



# Constitution-making in Southern Africa

The cases of Tanzania, Zambia, and Zimbabwe



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## FOREWORD

With the exception of Ethiopia, every other African country was colonized. Indeed, back in the 1950's and prior to Ghana being the first State to obtain independence, every other African country was governed through colonial rule, either, for example, by the French, British or Portuguese. The laws from these Colonial masters, constituted what was then the legal order in their respective colonies. African States have since achieved independence and in the last decades of the 20<sup>th</sup> century, these laws faced massive criticism on the basis that they were not African, not contemporary and not people-centered.

Constitutional revisions did not stop in the 20<sup>th</sup> century. Indeed, over the first two decades of the 21<sup>st</sup> Century, heighten constitutional debates have emerged and there has been an increase in the number of States that have initiated constitutional revisions across the Continent. But, specifically, such revisions have been due to, remarkable social and political movements that have emerged around the Continent. These movements could be regarded to have ushered in new energy and ideology in the way African Constitutions should look like, based on, for example, international and regional law standards African states have committed to through their ratification of several international and regional legal instruments. For example, such movements have demanded Constitutions that reinforce greater justice and more protection of human rights, more transparent political processes and increased dialogue on governmental issues. Briefly, they have demanded Constitutions that mandate democratic governance based on the rule of law that operates on a people-centered principle such as separation of powers anchored in participatory and consultative processes.

The significance of a participatory and consultative constitutional process is critical in the fact that a constitution represents a social contract between the government and the governed; it is the basic law of the land. It prescribes the process and political ideology a government adopts, it guarantees peaceful governmental transitions - through the recognition of term limits, it assures the people that they decide, through vote, on who governs them. In all, a constitutional process should be an open process which also ensures that ownership of a constitution is vested in the people and nation and not in individuals. Indeed, the Charter of the African Union, for example, reaffirms that freedom, equality, justice and dignity are critical objectives for the achievement of the aspirations of the African people. Recently, these aspirations have been strengthened further through the adoption of the African Union's Agenda 2063: *The Africa We Want* and specifically through 'aspiration' three, which hopes for 'An Africa of good governance, respect for human rights, justice and the rule of law' and 'aspiration' four, which hopes for 'A peaceful and secure Africa'.

To date, more than 10 out of 54 African states have drafted new constitutions to reflect some of the demands and aspirations mentioned above. In fact, between 2010 and 2016, eight African countries have been in the process of drafting Constitutions and some have been adopted. These are: Egypt, Liberia, Kenya, Somalia, Tunisia, Tanzania, Zambia and Zimbabwe. Each of these countries has achieved different levels of progress and not all have concluded the process successfully. In fact, where the process has been successfully concluded, such success has been dampened by a slow comprehensive legal reform which could have aligned other pieces of legislation extant within a state to the new ideology adopted by the Constitution. This is telling in countries such as Kenya where despite adopting a new Constitution in 2010 which protects an array of rights, Kenya still has a discriminatory civil registry which discriminates against people of Nubian decent. However, both successful and unsuccessful processes offer lessons that can strengthen future constitution drafting

attempts on the continent. More so, because, there is persuasive conviction that African governments do understand that the most critical aspects of a Constitution-making processes, is that it transcends beyond paperwork to actual implementation in order to ensure that constitutional provisions are not mere legal rhetoric.

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## Introduction

In 2013, Zimbabwe adopted a new constitution. That same year a Zambian technical committee released a final draft of a new constitution over which they had been working since 2011, and the Constitutional Review Commission of Tanzania released a first draft of a proposed constitution for the United Republic of Tanzania.

Each of these countries had been then and has continued to be engaged in a substantial debate both on the contents of these constitutions and on whether they were reflective of the aspirations of their citizens and the needs of the moment. So it seemed an appropriate time to make some of that debate available in a comparative way.

This publication is the outcome of that very limited purpose. Each chapter takes the same shape: a short summary of the constitutional history of the country, a description of the process which established the text of the latest version of the constitution, and a review of certain key principles contained in the text.

As the chapters were written, there was still some confidence that this would be an important moment in the life of Southern Africa – three modern constitutions with substantial input from large sections of their citizens. A quarter of the population of the Southern African Development Community would be governed according to versions of democratic best practice aligned with the principles of the African Charter on Democracy, Elections and Governance (ACDEG).

In 2016, the mood is inevitably more somber. In Zimbabwe, the constitution is regularly flaunted by the incumbent government and the public service. Few laws have been aligned with the constitution, leaving massive contradictions which have severe implications for effective governance and for protection and promotion of human rights. In Zambia, the momentum for adoption of the new draft has slowly but surely been sandbagged, until in August this year, the innovative human rights components of the draft failed at the referendum, not because of voter resistance but because of low turnout. The Zambian Parliament had already cherry picked certain clauses so that the country remains with a somewhat confused and certainly not constitutionally coherent patchwork version which falls short of the aspirations expressed in 2011 when the latest process began. In Tanzania, it appears that the process has stalled completely on the verge of adopting a draft which itself appeared to undermine the constitutional versions that emerged from public consultation.

The relationship between the process by which a constitution is developed, and the content of that constitution have not been addressed in any critical way in this publication. The reader will be able to obtain an overview of the process and the extent to which it may have involved broader consultation; and they will find a review of key aspects of each constitution. These deal in the main with aspects of the rule of law, separation of powers and human rights principles which these constitutions embody. It can be argued that analysis of discrete constitutional clauses is insufficient to determine whether a constitution stands up to overall scrutiny in the light of international democracy and human rights standards. Restrictive limitations on rights, being overly deferential to the executive and its powers, incongruities between clauses dealing with rights and those establishing the powers of intelligence, military and police services, incomplete arrangements around inter-governmental relations and devolution of authority may all undermine a democratic constitution. While the chapters allude to some of these, much more analytical work has to be done and is being done on individual constitutions. This publication may provide some starting points.

In all three cases, there has been an explicit debate about ensuring that the constitutions are developed in a participatory way. Citizen groups have called for “people driven” constitutions and have organized around that call. In Zimbabwe at least, some citizen groups adopted a purist position, campaigning against the legitimacy of the final version not on its merits but on the process by which it was compiled. Of course there are differences of opinion about the term “people driven”. Does it mean that the constitutional process should not involve the executive or legislature of a country and the parties which are represented in that legislature? Surely not. Does it merely mean that citizens should be consulted as to their aspirations for a constitution expressed in broad “apple pie and motherhood” terms? That too would be an error. Perhaps it is considered sufficient that an elite group draft a constitution and have the voters of a country either like it or not through a referendum. That seems too blunt and uncertain an instrument for national consensus and commitment.

Nor should it be taken for granted that a people driven constitution will automatically lead to a more democratic constitution with a human rights approach. Resistance to certain human rights principles by groups in civil society which have a more socially conservative point of view than that prevailing in international law suggests that merely being people driven is an insufficient criteria for assessing any constitution.

Nevertheless, the key principles in Africa in regard to constitutionalism are those framed by the ACDEG in article 10:

“1. State Parties shall entrench the principle of the supremacy of the constitution in the political organization of the State.

2. State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.”

Neither the African Union Constitutive Act nor ACDEG deal with the manner in which states will ensure national consensus, other than suggesting a referendum. So States have tended to increasingly make use of participatory processes invented by local polities with an eye on their neighbors, and a particular eye on the means by which South Africa crafted its 1996 constitution. Given that dissatisfaction with existing constitutions is often expressed through organized civic campaigns which mutate into citizen organizing around the process of constitutional reform and then mutate again into organizations making content suggestions, doing popular education around constitutionalism, and then once again into forms of popular support or resistance to the constitutions that finally emerge from the chosen process, it is not surprising that high values are given in these designs to transparency, participation, protection of the process from executive influence, and some skepticism about expert groups and commissions.

