limited to submitting recommendations for a new constitution to the president on or before 30 November 1999, which he was under no legal obligation to accept (Hatchard 2001).

The composition of the commission further betrayed the president's intention to steer the constitutional-reform process; in fact ZANU-PF monopolised the commission's work from the start. It was chaired by high-court judge Godfrey Chidyaisiku, who was seen as a close ally of the president (a suspicion confirmed by his appointment as judge president and subsequently as chief justice in 2001). In addition, while the government invited members from a cross-section of society in an effort to give the commission a semblance of being fully representative, the majority of the commission's 400 members were ZANU-PF members or supporters - for example, all 150 members of parliament were included (of which only three belonged to other political parties). Although some reputable academics and civil society activists agreed to 'work from within' in an attempt to influence the commission's performance, others associated with the NCA refused to participate in what they perceived to be a fundamentally flawed process (Hatchard 2001). The president gave the Constitutional Commission a tight schedule to produce a new draft constitution, increasing fears that he was 'intent on pushing his own constitutional and political agenda' (Hatchard 2001: 213). Not surprisingly, these procedural choices severely undermined the legitimacy of the final draft.

Nevertheless, the Constitutional Commission embarked on a nationwide outreach programme to gather the views of the people. This commendable and extensive consultation process, guided by the much-publicised List of Constitutional Issues and Questions, offered Zimbabwean citizens an opportunity to openly discuss and debate the proposed constitution (Mandaza 2012). The Commission said it organised 4 321 public meetings which were attended by a total of 556 276 individuals, and 700 special ad hoc meetings attended by a total of 150 000 people. In addition, the commission received 4 000 written submissions, and aired 31 programmes on ZBC TV as well as 143 programmes on Zimbabwe's four public radio stations: 16 programmes on Radio 1 (English); 55 programmes on Radio 2 (Shona and Ndebele); 2 programmes on Radio 3 (English); and 70 programmes on Radio 4 (minority languages such as Tonga and Venda) (Dorman 2003: 852). Externally, Zimbabweans in South Africa and the United Kingdom were also consulted. Significantly, while the Constitutional Commission stressed the deficiencies of the Lancaster House Constitution, participants in the public outreach phase stressed that they were more concerned about the 1987 constitutional amendments, which entrenched the powers of the executive presidency, and linked the constitution to the country's growing political and economic crisis (Dorman 2003). In addition to undertaking a 'scientific' survey to further strengthen its findings on specific issues, the commission convened an international conference that brought together constitutional scholars and experts able to offer useful lessons from elsewhere (Mandaza 2012).

The Constitutional Commission managed to complete all these processes and submitted a draft constitution to President Mugabe on 29 November 1999, within its stipulated five-month time frame. Ibbo Mandaza indicated that the audited cost of the process amounted to US\$7 280 652 (Mandaza 2012) and, as chair of the Constitutional Commission's administrative and finance subcommittee, it is perhaps not surprising that he believes the Commission's model and process stands out as the best of Zimbabwe's constitution-making endeavours (Mandaza 2012).

Predictably, however, the Constitutional Commission's draft retained the executive presidency's dominant role, although it did suggest limiting a president to two five-year terms in office. While it introduced the office of a prime minister, it still allocated to the president

the power to appoint and dismiss public figures, dissolve parliament and declare states of emergency. The draft contained a wider bill of rights than the Lancaster House Constitution, but failed to provide for a genuinely independent electoral commission.

Despite the role allocated to presidential office, and true to people's fears of state intervention, President Mugabe was apparently not satisfied with the draft constitution and used his control over the process to amend it. A Government Gazette titled 'Draft Constitution for Zimbabwe: Corrections and Clarifications' was subsequently published towards the end of 1999 (GoZ 1999a). Chief among the 'corrections' was the introduction of compulsory military service, the prohibition of same-sex marriages and the inclusion of a clause allowing the state to 'compulsorily acquire agricultural land for resettlement' while obliging Britain as the 'former colonial power' to compensate farmers. The publication of the Gazette reversed the positive steps taken during the participatory and inclusive outreach phase, and put an end to the prospect of a genuinely 'people-driven' democratic constitution being produced. It was the Constitutional Commission Draft as amended by the 'Corrections and Clarifications' that was put to a national referendum in February 2000.