Constitutional reform is therefore going to have to remain an art rather than an exact science. Benjamin Odoki makes the point that: “The manner in which a constitution is finally adopted by the people is fundamentally important in demonstrating the legitimacy, popularity and acceptability of the constitution. To command loyalty, obedience, respect and confidence, the people must identify themselves with the document through involvement and a sense of attachment (Odoki 2005). Gaining that loyalty, obedience, respect and confidence requires

those in power at the moment of reform to consider their responsibilities towards their citizens, and act with imagination and empathy.

None of the cases considered here entirely captures the spirit of constitutional reform anticipated by those who agitated for that reform. "A constitution will only embody national values – the autobiography of a country, if you will – if it takes the form of a covenant between the governors and the governed" according to Michael Bratton (2014). This book describes countries in which that covenant has not yet been cut.

As for the content of constitutions forged in the 21<sup>st</sup> Century, they draw on global precedents and are constrained by the international standards to which all countries have assented over the years since 1948 and the Universal Declaration of Human Rights whatever domestic contemporary challenges they may want to address. In Africa, countries are expected to comply with those principles they have adopted in the African Charter on Human and People's Rights and the African Charter on Elections, Democracy and Government. It is therefore perfectly appropriate for citizens and citizen organizations to evaluate the outcomes of constitutional reform processes against these standards.

This publication has used some of these principles in determining which sections of the constitutions it will pay attention to, but it tries to represent the content directly and fairly, which is no small task given that the Tanzanian Constitution will only have an official English translation if and when it becomes law, and that various pieces of the Zambian constitution have been subject to amendment and piecemeal acceptance. There has not been an attempt to judge the constitutions by one another nor by others in the neighborhood.

As a result, readers must derive their own general lessons from this publication, and consider in more detail the extensive guidelines for democratic governance accepted by African countries in ACDEG. Nevertheless, there is however, one signal lesson which is communicated in these three cases: the last mile and the first mile count.

Despite tremendous and costly effort on the part of citizens, parliamentarians, commissioners, technical experts, and international partners, two out of the three constitutional processes described here have failed at the last hurdle leaving that effort unfulfilled. Last minute tinkering, insufficient thought about how to manage a legal transition from one constitution to another, last minute failures in political will all stymie progress. In Zimbabwe, external pressure combined with domestic intensity meant that the constitution was adopted. But subsequent dereliction of duty by the ruling party has meant that it is honored largely in the breach with one or two notably exceptions driven not by politicians but by the judiciary.

In future more attention has to be given to these two critical processes – adoption and implementation – and to ways in which they can be supported given that they are not primarily technical but political moments.

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## The Tanzanian Constitution – Not Yet a Dream

In late 2010, Tanzanian President Kikwete announced that there would be a process of constitutional revision in Tanzania, and that a new constitution would be in place by 2015. President Kikwete's announcement came in response to increasing public pressure for constitutional reform. Several other countries in the region had recently revised their constitutions; often these constitutions had been enacted in the immediate post-colonial period with little public participation. Tanzania has, in fact, had four constitutions since independence. But all of them were adopted with minimal public consultation. The current constitution, first adopted in 1977, has been amended multiple times, most recently in 1995.

### A Short Constitutional History of Tanzania

In 1961, Mainland Tanzania (Tanganyika) won independence from the United Kingdom (UK), under the leadership of Julius Nyerere and the Tanganyika African National Union (TANU) party, and adopted the Independence Constitution of Tanzania. This constitution was based on the Westminster model, with an executive Prime Minister and a separate Governor General who represented the British monarch as Head of State. The following year, Tanzania adopted a republican constitution that combined the powers of the Prime Minister and the Governor General. Nyerere became the first executive President, and Tanzania became a one-party state in 1963 (Carter 1986). Also in 1963, the UK ended its protectorate of Zanzibar, and a coalition of Arab parties formed the Sultanate of Zanzibar. One month after independence, the AfroShirazi Party and the leftist Umma Party violently overthrew the Arab-minority government of Zanzibar and established a republic (Gascoigne 2001). In 1964, Zanzibar became a one-party state under the ASP. Subsequently Tanzania and Zanzibar united to form the United Republic of Tanzania, and adopted an interim constitution. The Union was established through the signing of a treaty called the Articles of Union. After being ratified by the two countries' legislatures, this treaty became the Acts of Union - a founding constitutional instrument that still has a profound influence on the structure of Tanzania today. The Acts of Union established a two-government structure, with 11 items placed under the jurisdiction of the Union government (which governed both the Union and Mainland Tanzania), while all other items remained under the exclusive jurisdiction of Zanzibar. Over the years, however, the Union government's powers have continued to grow, as more and more items have been included under its jurisdiction.

In 1977, TANU and ASP merged to form the Chama Cha Mapinduzi (CCM) party. In effect, CCM and its forebears have controlled the country's government since 1961, and have remained in power longer than any other party in Africa (Hutton 2015).

Also in 1977, a presidentially-appointed constitutional commission drafted and secured adoption of Tanzania's constitution in only 40 days, and without public debate or consultation. The constitution set out a two-tier structure of government for the country. It establishes separate governments for the United Republic of Tanzania and Zanzibar, and divides power over "union" and "non-union" matters between these two entities. The government of the United Republic has authority over union matters, as well as over the non-union matters of Mainland Tanzania; the government of Zanzibar has authority over all non-union matters of Zanzibar. The 22 union matters listed in the constitution include: foreign affairs; defense and security; banking and trade; mineral oil resources; and political parties. Non-enumerated functions are considered non-union matters.

In the years after 1977, a number of issues related to the union between Zanzibar and Mainland Tanzania began to cause friction, including: the Mainland Tanzanian government's influence over union matters; the scope of union matters as compared to non-union matters;



the lack of integration between the economies of Zanzibar and the Mainland; Zanzibar's level of autonomy (including the existence of a separate flag, national anthem, and constitution); and contradictions between the constitutions of Zanzibar and the Union (Minde 2014). In addition, the Tanzanian public, as well as international observers have expressed concerns about separation of powers, and excessive executive influence over the judiciary and law enforcement agencies, particularly in relation to authorities' failure to investigate a number of credible allegations of high-level corruption (House 2012).

In 2011, Parliament passed the Constitutional Review Act, which created a Constitutional Review Commission (CRC) to oversee the process of constitutional reform. The President retained the power to appoint CRC members, raising concerns about the extent of the ruling party's influence over the process. However, because the President "consulted widely" (Development 2013) before appointing members, the public generally viewed the CRC "as an inclusive and independent" body. (Development, 2013) The 30 members of the CRC consisted of politicians, judges, lawyers, and professors, as well as representatives from the private sector, unions, and civil society (Longino 2012), with 15 members from the Mainland and 15 from Zanzibar. Joseph Warioba, a former prime minister and attorney general, (Branson 2015) chaired the CRC.

Between July and December 2012, the CRC held extensive public consultations across Zanzibar and Mainland Tanzania. In accordance with the Constitutional Review Act, the CRC convened at least three public meetings in each district. A total of 1,400,000 people attended the 1,773 meetings that occurred across the country. The CRC also solicited written feedback from those who did not attend. In addition, the CRC met separately with stakeholder groups, including civil society organizations, religious leaders, and political parties.

In June 2013, the CRC released the first draft of the constitution, which proposed a number of important changes to the structure of government initially recommended by the Warioba Commission. The CRC then began a second round of public discussion through constitutional fora (*barazas*). Each ward elected a forum to discuss the draft constitution, holding an introductory session, working groups, and public sessions. However, members of the ruling CCM party dominated the committees charged with screening the individuals that would participate in the fora, again raising concerns about undue influence over the process (Branson 2015). Additionally, institutions and organizations were able to propose fora to express their views. The CRC received 614 applications to conduct fora, and 500 applicants were selected to participate and submit their views. After the conclusion of the fora, the CRC published a report on citizens' views about the draft constitution.

In December 2013, (Kimboi 2013) the CRC released the second draft of the constitution (Polepole 2015). This draft proposed a three-government structure, with a Union government and semi-autonomous governments for Mainland Tanzania and Zanzibar (Polepole 2015). The number of union matters decreased significantly—from 22 to 7. These included: the constitution and government of the United Republic; defense and security; citizenship by immigration; currency and banking; foreign affairs; registration of political parties; income taxes; and customs and excise duties. Reflecting the Union government's reduced powers, the number of members of the Union parliament was also reduced, from 357 to 65.

The Constitutional Review Act then required the President to convene a 635-member Constituent Assembly (CA). The CA included all members of the National Assembly of the United Republic and Zanzibar's House of Representatives, as well as 201 additional members,

whom the President appointed “upon consultation and in agreement with the President of Zanzibar” (Polepole 2015). These additional members included representatives from NGOs, faith-based organizations, all registered political parties, universities, and groups of people with special needs, unions, and associations representing farmers, pastoralists, and other interests (Minde 2014). The Constitutional Review Act stipulated that each of these stakeholder groups could submit between four and nine candidates, with information about each candidate’s age, gender, experience, qualifications, and residence. From that list, the President selected three to serve on the CA, based on each candidate’s qualifications, experience, and gender (Anon 2014).

The CA struggled to achieve consensus. Critics charged that the majority of the Constituent Assembly members were affiliated with the ruling party and not interested in building consensus among divided factions, referring to the CA process as the “tyranny of the majority” (Polepole 2015). Members of the CA disagreed about the scope of the CA’s mandate, and whether it had the authority to make substantive changes to the draft constitution. Some interpreted the mandate narrowly; they asserted that to ensure that the final constitution reflected the public’s input the CA could not alter fundamental principles in the second draft of the constitution. Others interpreted the CA’s mandate more broadly, asserting that the CA had unlimited power to revise the constitution (Polepole 2015).

Relationships among the CA members further deteriorated after the CA divided into two major factions; this division occurred over open versus secret voting on proposed changes to the draft, amidst concerns that the ruling CCM party was seeking to manipulate and influence votes. The majority of those in favor of open voting were CCM members, and critics alleged that this was to ensure that CA members affiliated with CCM voted on proposed changes along party lines. The majority of those against open voting were members of minority parties, who argued that an open ballot would go “against democratic principles,” and intensify a growing partisan divide (Panapress 2014). In April 2014, the three main opposition parties boycotted the CA, stating that the CCM retained too much control over the drafting process (Bulletin 2014).

The third and final draft of the constitution was released in September 2014 and contained a number of substantive changes. It included two new chapters: a chapter on Land, Natural Resources, and Environment, and a chapter on the Revolutionary Government of Zanzibar, the Revolutionary Council of Zanzibar and the House of Representatives of Zanzibar. The draft also maintained the same two-government structure that previously existed, which many Zanzibar’s opposed (Polepole 2015). The third draft also revised provisions relating to Members of Parliament, reducing the educational qualifications for MPs, eliminating restrictions on tenure, and limiting the means by which to remove MPs from office. The third draft also expanded presidential powers, removing a provision that required the president to seek advice and consent from parliament before appointing officers. Opposition parties alleged that these revisions demonstrated that Members of Parliament and the ruling party retained too much influence over the content of the constitution.

Opposition parties claimed that the process had “divided rather than united” the country (Kabendera 2014). They also challenged the process for approving the third draft of the Constitution, asserting that there was no quorum to approve the final draft. Nevertheless, the President called for a referendum on the final draft (hereafter the proposed constitution), in accordance with the Constitutional Review Act, which mandates that a public referendum must be held to approve the proposed constitution. The referendum was originally scheduled

for April 2015 but, due to problems with voter registration, it was postponed (Ng'wanakilala 2015). Notably, CCM did not mention the proposed constitution in its 2015 election platform (Mtulya & Kalunde 2015).

## Analysis of the Proposed Constitution

Although it remains inactive, the proposed constitution warrants consideration as a document that could become the supreme law of Tanzania. If the government ever follows through on a constitutional referendum, it is likely to be highly contentious. Opposition parties and many civil society organizations have already vowed to campaign against adopting the proposed constitution. In analyzing this proposal, it is important to compare corresponding positions under two other constitutions: the "current constitution," and the "CRC draft." The current constitution refers to the 1977 Constitution of Tanzania, as amended, which remains in effect until there is a referendum on the proposed constitution. The CRC draft refers to the second draft of the Constitutional Review Commission, published by the *Government Gazette* in December 2013. This draft has no force of law; however, given intense objections over changes made to the CRC draft by the Constituent Assembly, it can be useful to consider positions under the CRC draft to understand why certain groups remain opposed to the proposed constitution.

## Citizenship

Tanzanian citizenship is constitutionally protected under the proposed constitution. Citizenship is not dealt with in the current constitution apart from designating it a Union matter, and thus it is left to the laws of Parliament for regulation. Under the proposed constitution, only citizenship by immigration is a Union matter. The proposed constitution would retain the current two types of citizenship: by birth and by registration. Dual citizenship is not prohibited by the proposed constitution, but also not guaranteed, which means that the current ban on dual citizenship would still stand.

## Bill of Rights and Fundamental Objectives

Tanzania's proposed constitution includes in chapter five a bill of rights (although it is not referred to by that name), enforceable in courts of law. It is similar to the existing bill of rights in Tanzania's current constitution. Basic civil and political rights are protected, but economic, social and cultural rights are largely excluded, with just a few exceptions. Additionally, the proposed constitution includes a chapter on Fundamental Objectives, Directive Principles of Government Duties and National Goals. This chapter also refers to some additional rights; however, following the current constitution, Article 20(2) of the proposed constitution states "the provisions of this chapter are not enforceable by any court." The duties and rights enshrined in that chapter are therefore not justiciable. Under the CRC draft, the status of these duties and rights as justiciable was left open, as it was in Zimbabwe's 2013 constitution, while the proposed constitution is clear.

## Civil and Political Rights

The proposed constitution enshrines an extensive set of civil and political rights in the country's supreme law, including, *inter alia*, the right to life and the right to dignity, freedom of association, movement, expression and religion, rights of detained and arrested persons, non-discrimination, freedom of information and news media, personal freedom, a right not to be enslaved, and a right to privacy. Although not a free standing right in the constitution, the right to freedom from torture or inhumane punishment is embedded in an exposition of principles that must be taken into account to ensure equality before the law. These rights are

largely similar to the rights that are enshrined in the current constitution. The issue remains enforcement and protection of these rights in practice.

### *Death Penalty*

Despite the proposed constitutional protections of right to life and from inhumane punishment, the death penalty would remain in the statutes for the crimes of murder and treason, even though no one has been executed in Tanzania since 1994 (Cornell Center on the Death Penalty World Wide 2015). Although Tanzania has not signed the UN Optional Protocol on the abolition of the death penalty, (The Death Penalty Project 2009). Basic principles of international human rights are contrary to the use of capital punishment; it would have been consistent for the clause on the right to life to have been coupled with a clause explicitly abolishing the death penalty.