ZANU-PF then campaigned vigorously for an endorsing 'Yes' vote while the MDC and NCA, aided greatly by the prevailing socio-economic morass and the general disenchantment with ZANU-PF, orchestrated a 'No' campaign. 'No' campaigners argued that the Constitutional Commission's draft ignored the provincial and thematic-committee reports that had been submitted, and particularly people's views on the need to limit the powers of the executive and ensure an even balance of power between the legislative, judicial and executive branches of government (Dorman 2003: 853). Chisaka (2000: 19) noted that 'the majority of those consulted clearly wanted a governmental system that was accountable to them through elected representatives in parliament...but this was denied them by the Commission'. A total of 26 per cent of about five million registered voters participated in the referendum, and the new constitution was rejected by 54.31 per cent of the votes (Hatchard 2001: 213).

In reaction to this defeat, the ZANU-PF-dominated parliament subsequently amended the 1992 Land Acquisition Act in line with the rejected Constitutional Commission Draft, which provided for the appropriation of land without compensation.

## **The National Constitutional Assembly's draft constitution**

Following the Constitutional Commission's failed attempt at constitution-making, the government relegated constitutional reform to the back burner once more. However, desire for a new democratic constitution remained strong among Zimbabweans. The NCA, which had declined to participate in the government's initiative, then carried out its own 'people-driven' constitutional-reform process and published its own draft constitution in December 2001. The NCA draft differed from the existing constitution and the Constitutional Commission's draft in that it proposed to vest executive authority in a prime minister and cabinet rather than in a president, who was relegated to the role of titular head of state (NCA 2001: 6). The NCA draft also removed certain presidential powers and privileges such as the authority to dissolve parliament, grant pardons or to declare war or a state of emergency. The NCA draft also contained provisions for the legislature, civil society and the wider public to oversee important institutional appointments. It proposed a full set of fundamental human rights including civil and political, economic, social, cultural and environmental rights, as well as specific protection for the rights of minorities and vulnerable populations.

Furthermore, the NCA draft provided for a truly independent electoral commission, a human-rights commission, an anti-corruption commission and a strong auditor-general to enhance democracy. It allowed the government to compulsorily acquire land for redistribution provided it paid fair compensation for it. The NCA draft, however, remained

silent on matters traditionally controlled by the executive, such as diplomatic appointments, the making of treaties and the calling of referenda (ZLHR 2011: 6). Although the government ignored the NCA draft, the constitutional reform organisation 'managed to keep the constitutional issue on the national agenda despite operating in a difficult political, social and economic environment over the years' (Lumina 2009: 2).

## The Kariba Draft Constitution

In September 2007, as part of inter-party dialogue, members of ZANU-PF and the two MDC formations met secretly at Lake Kariba in Zimbabwe, where they unilaterally negotiated and produced the document now referred to as the 'Kariba Draft Constitution'. Restricting the constitutional-reform process to a select team of partisan representatives meant that most Zimbabweans were 'denied their right to write a constitution for themselves' (NCA 2009: 1). Since the Kariba exercise was an elite process from the start, it is hardly surprising that its content is undemocratic.

The Kariba document is, in essence, a hybrid of the much-amended Lancaster House constitution and the Constitutional Commission's draft. More than half of the articles in the Kariba Draft mirror those in the Constitutional Commission's draft, essentially replicating some of the shortcomings of the latter (NCA 2009: 2). The Kariba Draft also incorporates the existing constitution's provisions that enable the executive to dominate the other branches of government. It imposes a two-term limit for the presidency but proposes that this should not apply to terms served by the existing president, thus allowing the incumbent Mugabe to serve additional terms. The Kariba Draft has also been criticised for failing to protect fundamental rights and freedoms (NCA 2009: 1). Although it had not been adopted prior to the harmonised elections of March 2008, the Kariba Draft was annexed to the GPA of September 2008, and analysts feared that it would form the basis of future constitutional reform.

## The COPAC Process

The GPA recognised that the inadequacies of the existing Lancaster House Constitution made it imperative for 'the Zimbabwean people to make a constitution by themselves and for themselves' (GPA 2008). Zimbabwe's history of election-related violence also made the adoption of a new democratic constitution central to the GPA's goal of creating an environment that is conducive not only to conducting peaceful, free and fair elections but for laying the foundations of a democratic society, free from violence and intimidation. Article 6 of the GPA required the transitional inclusive government, comprising ZANU-PF and the two MDC formations, to set up COPAC and establish a new constitution within 20 months of its formation. This is a marked departure from the prior Constitutional Commission's reform process, which allowed the president to dominate the process. However, the GPA lacked specific details, and the inauguration of the inclusive government, and by extension the implementation of the Article 6 timetable for constitutional reform, was delayed until February 2009 due to disagreements over implementation of the agreement.