### *Equality and Non-discrimination*

Article 34 of the proposed constitution states, "all persons are equal and are entitled to protection and equal rights before the law." This provision also lists grounds on which discrimination is prohibited, although discrimination on the basis of sexual orientation is not explicitly mentioned. Given Tanzania's poor record in protecting its LGBT population, this provision leaves this community vulnerable. Same-sex relations remain illegal, and carry a lengthy prison sentence. Nevertheless, the proposed constitution does seek to provide redress or legal protection for members of society who have been victims of discrimination in the past. For example, an extensive list of women's rights is enshrined in the proposed constitution, including a right to "be protected against discrimination, abuse, injustice, bullying, gender violence and harmful traditions, ... [to] be availed opportunities and equal payment with men in employments of similar qualifications, ... [to] protection of her employment during pregnancy and after delivery; ... [and to] own property". The proposed constitution also protects special rights for children, youth, persons with disabilities, minority groups and the elderly. Article 34(6) ensures that the non-discrimination clause will not prevent the government from taking affirmative action measures to rectify past injustices.

### *Economic, Social and Cultural Rights*

A major omission from the proposed constitution is a comprehensive list of economic, social and cultural rights (socio-economic rights). The bill of rights focuses almost exclusively on civil and political rights, leaving out reference to many fundamental human rights, such as the rights to healthcare, food and water, and adequate housing. Nevertheless, the proposed constitution does include a few significant socio-economic rights. The right to "free primary education" is a justiciable right under the proposed constitution, while under the current constitution, the right to education is not enforceable in a court of law, as it is included in Part II of chapter one, over which court jurisdiction is ousted by section 7(2). The right to health care is acknowledged, although not protected, by the proposed constitution. Article 14(f) states that government must "ensure access to quality health care for all people including safe sexual health," but the provision is subject to the Article 20(2) claw-back clause.

Like the current constitution, the proposed constitution protects the right to work and basic labor rights, such as the right to form unions, receive just remuneration, and have a safe work environment. However, the constitution does not explicitly protect the right of workers to engage in collective action, such as strikes, to negotiate demands. While Tanzanian labor law currently protects this right for employees (other than those in essential services), a constitutional right would wield more force.

## Land and Property Rights

A new chapter on land, natural resources, and environment in the proposed constitution recognizes that “farmers, fishers, pastoralists and small groups” have the “right to own, develop and preserve land.” Significantly, the proposed constitution also recognizes that women have the same land rights as men (Proposed Constitution of Tanzania 2014). This will help to address customary practices that exclude women from inheriting land. This chapter also requires the government “to make provision to ensure [all natural resources are] used for the benefit of present and future generations” (Draft Constitution of Tanzania 2014). The draft does not, however, go so far as to protect communities from land grabs, a serious problem in Tanzania in recent years. Foreigners’ property rights are also left somewhat ambiguous in the proposed constitution. Article 45(1) states that “every person is entitled to own property,” but Article 22(a) holds that “only Tanzanian citizens shall have the right to own land in Tanzania.” Presumably, this means that non-Tanzanian citizens may own other forms of property, but would not have the right to own land.

## Business and Human Rights

Article 61(2) states that, “rights and freedom of every person as stipulated in this Constitution shall be respected, preserved and promoted by the authorities of the land, private institutions and every citizen.” Thus, the proposed constitution would impose an obligation on private institutions, including corporations, to respect human rights. This follows the legal position of several other African countries, including Gambia, Ghana, Malawi, South Africa, and Zimbabwe. By using the word “promoted,” it seems that Tanzania would, like Zimbabwe, place *positive* obligations on corporations to not only refrain from violating human rights but to actively promote them.

## Mechanisms for Government Accountability and Transparency

Article 6(2) of the proposed constitution states that accountability is a national principle of good governance in Tanzania. In line with this thinking, the constitution establishes several mechanisms for ensuring accountability and transparency in government. These include a code of ethics for public officials, a Commission for Public Ethics, and a Controller and Auditor-General. However, an opportunity was missed to ensure robust accountability, as provisions relating to public accountability in the CRC drafts were weakened in the proposed constitution.

## Code of Ethics

The proposed constitution does include a basic code of ethics, a valuable inclusion. But this code of ethics only provides broad and vague guidelines, leaving detail to an Act of Parliament. By contrast, the CRC draft had provided much more detail on ethics in the constitution itself. For example, while the CRC draft prohibited public officials from opening bank accounts outside of Tanzania, the proposed constitution merely states that an Act of Parliament must regulate this practice. This opens the possibility that the ruling party will use its majority in Parliament to pass lax laws that do not ensure accountability.

## Commission for Public Leadership Ethics

The proposed constitution establishes a Commission for Public Leadership Ethics. The Commission will take the place of the Public Leaders Ethics Secretariat under the current constitution. It has the potential to be more effective at holding leaders accountable than its precursor. The Ethics Secretariat is merely empowered to “inquire into the behavior and

conduct,” (Constitution of Tanzania 1977) while the Commission in the proposed constitution has the additional power to “take action against a public servant or public leader where necessary.” However, the detail of the Commission’s functions is left to be decided by an Act of Parliament.

### *The Controller and Auditor-General*

The proposed constitution imports the office of the Controller and Auditor-General (CAG) from the current constitution, with an almost identical set of provisions. Thus the CAG’s role is unlikely to change significantly under the proposed constitution. The CAG will continue to have the responsibility of ensuring that public funds are spent in a manner authorized by law and on an authorized purpose, and to submit an annual audit to the President. If the President does not submit the audit report to Parliament within a prescribed period of time, the CAG must submit the report to the Speaker of Parliament him or herself. Although the President controls the appointment of the CAG, he or she does retain a relatively high degree of independence upon appointment, due to clearly outlined grounds of removal. Since the President controls the removal process as well, there is still a risk of political interference.

### *Commission for Human Rights and Good Governance*

Tanzania’s Commission for Human Rights and Good Governance has been hampered by lack of independence to date. The proposed constitution adopts the position under the current constitution that a Selection Committee should nominate candidates for commissioners, who are then appointed by the President. All the members of the Selection Committee are therefore either presidential appointees or senior politicians likely to be politically aligned with the President.<sup>1</sup> Thus the procedure for appointing commissioners remains vulnerable to political interference; even though commissioners are required to relinquish any position they may hold in a political party upon assuming office.

The current grounds and procedure for removing commissioners also undermines their independence. The President may appoint a special committee to investigate whether to remove a commissioner from office. Not only are there no restrictions placed on whom the President may appoint to investigate a commissioner, the wording of the provision seems to imply that the President is also not bound by the recommendations of the special committee (Proposed Constitution of Tanzania 2014). Last, some of the grounds for removing a commissioner from office are quite vague, including “a lack of professionalism” and a “lack of discipline,” both of which are very subjective and subject to manipulation.

### *Independence of the judiciary*

Article 145 of the proposed constitution establishes the independence of the judiciary, stating that it “shall not be interfered with or controlled, pressurized or instructed by any person or entity.” The article also establishes the financial independence of the courts. Under the proposed constitution, the President has less control over the procedure for the appointment of the Chief Justice and other judges. Under the current constitution, the President must merely consult the Judicial Service Commission (JSC) before making judicial appointments, (Constitution of Tanzania 1977) whereas under the proposed constitution the President must make an appointment from a list recommended by the JSC (Proposed Constitution of Tanzania 2014). As there is no procedure outlined for what should happen if the President

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<sup>1</sup> The members of the selection committee are the Chief Justice of the United Republic who shall be the Chairman; the Chief Justice of Zanzibar who shall be the Vice Chairman; the Speaker of the Parliament of the United Republic; the Speaker of the House of Representatives of Zanzibar; and the Deputy Attorney General who shall be the Secretary.

rejects the list, the legal presumption is that the President has no option but to choose from the list provided by the JSC.

The composition of the JSC under the proposed constitution is marginally more independent than under the current constitution. Nevertheless, it still suffers from significant executive control. Between 7 and 9 of 11 commissioners are persons either directly or indirectly appointed to their positions by the President (Proposed Constitution of Tanzania 2014). The reason for the ambiguity in this number is that it is unclear whether the President may appoint any representative of the Tanganyika Law Society and Zanzibar Law Society, or whether these law societies will recommend their own representative to the President. Either way, a majority of commissioners are presidential appointees. This undermines the independence of the judiciary, especially in relation to the appointment of judges.

If the President considers a judge for investigation to establish whether that judge should be removed from office, the President may suspend such judge, after consulting with the Chief Justice, and establish a commission to investigate him or her (Proposed Constitution of Tanzania 2014). According to the proposed constitution, the President must follow the recommendation of the commission on whether or not to remove the judge. A judge must only be removed on the grounds that he or she is unable to perform their functions, or due to misbehavior that breaches a code of ethics. While these grounds do provide some protection for judges from being removed on political grounds, the vagueness of these grounds, and the President's control over the process, still pose a significant risk to judicial independence.

## Separation of Powers

In line with the doctrine of separation of powers, the proposed constitution establishes three branches of government: the executive, the legislature and the judiciary. However, due to Tanzania's two-government structure, the state's executive, legislative, and judicial authority is divided in unusual ways. Article 71(2) establishes that executive authority is vested in the Government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar; judicial authority is vested in the Court of the United Republic of Tanzania and the High Court of Zanzibar; and legislative authority is vested in Parliament (of the United Republic of Tanzania) and the Council of Representatives (Zanzibar's equivalent of Parliament). Thus, the discussion below will begin with an examination of the division of powers between the Union government and the Zanzibar government, before proceeding to discuss the separation of powers between the three branches of government (i.e. the executive, legislature and judiciary).

## The Division of Power in the Union

The governmental structure of the Union was among the most contentious issues during the constitution making process. The proposed constitution rejects the three-government structure of the Union put forward in the CRC draft constitution, and maintains the current two-government structure. The three-government structure under the CRC draft proposed a limited Union government, with jurisdiction over just seven constitutionally defined issues: the constitution; defense and security; citizenship by immigration; currency and the Bank of Tanzania; foreign affairs; registration of political parties; and various taxes. This would have drastically reduced the Union government's jurisdiction, from its current 22 areas of governance. Much of the Union government's current power would have been devolved to the government of Zanzibar and a newly proposed government of Mainland Tanzania. In line with the Union's reduced jurisdiction, its size would have been drastically reduced under the CRC draft too, with the Union Parliament reduced to just 75 members. In the proposed



constitution, the Union government maintains jurisdiction over 16 matters: the constitution; foreign affairs; defense and security; police; state of emergency powers; citizenship and migration; public service; certain types of taxation; communications; currency and the central bank; higher education; the National Examination Council; air transport; weather forecasting; the Supreme Court and the Court of Appeal; and the registration of political parties.

### Institutional Division of State Authority

Traditionally, in the doctrine of the separation of powers, the legislature enacts laws, the executive executes laws, and the judiciary interprets laws. The proposed constitution generally adheres to these basic principles. It does not, however, address the extent to which the legislature may delegate its legislative authority, thus leaving this matter uncertain. Article 97(5) of Tanzania's current constitution allows the legislature, without qualification, to confer "on any person or department of Government the power to make regulations having the force of law." Such a broad provision, which does not provide any restrictions on the executive's power to enact laws, has the potential for the executive to usurp the legislature's central role in law making. What is notable about the proposed constitution is the complete lack of an equivalent provision. This could be interpreted to mean that the legislature may not delegate *any* of its law-making authority—establishing a very rigid separation of powers in this regard. But it seems unlikely that its framers sought to abolish the practice of subsidiary legislation completely, such as in relation to rules and regulations. Indeed, Article 79(3) (b) states that another provision should be construed as "preventing Parliament from conferring power upon any person," which could imply that Parliament may in fact confer legislative power on another person. Thus, the proposed constitution leaves ambiguity on this issue. This could result in a continuation of the practice of legislative power being delegated without restriction. It would have been preferable for the proposed constitution to clearly define the confines within which Parliament's legislative functions may be delegated.

### Free from Undue Control by Other Branches

A major weakness of separation of powers in the proposed constitution is the extent to which the executive is able to control Parliament and the Judiciary. As the independence of the judiciary is discussed at length above, this section focuses on two aspects of executive control over Parliament: control over the *composition* of Parliament through presidential appointments; and control over *what legislation is passed* by Parliament, through presidential veto, and the threat of dissolution.

First, the President is able to control the composition of Parliament through a provision that allows him to appoint up to 16 Members of Parliament (Proposed Constitution of Tanzania 2014). Although 16 is a relatively small proportion of Parliament's total members (which may range between 340 and 390), it blurs the lines between the executive and the legislature, and gives the President leverage over Parliament, especially in the event of a closely contested vote. The number of appointed MPs has been increased under the proposed constitution—from 11 under the current constitution, and with just five under the CRC draft. The proposed constitution retains two provisions on presidentially appointed MPs from the current constitution, both of which had been scrapped in the CRC draft: Article 129(1) (e), stating that the presidentially appointed Attorney General, a member of the executive, is part of Parliament; and Article 129(1) (c), allowing the President to appoint up to 10 MPs of his choice. It is no longer required (as it is under the current constitution) that 5 of the 10 appointed MPs should be women, so the gender value of this provision has been removed. The addition of five appointed MPs (which raises the total to 16) emerges from an otherwise progressive provision included in the CRC draft, requiring that 5 persons with disabilities should be



appointed as MPs. While it is admirable to ensure the representation of persons with disabilities in Parliament, it would be more democratic if an independent body that represents persons with disabilities nominated the 5, as this would reduce the risk of political interference.

Second, the President is able to control what legislation is passed by Parliament through his or her ability to veto bills the first time they are presented for presidential assent and to dissolve Parliament if she refuses to assent to a bill presented to her a second time. Presidential assent to legislation is meant to provide a legitimate check on the power of Parliament to pass potentially unconstitutional legislation. However, Article 137 of the proposed constitution gives the President excessive power over Parliament. Under the CRC draft, if the President refused to assent to a bill, Parliament would have to pass the bill by at least two-thirds of its members, after which the President would be obliged to assent to the legislation. But under the proposed constitution, even after Parliament passes a Bill by two-thirds of its members following the President's refusal to assent, the President may dissolve Parliament. As this presents a threat to MPs' jobs, it is unlikely that Parliament would ever seek to pass legislation that is unfavorable to the President a second time. Also in the proposed constitution, no restrictions are placed on the grounds on which the President may legitimately reject a bill.

Nevertheless, the proposed constitution does curtail some of the President's current power to dissolve Parliament. For example, Article 90(1)(d) of the current constitution allows the President to dissolve Parliament if, "the National Assembly declines to pass a motion which is of fundamental importance to Government policies and the President considers that the way out is not to appoint another Prime Minister but to call for a general election." There is no such provision in the proposed constitution. Additionally, the circumstances under which the President can dissolve Parliament due to the latter's refusal to pass a budget motion have been greatly curtailed (as discussed in greater depth below). In light of the above, despite some provisions in the proposed constitution that undermine the doctrine of the separation of powers, both Parliament and the Judiciary have greater institutional independence under the proposed constitution than under the current constitution.

## Oversight

The proposed constitution establishes several mechanisms for Parliament to exercise oversight over the executive. First, Article 19(2) requires the executive to submit an annual report to Parliament on measures taken to implement the national objectives. Second, Parliament is empowered to ask any Cabinet Minister any question about public affairs that falls under his or her responsibility (Anon. 2014).