COPAC was indeed inaugurated in April 2009, within two months of the establishment of the inclusive government – as provided for under the Article 6 timetable. It consisted of 25 parliamentarians selected to reflect parliament's gender balance and the relative strengths of the different parties in both the senate and the house of assembly. (Thus COPAC consists of 17 men and 8 women, 11 members of MDC-T, 10 ZANU-PF members, 3 MDC-N members and 1 representative of the traditional chiefs.)

The COPAC process offered Zimbabwe's main political parties a platform to develop a

new democratic constitution for the country based on an agreed procedure. However, some civil-society activists argue that ZANU-PF and the two MDC formations have captured the constitutional project and narrowed it to a struggle over party-political interests at the expense of the will of the people. The NCA therefore boycotted the COPAC process, and even mooted an alternative people-driven process under the banner ‘Take charge!’.

The members of COPAC on the other hand attended courses on constitution-making, held workshops and consulted with civil society about the process (although not many of the assurances given to civil society were adhered to). A work plan was drawn up, together with a list of 16 constitutional themes. This was double the number of themes that the Constitutional Commission had worked with, and there was some concern that the large number of themes would make both public consultation and drafting more difficult. Nevertheless, COPAC managed to meet its first GPA deadline by holding its first All-Stakeholders Conference in July 2009. The conference was attended by 4000 delegates, including all parliamentarians as well as nominees from political parties and civil society, and delegates chosen to represent special-interest groups such as war veterans. This broad participation helped to debunk perceptions of the constitutional-reform process being driven from above. And despite organisational failures, violent politically inspired disruptions of proceedings and logistical problems on the second day of the conference that limited discussion time to just a few hours, COPAC declared the conference a success, and added one more theme to the list, making 17 themes in all.

Notwithstanding the clear timeframe laid out in the GPA, enormous logistical, administrative and funding challenges as well as disagreements over the status of the Kariba Draft subsequently delayed the constitution-drafting process by over a year. The Ministry of Finance allocated a measly US\$1 million for the constitutional reform process in the 2011 national budget, which the unimpressed COPAC dismissed as a ‘joke’ (CISOMM 2011: 12).<sup>4</sup> The lack of state funding has meant that COPAC’s constitutional reform process has largely been donor funded. The acceptance of foreign funds for the process of establishing the supreme law of the land is striking given ZANU-PF’s stance that certain donor funds interfere with the autonomy and sovereignty of domestic politics. Nevertheless, by November 2011, development partners such as the United Nations Development Programme had pledged over US\$20 million to support the process (UNDP 2011).<sup>5</sup> Unfortunately delays in the disbursement of some of these funds have since affected the pace of the process.

The public consultation process that the GPA emphasised in order to ensure that the new constitution would be ‘owned’ by the people took place from June to October 2010 and was acrimonious. ZANU-PF and the MDC had been at each other’s throats for years prior to their uneasy co-existence in the inclusive government. Predictably, the legitimacy and credibility of the constitutional outreach programme was undermined by this polarisation, with political-party influence and ‘coaching’ of participants occurring in some areas alongside violence and intimidation mainly by ZANU-PF supporters and its allies among war veterans (CISOMM 2011: 5, 13; Human Rights Watch 2011). Frequent violent outbreaks between ZANU-PF and MDC loyalists interrupted the public consultations, and presented an obstacle to the active and effective participation of citizens in the outreach programme.

ZANU-PF used the consultation process to ensure that the draft constitution reflected its preference for a powerful executive president, the removal of the office of the prime minister and the preservation of the current security structures (CISOMM 2011: 13). The party also reportedly co-ordinated Operation *Vhara Muromo* (‘Shut Your Mouth’) to suppress dissenting voices during the outreach phase (CISOMM 2011: 13). The police allegedly disrupted several MDC-organised preparatory meetings, beat up participants and arbitrarily arrested others. For example, in February 2010 the police disrupted MDC-organised constitutional-reform meetings, beat participants and arbitrarily arrested 43 people in Binga, 48 in Masvingo and 52 in Mount Darwin (Human Rights Watch 2011). The violence worsened in Harare, and

led to the suspension of 13 scheduled meetings in September 2010. All this undermined prospects for producing a legitimate draft constitution that represents the will of the people. Meanwhile, hardliners in ZANU-PF blocked attempted discussion of the contentious issue of security sector reform. Given the sector's violent and partisan involvement in influencing the outcome of previous polls, reforms are widely seen as essential if free and fair elections are to take place. Notwithstanding this, the fact that the security sector was not included in the 17 themes discussed during the public outreach process may have placated this powerful faction, and prevented it from derailing the entire constitution-making process and its possible outcome.