The proposed constitution also strengthens Parliament's financial oversight role. Parliament is empowered to "debate the allocation of funds and approve the expenditure for ministries, institutions and [government-owned] organizations" (Proposed Constitution of Tanzania Article 2014). Significantly, Article 138 allows the National Assembly to return a budget motion submitted by the executive if it is not satisfied with it. The executive is then obliged to address the National Assembly's concerns to the best of its ability, and present it to the National Assembly a second time. Only if the National Assembly rejects the budget proposal a second time is the President authorized to dissolve Parliament. This stands in stark contrast to the current constitution, whereby the President has unqualified power to dissolve the National Assembly if it refuses to pass a budget proposed by the government. The current position completely undermines Parliament's financial oversight role.

## Checks and Balances

There are several mechanisms in the proposed constitution by which Parliament can hold the executive to account, including the impeachment of the President or Vice President, or a vote of no confidence in the Prime Minister. Parliament may, under tightly restricted circumstances, impeach the President or the First Vice President on the broad grounds that he or she: greatly contravened the provisions of the Constitution; committed serious criminal offences; prevented in any way an inquiry into his or her conduct; carried out corruption; behaved in a manner that tarnished the office of President; ignored or refused to implement a lawful decision or orders given by the judiciary; or behaved in such manner as to contravene the code of conduct or leadership ethics. They include the President's failure to implement decisions of the judiciary, an important safeguard to ensure the executive does not blatantly ignore judicial decisions. This process, however, is very tightly controlled, making it unlikely that it will be used in practice, or result in the removal of the President from office. Such a motion requires the support of 75% of MPs just to establish a Commission of Inquiry. The Commission itself is to be composed of members appointed by the President or the Speaker of Parliament. Upon receipt of the Commission's report, impeachment must pass by a vote of at least 75%.

Under the proposed constitution, Parliament has a much stronger mechanism for holding the Prime Minister to account. A vote of no confidence in the Prime Minister requires only a simple majority vote of MPs to pass. If such a motion passes, the Prime Minister must resign, and the President must appoint a new Prime Minister. In reality, very little executive power is vested in the Prime Minister, as the President is both the head of state and the head of government and also appoints the Cabinet. In light of this, a vote of no confidence in the Prime Minister is a weak check on executive power.

Under the proposed constitution, the judiciary acts as a check on unconstitutional exercise of power by both the executive and the legislature. Article 65 empowers the court to declare any law enacted by Parliament, or any action taken by the executive, unconstitutional and therefore void if the court has sufficient evidence that it violates a constitutionally protected fundamental right or rights. This provision also allows the judiciary to make a directive to any branch or institution of government responsible for a rights violation to address the problem within a certain time period, to avoid a law being struck down. Courts in Tanzania have also employed a legal mechanism called "reading in," by which a court may read new language into a piece of legislation to bring it in line with the constitution.

## International Law and the Protection of Human Rights

In contrast to the current constitution, which makes no reference to international law, the proposed constitution includes several mechanisms to ensure that Tanzania incorporates international law into its domestic law, and complies with international human rights law at home and abroad.

The proposed constitution's national objectives make several references to international law. Article 8(2) requires that government focus its policies, laws and all other activities towards ensuring human dignity, and that respect for human rights are protected "taking into account culture and customs of Tanzanians and international treaties ratified by the United Republic." Article 14(1) requires the government to "ensure that human respect is defended and sustained in accordance with tradition and custom and the Universal Declaration of Human Rights," and Article 22(1)(d) states that Tanzania must "respect international laws" in its foreign policy. Although these provisions are not, in themselves, enforceable mechanisms,

since they fall under the gambit of the ouster clause in Article 21(2), they represent a significant policy shift, and are reinforced by several other enforceable provisions.

Firstly, courts may take international law into account when interpreting the provisions of Chapter Five (the bill of rights) (Proposed Constitution of Tanzania 2014). This means that, as far as possible, courts should interpret the rights enshrined in the bill of rights in a manner consistent with international human rights norms; this is a mechanism for the incorporation of international human rights norms into Tanzania's domestic law. Second, Parliament is given the responsibility to deliberate on and ratify all international treaties and agreements to which Tanzania is a party (Proposed Constitution of Tanzania 2014). Third, Article 265(3) (b) requires Tanzania's defense forces to observe both national and international laws when carrying out their duties.

The CRC draft placed a similar restriction on Tanzania's police force, but this is absent from the proposed constitution. While this should not be interpreted to mean that police are not expected to respect international law in the exercise of their duties, but it would have been preferable for such a provision to have been explicitly included.

### Bringing the Constitution into Force

The Constitutional Review Act requires that the proposed constitution must be validated by a national referendum. The procedure for holding a referendum on the constitution is governed by the Referendum Act 2013, which states that the power to initiate a referendum is vested in the President (Referendum Act 2013). Section 4 of the Act states that the President, in consultation with the President of Zanzibar, must within 14 days of receiving the proposed constitution, order a referendum to take place, through promulgating such order in the *Government Gazette*. President Kikwete made an order to that effect in November 2014, and a referendum was scheduled for April 30, 2015. But the National Electoral Commission (NEC) postponed the referendum indefinitely, citing difficulties with voter registration. It seems the drafters to the Referendum Act did not foresee such a situation, as there is no provision in the Act for how a referendum process may be re-initiated. The NEC said at the time that it would announce a new date for the referendum (Reuters 2015). If the President must promulgate a new order in the *Government Gazette* for the NEC to do so remains unclear. Over a year has passed since the original date set for the referendum and still no announcement has been made to set a new date. During that time, Tanzania has held a general election, which would seem to indicate that previous difficulties with voter registration challenges have been sufficiently resolved. It remains unclear why a referendum has yet to be rescheduled.

When a referendum is held, all registered voters in Tanzania (in both the Mainland and Zanzibar) will presumably have the opportunity to vote "YES" or "NO" on the proposed constitution. Prior to such a referendum, two referendum committees will be established, at the national level, and two will be established at the local level, one for those expected to support the proposed constitution, and one for those expected to oppose it. The referendum committees are required to appoint leaders, and will have the opportunity to register their supporters prior to the referendum, and to campaign for their position for a period of 30 days (Referendum Act 2013).

Referendum results will be binding on the government if more than 50% of the vote in Mainland Tanzania and more than 50% of the vote in Zanzibar vote "YES" for the proposed constitution. If the majority of voters reject the proposed constitution, the current 1977 constitution will remain in force. If the total number of "YES" votes falls short of 50%, in either

Mainland Tanzania or Zanzibar, the NEC must schedule another referendum within 60 days of the announcement of the results. The Act does not specify what should happen if the vote is indecisive on the second round.

If the total number of "YES" votes exceeds 50% in both Mainland Tanzania and Zanzibar, the President will be obligated to promulgate the proposed constitution as the new constitution of Tanzania, though the law does not specify a time period within which he must do so. Upon promulgation, the new constitution will immediately come into effect, (Proposed Constitution of Tanzania 2014) and the current 1977 constitution will be repealed. Some transitional provisions will remain in force for the first four years of the new constitution, but these primarily relate to the time needed to bring laws in line with the new constitution, and to establish new government entities under the new constitution.

## Conclusion

The proposed constitution is an improvement on Tanzania's current constitution, but still lacks protections for democracy and human rights. A broader range of human rights, including the right to education and several minority rights, are protected under the proposed constitution's bill of rights in comparison to the current constitution. Additionally, it includes mechanisms to ensure that corporations as well as government officials are held accountable for human rights abuses. However, several fundamental rights are excluded from the bill of rights, including the rights to adequate housing and health care.