Three principal drafters – Justice Moses Chinhengo with constitutional experts, Priscilla Madzonga and Brian Crozier – led the drafting committee. In a move that demonstrated that the constitutional-review process was drawing lessons from comparative African experiences such as that of South Africa, the draft constitution is based on a list of agreed constitutional issues drawn from a national report of people's submissions. The chief drafters were assisted by 17 constitutional experts – five from each of the three governing parties and two from the council of traditional chiefs. COPAC also enlisted the services of South African constitutional law and constitution-making expert, Hassen Ebrahim, who brought to the process his experience of constitution drafting in South Africa, Nepal, Somalia and Uganda.

Some civil society organisations, including the NCA, which ironically boycotted the COPAC process, expressed their dismay at being excluded from the drafting phase that has been ongoing since December 2011, arguing that this undermined the representativeness and transparency of the process. Other critics have also argued that opting to have a small drafting committee undermined public participation and deliberation at the critical constitution-writing stage. However, it is possible that, by precluding the need to constantly bargain and compromise to accommodate numerous divergent interests, the small number of drafters can more productively manage logistical challenges, and thus facilitate a more efficient production of a coherent constitutional document.

Unfortunately, the parties represented in the inclusive government, just as they had done during the preceding public outreach programme, turned the drafting process into yet another battleground. The deeply polarised political environment, characterised by mistrust between ZANU-PF and the two MDC formations, dominated the process. Critics have charged that the parties are bent on manipulating the constitution-writing process to ensure the incorporation of their positions and interests at the expense of reflecting the will of the people. Indeed, after the production of the preliminary drafts of the first four chapters of the constitution, ZANU-PF unilaterally attempted to stop the drafting process and accused the drafters of siding with the MDC by allegedly importing items not raised during the public outreach process.<sup>6</sup> There remained concern that the process would fall victim to partisan capture, with political parties 'smuggling in' points that were not covered during the outreach phase.<sup>7</sup> The result could be a draft constitution which is acceptable to the entrenched political powers and interests but lacks wider public support. As Bruce Ackerman (2000: 633, 673) rightly argues, 'A workable constitution is worthless unless [the framers] can get it accepted.'

The constitution-drafting process, already once re-scheduled for completion by January 2012, is running behind schedule. Problems so far have included: disruption of COPAC activities by war veterans allied to ZANU-PF who accuse COPAC officials of slowing down the process and manipulating it by ignoring views expressed during the outreach process; leakage of documents to state media allegedly by ZANU-PF members of COPAC intended to put pressure on drafters to change certain positions; and military interference – the army chief regularly summonses the ZANU-PF component of COPAC for briefings, thereby aggravating suspicions and divisions within the committee as a whole.<sup>8</sup>

## Justice and reconciliation

Zimbabwe is clearly a candidate for a far-reaching national healing and reconciliation project. As Mashingaidze has stated, ‘Zimbabweans have failed to heal and reconcile after major crises, because their national leadership has accorded premium to the state-sanctioned ideal of forgiveness without truth, and reconciliation without justice’ (Mashingaidze, 2010:21). The series of elite political transitions that Zimbabwe has experienced over the last three decades have all been characterised by a fundamental failure to deal with crucial issues of justice and reconciliation. Machakanja observes that the successive ‘negotiated peace processes were couched in reconciliatory amnesty measures’ (Machakanja 2010: 10). The Lancaster House Conference and the 1979 Agreement that sealed Zimbabwe’s transition from a colony to a sovereign state failed to provide the conceptual, legal or institutional framework for transitional justice. The Amnesty Ordinances of 1979 and 1980, passed on the basis of the Lancaster House Agreement, pardoned all atrocities perpetrated by the Rhodesian security forces on one side, and the liberation armies on the other.