The constitution establishes several institutions to ensure accountability and transparency, such as the Public Leadership Ethics Secretariat, the Anti-Corruption Commission and the Human Rights Commission, but all of them are undermined by a lack of genuine independence from the executive, and/or a lack of an effective constitutional mandate. Similarly with the judiciary, independence of the courts is improved in comparison with the current constitution, but the President still maintains undue control. And similarly with the legislature, in which the President retains the power to dissolve Parliament on fairly broad grounds, even though his powers have been slightly curtailed. There are insufficient checks on the executive to balance its power against either of the other two branches of government.

In light of these democratic deficiencies in the proposed as well as the current constitution of Tanzania, the indefinite postponement of a constitutional referendum, and perhaps most important, the breakdown of consensus during the final stages of constitution making, it may now be advisable for the proposed constitution to be returned to the Constituent Assembly. The process of making a constitution is, in some respects as important as the content of the document itself. It is an opportunity for a nation to come together with unity of purpose to write a social contract of governance that most if not all of its citizens can willingly subscribe to. The foundations for such an achievement were laid during earlier stages of Tanzania's constitution making process. It is now essential to ensure that a new constitution taking full account of the wishes of the people and with their involvement is introduced.

## A Dream Deferred – The Zambian Constitution

Zambia's constitutional process has been long and arduous; despite having had three constitutions and one substantial amendment since independence, none of these have been particularly participative of the citizens of the country. When the late President Michael Sata of the Patriotic Front was elected in 2011, one of his major campaign promises was a new constitution within 90 days of assuming office. After watching the former ruling party, the Movement for Multiparty Democracy, fail to deliver constitutional reform, Zambians had hoped that a new ruling party would finally allow an effective and consultative process. That project commenced in December 2011, when President Sata appointed a technical committee to draft a new charter, taking into account submissions from the public, with a deadline of February 2012 for a first draft. Even with heavy involvement of the executive, Zambians were optimistic that the process would be completed and their voices heard. Despite this initial momentum, it was not until December 2015 that Zambians finally received a new constitution through an Act of Parliament, leaving behind the much needed Bill of Rights and other key amendments that would have protected freedom of expression and other human rights. Examination of the content of Zambia's draft constitution and its accepted amendments, along with the drafting process itself, yields lessons for Zambia, and other countries in the region.

### Zambia's Constitutional History

Zambia's first constitution was created in 1964 as an order of the British government as part of Zambia's independence process. There was no mechanism for popular support; the constitution read like many constitutions of other post-colonial countries, created under and led by the British government. This constitution remained in force until the ruling United National Independence Party (UNIP) was threatened by internal divisions, and moved to establish a one party state. As part of this effort, in 1972, they created the first truly Zambian constitution, which declared Zambia a one party state. Although this was a Zambian drafted document, it too lacked popular input, as it was drafted by a government-appointed Constitutional Review Commission; it limited democratic rights, and eliminated political pluralism. This constitution remained in effect throughout Zambia's governance under one party rule, a period in Zambia's development during which democratic rights were stifled and its economy faltered despite success in building a post-colonial nation.

The third constitution was established in 1991 when, as part of Zambia's transition back to multi-party democracy, the Movement for Multi-Party Democracy (MMD) pushed for a return to the content in the 1964 constitution. To create this new constitution, a drafting committee was formed, but the draft constitution was never submitted to the Zambian people for approval prior to its enactment and implementation. Further, it did not expand the protection of Zambians' rights, but reverted to the content of the British constitution, including a clause that subjects any provision outlawing discrimination to customary law. This constitution was amended in 1996. However, the amendments made were controversial, having been forced through an MMD-dominated Parliament, without significant involvement of citizens or other parties. Amongst contentious amendments at that time was a revision to the requirements to run for president. Human Rights Watch noted at the time the Constitutional Amendment Act (1996) that imposed new requirements on persons seeking to hold the office of president. These included that the person be a Zambian citizen born to parents who are Zambian by birth or descent and that the person not be a tribal chief. These requirements appeared to be precisely tailored to disqualify specific opposition leaders from running for president, including former president Kenneth Kaunda. Some of the new restrictions appeared to violate

the International Covenant on Civil and Political Rights, to which Zambia is a party. Articles 25 and 26 of the covenant guarantee to citizens the right "to be elected at genuine periodic elections" without "unreasonable" restrictions and without distinctions such as birth, national origin, or political opinion. The disqualification of all but second or third generation Zambians from office appeared unreasonable, especially in light of the transparent political motivation to exclude UNIP leaders from the race (Human Rights Watch 1996).

The MMD attempted another constitutional overhaul in 2005, but this was widely criticized for being cumbersome, as the government required a national census and referendum to allow for a Constituent Assembly, before drafting even started. Ultimately the Zambian National Constitutional Conference was established to shepherd the process and, while momentum was maintained even after President Mwanawasa's death, it was widely criticized as a circus (Holder 2010). A draft constitution was finally released in 2010. However, it was thwarted through a legal challenge after opposition parties boycotted the process and the draft failed to gain the necessary votes at the National Constitutional Conference, leaving the 1996 amendment as the most current and the official constitution – still not people driven.

Despite being based largely on the British-drafted 1964 constitution, Zambia's current Constitution does include several key protections for democracy and human rights. To begin, while it does not include a Bill of Rights, it does protect personal freedoms, including freedom of religion, individual freedom of expression and freedom of the press. It also establishes a Human Rights Commission, although the structure and function of the Commission is left to Parliament. The Constitution also bans discrimination. However, as in the previous constitution, provisions outlawing discrimination are subject to customary law; this means that women's and children's rights can still be violated when redress is sought through customary rather than national law. Because customary law, observed by many Zambians despite its informal status, governs many marriages and Zambia has one of the highest child marriage rates in the world, (Girls not Brides 2010) there is little effective redress left for women in formal courts.

The vagueness of much of the content of the current Constitution can be used to manipulate laws and state practice – particularly in relation to freedom of expression and freedom of assembly. While freedom of assembly is protected under the Constitution, the Public Order Security Act is still used to suppress opposition and restrict protests. For example, one opposition member was taken to the police station after greeting supporters while visiting a market on a personal errand. Further, while freedom of religion is protected, the Constitution still declares Zambia to be a Christian nation.

Zambia's laws on citizenship are also questioned; one parent must be Zambian for a child to possess citizenship at birth, and anyone acquiring Zambian citizenship is required to renounce any other citizenship, as dual citizenship is disallowed.

One of the biggest concerns regarding Zambia's current Constitution involves the election of the President. The current Constitution has already led to two by-elections upon deaths in office<sup>2</sup>. This requirement has unexpectedly disrupted the lives of Zambians, and required the country to spend significant funding on hastily arranged nationwide by-elections, rather than allowing an elected Vice President to assume office for the remainder of the President's term. Further, the 2015 by-election involved the disenfranchisement of thousands of Zambians who had reached voting age since the last election but not yet registered. Another concern relates

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<sup>2</sup> President Levy Mwanawasa died in office in 2008 while President Sata died in office in 2014.



to the requirement that a President can only be elected by simple majority; as a result of this requirement, a candidate can win the election with less than half the eligible population. For example in the most recent by-election, President Lungu won with less than 50% of the vote.

## Zambia's New Constitution

In December of 2015, the Zambian Parliament voted to adopt a majority of the key provisions of the draft constitution. Much of the content, described below, advances democracy. However, key provisions of the draft were not passed, thus allowing the revised constitution to fall short of what Zambians' demanded. As with the previous constitution, rights can still be limited in the interest of public safety; however, unlike the previous constitution the new Constitution emphasizes that any limitations on rights cannot negate the core content of those rights. That being said, it is unclear if the Public Order Act or proposed Civil Society Act, which arguably unjustly restrict human rights, will be found in violation and repealed or amended.