In 1980, Robert Mugabe famously and magnanimously pronounced a policy of national racial reconciliation under which, ‘the wrongs of the past must now stand forgiven and forgotten’ (quoted in Barnes 2007: 634), but this meant that there was no formal process whereby people could openly deal with the trauma they had suffered. Similarly, the 1987 Unity Accord, which ended the violent civil strife that had engulfed the regions of Matabeleland and the Midlands since 1980 and resulted in the Gukurahundi massacres, had no dedicated transitional justice and reconciliation component. Furthermore, in October 2000, President Mugabe used his presidential prerogative to issue a clemency order granting amnesty to the perpetrators of the politically motivated violence that Zimbabwe experienced in the run-up to the June 2000 parliamentary elections (Feltoe 2004: 213–214).

The signing of the power-sharing GPA was heralded as presenting another opportunity for justice and reconciliation in Zimbabwe, and this seemed particularly necessary after the significant political violence experienced by Zimbabweans during the lead-up to the presidential run-off election in June 2008. The GPA provides for restorative transitional justice but does so quite vaguely. Under Article 7 of the GPA, entitled ‘Promotion of equality, national healing, cohesion and unity’, the three parties committed themselves ‘to putting an end to the polarisation, divisions, conflict and intolerance that has characterised Zimbabwean politics and society in recent times’. The GPA also states that the inclusive government ‘shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of pre- and post-independence political conflicts’ and ‘will strive to create an environment of tolerance and respect among Zimbabweans and [ensure] that all citizens are treated with dignity and decency irrespective of age, gender, race, ethnicity, place of origin or political affiliation’ (GoZ 2008).

Although Article 7 of the GPA acknowledges the culture of endemic violence and impunity in Zimbabwe, it is ambiguous in dealing with the fundamental issues of justice, reconciliation and human rights (Machakanja 2010). It merely states that the inclusive government ‘would give consideration’ to the establishment of transitional justice mechanisms. In other words, the GPA is, perhaps predictably, muted about the issue of accountability for past atrocities. The absence of the key words ‘justice’ and ‘reconciliation’ exempted the three parties, and particularly ZANU-PF, from accounting for post-independence human-rights violations (Machakanja 2010).

It is important to remember that the GPA emerged from the SADC-mediated bargaining process between the ZANU-PF and MDC elites. It is thus highly probable that tabling the issues of truth and justice would have hampered those delicate talks. Indeed, Zimbabwe

can be characterised as a 'hard case' in terms of transitional justice, in that members of an authoritarian regime retain significant capacity for violence and the ability to threaten the new polity if attempts are made to punish them (Stacey 2004). Under the GPA, ZANU-PF retained control of the defence portfolio and, by extension, significant capacity for violence. Thus, as president, Mugabe retains the potent executive office, as well as control over the influential echelons in the state's military and security apparatus. This close relationship has probably also protected the armed forces from being made accountable for any wrongdoing, despite the fact that opposition parties have accused them of committing human-rights abuses since the early 2000s.

There has been a glaring lack of political will among the governing parties to drive the process of transitional justice and reconciliation in Zimbabwe. Although the Organ on National Healing, Reconciliation and Integration (ONHRI) was established for consultative processes in February 2008, Mashingaidze (2010: 24) highlights the inherent weaknesses of ONHRI and the challenges it confronts:

For truth and justice to take place, there should be strong moral rejection of the former regime, and a clear consensus that its system was bad and its agents guilty of moral wrongs. There should also be a clear definition of what was wrong with the past. The Inclusive Government is in reality, however, a case of transition without transformation. ZANU (PF)-aligned functionaries still control the police and army, the Attorney General's office, the reserve Bank and provincial governance. There is also no clear definition or understanding of what went wrong in the past.

Although ONHRI gathered Zimbabwean views and concerns about national healing processes between February 2009 and February 2010, no substantive 'heal the nation' measures were subsequently implemented (Mashingaidze 2010: 25). More than three years after the formation of the inclusive government, very few prosecutions have occurred in Zimbabwe as a result of human-rights violations.

Significantly, the consolidated draft constitution prepared by COPAC in April 2012 reportedly provides for the creation of a Truth, Justice and Reconciliation Commission through an Act of parliament (Newsday 2012). The functions of the envisaged commission include (but are not limited to) investigating pre- and post-independence political conflicts, recommending remedies for victims of these conflicts and promoting reconciliation.<sup>9</sup> The Act is expected to empower the commission to grant immunity to perpetrators of human-rights abuses, order wrongdoers to apologise or compensate victims, impose penalties for non-compliance, and recommend measures to prevent future conflicts and abuses of human rights (Newsday 2012). If created, the commission could allow for investigations into past human-rights abuses including the 1980s Gukurahundi massacres, election-related violence that occurred in 2000, 2002, 2005 and 2008, as well as during Operation *Murambatsvina* in 2005. This would be significant as Zimbabwe needs a justice and reconciliation process, not only at the level of the political leadership but one that has the potential to heal the widespread societal wounds resulting from the poisoned political environment and the associated deep suspicions and entrenched hatreds.

## Prospects for a constitutional referendum and elections

As shown, Zimbabwe's constitutional-reform process has occurred in fits and starts, and COPAC is still to produce a draft of the new supreme law of the land more than two years after its inception. According to the timetable laid down in Article 6 of the GPA, COPAC is required to swiftly table the draft document for discussion and validation before another

All-Stakeholders Conference and then table it in parliament for debate within the following month. Furthermore, a referendum on the new draft constitution should be held within three months of the conclusion of the parliamentary debate. Indications are that the constitutional referendum will be held after August 2012.

However, at its December 2011 national conference ZANU-PF declared 2012 an election year, with or without a new constitution. The party is keen to terminate the life of the inclusive government – both President Mugabe and Prime Minister Tsvangirai concede that it has become dysfunctional (The Sunday Mail 2012). The two MDC formations however remain adamant that elections should only be staged after the adoption of the new constitution and the completion of wider democratic reforms.

Although a new constitution is a significant precondition for free and fair elections, it is important to recognise that constitution-drafting is also part of a broader democratic reform process.

#### *Measures to prevent election-related violence*

Against the backdrop of the election violence that took place in 2000, 2002, 2005 and 2008, it is imperative that the tabling of a series of electoral reforms be completed to prevent political violence from recurring. These reforms include a requirement that the national police commissioner appoint a senior police officer for each province who, in consultation with the Human Rights Commission, will be responsible setting up special police units to expeditiously investigate cases of politically motivated violence. These police officers should be assisted by provincial committees, including representatives of the political parties contesting the election, and chaired by a representative of the Human Rights Commission. Special prosecutors and magistrates' courts dedicated to dealing with such cases, must also be established. However, for these measures to work, professional interventions by politically impartial law enforcement agencies are necessary.

#### *Establishing credible electoral systems*

To its credit, the inclusive government appointed a new Zimbabwe Electoral Commission (ZEC) in March 2010 in an effort to reduce political tension in the country. The ZEC was first established in 2005 to address long-standing concerns about the fact that the registrar-general was responsible for almost all election-related processes, including voter registration, the provision of electoral staff, the declaration of results and even for custody of election materials (ZESN 2002). Ideally the ZEC's commissioners and secretariat should fairly represent a wide cross section of Zimbabwean citizens and all of the main political parties. However, the 2010 reshuffle did not change the composition of the ZEC's secretariat, the staff of which (at the time of writing) still included ex-army officers sympathetic to ZANU-PF. It is critical that Zimbabwe build an effective and professional electoral commission if it is to establish democratic, competent and credible electoral systems.

The scope of the ZEC's role should also be clearly enunciated. It can either focus narrowly upon the efficient management of elections, or more broadly on the entire election process and its surrounding environment. As of mid-2012, the ZEC remains drastically under-capacitated and would struggle to properly organise an election at short notice. Meanwhile, the voters' roll that was first drawn up in 1985 is in a shambles, with a large proportion of 'ghost voters' (people who have died or left the country and no longer qualify to vote) (ZESN 2008).

In February 2012, the ZEC met with the registrar-general, Tobaiwa Mudede, to discuss the compilation of an accurate, credible voters' roll – a fundamental pre-requisite for a free and fair election. In addition, the ZEC, which is supposed to be independent from executive directions, has proposed that the country's existing electoral law gives it authority to

supervise the voters' roll, rather than the registrar-general who reports to a line minister. The outcome of ZEC's proposal has not been decided.

#### *Progress towards increased media freedom*

In terms of media freedom and media reform, developments have been mixed since the establishment of the GPA. The Zimbabwe Media Commission was created in March 2010 and, in a positive step, it licensed new print-media players in May and July of that year. The country's mobile-phone services have since also received a major capacity upgrade. However, calls for the reconstitution of the Broadcasting Authority of Zimbabwe, believed by some to be sympathetic to ZANU-PF, have fallen on deaf ears. In 2011, the Broadcasting Authority issued two commercial radio licenses to the state-owned Zimbabwe Newspapers and AB Communications – an entity allegedly linked to President Mugabe.<sup>10</sup> Meanwhile, pro-ZANU-PF media coverage by public broadcasters has continued. Unfortunately, the Zimbabwe Media Commission has not yet been able to reform the country's repressive media laws such as the Access to Information and Protection of Privacy Act of 2002 and the Censorship and Entertainment Control Act of 1967. Parliament has also so far failed to pass necessary media-reform bills such as the Media Practitioners Bill and the Freedom of Information Bill (CISOMM 2011: 7). Against this backdrop, the harassment of journalists and artists continues.

#### *Security-sector reform*

Despite constant pleas from the MDC, the security sector has been shielded from reform by ZANU-PF. In September 2011, the defence minister, Emmerson Mnangagwa, who is also a senior member of ZANU-PF, said: 'If you want to test me speak about the change of generals and removal of war veterans from the security sector. I will not let our security forces be led by puppets of the West [MDC] never!'<sup>11</sup>

#### *The sanctions issue*

The issue of sanctions is another contentious and outstanding issue. President Mugabe has stated that he will not retire until sanctions imposed in 2002 and 2003 by the European Union (EU), Australia, New Zealand, and the United States, which targeted himself and 200 senior ZANU-PF as well as government officials and institutions have been lifted (The Standard 2011). Those sanctions that relate to international financial institutions and government-to-government loans are preventing Zimbabwe from receiving official development assistance. In February 2012, the EU retained Mugabe on its sanctions list but lifted sanctions against 20 entities and 51 individuals in light of perceived politically progressive reforms which could lead to a credible election (EUbusiness 2012). Against this backdrop the call for elections may be in line with President Mugabe's declared stance that he will not step down until sanctions are wholly lifted. It remains to be seen whether the EU will accede to the unprecedented and unanimous call for the full removal of sanctions made in May 2012 by Zimbabwe's ministerial re-engagement team, which comprises members of the three signatories to the GPA.<sup>12</sup>

#### *Possible election dates*

Although Zimbabwe provides a constant reminder that politics is not always black and white, recent developments may well indicate President Mugabe's preparedness to call for elections in 2012 in an effort to pre-empt and put an end to such constitutional and electoral reform processes. In a series of interviews in the run-up to his 88th birthday celebrations in February 2012, President Mugabe reiterated that there would 'definitely' be elections in 2012 to end the inclusive government's term of office. Contradicting the minister of finance and MDC-T Secretary-General Tendai Biti, who said that Zimbabwe would not be able to afford to

hold elections in 2012 because they have not been budgeted for, Mugabe maintained that the money will be 'found' to hold the presidential and parliamentary elections. He dismissed as 'cowards' the two MDC formations in the inclusive government which remain adamant that elections should be staged only after the introduction of wider democratic reforms, including the completion of the constitutional-development process and the formulation of a clear road map to a constitutional referendum and peaceful, free and fair elections. Zimbabwe's prime minister and leader of the MDC-T Morgan Tsvangirai has proposed 31 March 2013, when the current parliament's term expires, as the constitutional deadline for elections. Meanwhile, the deputy prime minister, Arthur Mutambara, has indicated that June 2013 is the 'ultimate deadline' and that the GPA provides for elections under the current constitution if the three signatories to the GPA reach a deadlock.<sup>13</sup>

## Conclusion

Constitutional reform in post-independence Zimbabwe has been intermittent and the likely outcome of the current reform processes is difficult to determine. Various procedural choices have powerfully affected the legitimacy and output of constitutional reform initiatives to date. What is clear is that there is widespread political consensus on the need for a new constitution that truly 'mirrors the national soul'. However, the reform process is occurring in a polarised political environment and is beset by considerable structural and logistical challenges.

As of June 2012, Zimbabwe's constitution-drafting process is deadlocked. The two MDC formations accuse ZANU-PF of throwing spanners into the constitution-making process with its position paper demanding wholesale changes to the latest draft constitution.<sup>14</sup> COPAC continues to haggle over ZANU-PF's demands which include giving additional executive powers to the president, the rejection of dual citizenship and devolution of power and revisions to the preamble. COPAC is expected to produce a report and submit it to the negotiators from the three GPA parties for discussion. Meanwhile, concerns about the production of a negotiated constitution that does not reflect the views gathered during the outreach exercise have not been addressed. Uncertainty surrounds both the constitution-making process and the finalisation of the constitution itself.

Whether and when Zimbabwe will hold its next elections, with or without a new constitution, also hinges on the ability of the guarantors of the GPA - namely SADC, SADC's facilitator of intra-Zimbabwe dialogue (currently, South Africa's president, Jacob Zuma) and the AU- to persuade the signatories to the GPA to implement the agreement to the letter, and agree to a clear roadmap to free and fair elections. In a communiqué issued after the Extraordinary Summit of SADC Heads of State and Government in Luanda, Angola on 1 June 2012, SADC 'urged the parties to the GPA to finalise the constitution-making process and subject it to a referendum thereafter'. The communiqué also urged the parties, with the assistance of President Zuma in his role as facilitator, 'to develop an implementation mechanism and to set out time frames for the full implementation of the Roadmap to Elections' (SADC 2011). It remains to be seen whether SADC will be able to hold Zimbabwe's signatories accountable for fully implementing the GPA (Dzinesa and Zambara 2011: 65).

SADC has already registered its concern about the lack of implementation of the GPA to limited effect. For example, following much criticism of its monitoring of the implementation of the agreement, SADC appeared to be willing to take a harder line (Dzinesa and Zambara 2011). In March 2011, a Troika Summit of SADC's Organ on Politics, Defence, and Security Cooperation in Zambia noted its 'disappointment' with, and expressed its 'impatience' at, the slow pace of progress and the evident threat of a return to Zimbabwe's recent dark past (SADC 2011; Dzinesa and Zambara 2011). However, SADC has since failed to deliver on the

summit's undertaking to appoint a team of officials to join President Zuma's facilitation team and to work with Zimbabwe's own GPA monitoring body, the Joint Monitoring and Implementation Committee, 'to ensure monitoring, evaluation and implementation of the GPA' (SADC 2011).

The worst-case scenario is therefore that President Mugabe may call elections in 2012 or 2013 with or without a new constitution. It remains to be seen how SADC would react to this, and whether the two MDC formations would participate in or boycott such elections. The best-case scenario is for SADC to prevail upon the Zimbabwean parties to adopt a new democratic constitution and follow an agreed roadmap towards conducting peaceful, transparent and credible elections in line with SADC's principles and guidelines. History shows that this could be a tall order. President Mugabe and fellow ZANU-PF officials have gone on record stressing that Zimbabwe is a sovereign state, and will not countenance being dictated to by SADC regarding the implementation of the GPA.

## Notes

- 1 Judge Mohammed is quoted in Hatchard (2001: 210).
- 2 This is despite the fact that the process through which parliament can pass a vote of no confidence in the president has become extremely cumbersome.
- 3 The chiefs in question are Augustine Chihuri (Police Commissioner General), Constantine Chiwenga, (Commander of the Zimbabwe Defence Forces), Lieutenant-General Philip Valerio Sibanda (Commander of the Zimbabwe National Army), Air Marshal Perrance Shiri (Commander of the Air Force of Zimbabwe) and Retired Major General Paradzai Zimondi (now Commissioner of Prisons).
- 4 See also: COPAC Blasts Government, Donors over Funds. *Zimbabwe Independent*, 14–20 January, p. 4.
- 5 UNDP Receives Additional Funding from Development Partners for COPAC to Support Constitution Making in Zimbabwe. UNDP Press Release, 24 November 2011. Online at: <http://www.undp.org.zw/media-centre/news/22>
- 6 Zanu PF out to Derail New Charter. *Newsday*, 6 January 2012.
- 7 Zanu PF Threat to Sink Constitution over Devolution. *New Zimbabwe*, 7 March 2012.
- 8 Chiwenga Summons COPAC for Briefing. Radio VOP, 29 January 2012. <http://www.radiovop.com/index.php/national-news/8107-chiwenga-summons-copac-for-briefing.html>
- 9 Truth Commission in New Constitution. *Newsday*, 27 April 2012.
- 10 See: BAZ Awards Radio Licences, *ZimOnline*, November 2011.
- 11 Quoted in: We'll Sell Our Diamonds, *Herald*, 12 September 2011.
- 12 Statement by the spokesperson of the European Union's High Representative, Catherine Ashton, on consultations with the Zimbabwe re-engagement team, 10 May 2012.
- 13 See: Possible to Hold Polls This Year: DPM, *Herald*, 7 June 2012.
- 14 Zimbabwe's Constitution Committee Meets Over New Zanu PF Demands, *VOA News*, 11 June 2012.

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