The content of the draft constitution was initially considered quite strong, and included a draft Bill of Rights, with provisions that went much farther in protecting social, economic, cultural and environmental rights than the previous constitution. Some of the protected rights also included freedom of the press, freedom of assembly and gender equality. But the draft was truly progressive in the areas of economic and social rights, including the rights to health care services, decent housing, food of an acceptable standard, clean and safe water and education [V.52.1.1.a-g]. These rights, however, are subject to incremental implementation, and dependent on resource availability. The provision of social and economic rights would bring Zambia's Constitution in line with other progressive constitutions in the region, such as those of Zimbabwe and South Africa. Unfortunately, none of this content was adopted by Parliament. Instead it was referred to the referendum of 11 August 2016.

Zambia's draft constitution also noted, "the State shall take reasonable measures for the progressive realization of economic, social, cultural and environmental rights" [V.58.1], but followed that language with, "where a claim is made against the State on the non-realization of an economic, social, cultural or environmental right, it is the responsibility of the State to show that the resources are not available" [V.58.1]. The draft included citizen protection, through a provision that places the onus on the State to show a lack of resources when rights are not being met. This language was included to protect the Zambian government from being forced to provide too much too soon, and could be used by the government as an excuse to continue delaying the provision of much needed assistance to its people. It remains to be seen whether or not the government would strive to protect these rights, as they are dependent not only on political will but financial resources.

The final draft constitution also acknowledges the crucial role that civil society plays in promoting human rights, and requires State recognition of the role of civil society in protecting those rights. It also protects freedom of expression, which excluding from protection hate speech or speech that may incite violence; this leaves open the opportunity to classify statements against the government as either or both. Another major improvement was exclusion of the State from control of the media, except the regulation of signal distribution. Given Zambia's largely polarized media, this measure would have helped relieve state influence, and allowed less biased coverage. The draft also framed the right to privacy much more broadly than in other countries in the region stating, "a person has the right to privacy which includes the right not to be searched; have that person's home or property

searched; have that person's possessions seized; have information in relation to that person's family, health status or private affairs unlawfully required or revealed; or have the privacy of that person's communications infringed" [V.32.a-e]. None of these clauses, however, were included in the amended Constitution.

An additional development was the proposed creation of several thematic commissions, including a Gender Equality Commission, Human Rights Commission and Police Public Complaints Commission. Unlike the aforementioned provisions, these provisions were ultimately adopted. As with the current Constitution, which establishes a Human Rights Commission, the draft was weak, in allowing these Commissions to enforce their own mandates, and stipulating no requirements for appointments, tenure or budgets. Should the draft constitution ever be adopted, Zambians will need to be vigilant to ensure that these essential commissions are not rendered toothless, as they have in neighboring Zimbabwe.

Finally, amendments to the draft constitution that were adopted also included, for the first time, a Constitutional Court, the only court with the authority to hear constitutional issues (Chapter VII). This has been widely viewed by civil society as a positive development, with the Law Association of Zambia noting that its establishment allows for stronger protection of human rights, and the opportunity for judgment on contentious issues in the amended constitution (Bennet 2016). The Court is not without controversy itself, however, as there is no possibility to appeal a decision of the Constitutional Court to the Supreme Court, leaving it vulnerable to political influence and giving it a substantial amount of power.

Despite the current Constitution being more people driven there were still several shortfalls that prevented the draft from becoming as progressive as that of neighboring South Africa. To begin, despite extensive advocacy—including under the Freedom House *Justice as a Right in Southern Africa* program—the death penalty was retained in the final draft, and now remains part of Zambian law. Further, as expected, marriage is still only allowed between members of the opposite sex. While this keeps Zambia's Constitution in line with most others across the region, it remains a violation of the rights of LGBTI persons.

Of more concern, as noted by the Open Society Institute of Southern Africa (OSISA), the final draft removed any provisions regarding the right to dignity of marginalized groups, which was found in the original draft (OSISA). Zambia is home to several marginalized peoples, including residents of Barotseland who have been demanding independence from Zambia for many years. Without explicit protection of minority rights, Zambia's new Constitution does not truly protect all human rights.

Regarding the executive, the final draft constitution addressed two major challenges that carried over as an amendment. First, election by simple majority has been changed, with the current Constitution stating, "Elections to the office of the President shall be conducted directly, under a majoritarian electoral system where the winning candidate must receive more than fifty percent of the valid votes cast" [VI.74.1]. Second, the Vice President may now ascend to the presidency in the event of death under the guidance that, "When a vacancy occurs in the office of President, except under Article 138(a) the Vice-President shall immediately assume the office of President" [VI.103.5.a]. As will be discussed further below, there is much speculation that these specific provisions caused delays in the release of the draft, as winning over half the vote would have been difficult for the late President Sata. Last, the final amendment lacks an age limit, which was previously found in the initial draft; there



was also speculation that the draft was delayed in part because of this consideration, as an age limit could have excluded Sata from a second term.

### Zambia's Constitution-making Process

As stated above, despite having had three constitutions and one amendment, Zambia has never had a fully citizen driven constitutional process. After the consultative process of 2005, which was criticized for lacking legitimacy and which ultimately failed, President Sata made the creation of a new constitution one of his major campaign promises. The section below outlines this process, including challenges met by a technical committee and citizen input.

Much like Zambia's previous constitution making processes, President Sata appointed a Technical Committee in November 2011 to draft a new constitution. While the Technical Committee was tasked with collecting stakeholder input, recognizing "the importance of confidence building, engendering trust and developing a national consensus for the ratification process," (Terms of Reference for technical committee drafting the Zambian Constitution 2011) it was nevertheless initiated under the Inquiries Act (legislation Sata accused the previous administration of using illegally) which required that the committee report directly to the President, and thus prevented its work from being truly independent and non-partisan, while removing any genuine leverage civil society had to hold the government accountable for the textual suggestions and principles they proposed.

The first draft of this new constitution was released in April 2012 and was widely heralded as one of the most progressive in the region. The draft was widely disseminated, and went through two government-led rounds of review, including 10 provincial constitutional conventions and one National Constitutional Convention, with delegates from civil society, the government and ordinary citizens participating. While the process became stalled, and the national convention was not held until nearly six months after originally anticipated, both ultimately allowed for significant consultation with Zambian citizens and civil society. While this was a first for Zambian citizens, the process was not without some pressure from the government. For example, youth groups held meetings around the country to solicit youth feedback on the constitution; one group in particular, YALI, was threatened by the Minister of Justice, who claimed their youth dialogues were held outside of those held by the Technical Committee and were therefore "in defiance of the government" (Lusaka Times 2012).

After the convention, in April 2013, the Technical Committee adjourned to consider the feedback it received, and to produce a final draft. While the work of the Technical Committee was due by 30 June 2013, it was not until the end of October that they announced its completion. A week later the Technical Committee issued a press release stating that the government was demanding that ten copies be turned over directly to the Ministry of Justice, and that these would not be shared with the public, in direct violation of the government's initial promise (OSISA).

With this announcement came expression of concerns about delays and undue government influence. The government had already come under scrutiny regarding President Sata's mysterious illness, floor crossing by many MPs to the ruling party, and violence around by-elections. Shortly after the committee's announcement, Sata was quoted as saying that Zambia did not even need a new constitution, that the one they currently had was functioning well and merely needed a few amendments (Zambian Eye 2013). After this comment rumors circulated for months as Zambia watchers wondered if and when a referendum would ever be held. There was speculation that, as Zambia experienced apparent democratic backsliding; it

was no longer in the government's interest to move forward with a new constitution. Further, the new provisions on presidential election put President Sata and the PF in a less competitive position; the age limit could exclude President Sata from running again, while the 50% plus 1 requirement for majority vote could prevent the PF from winning another election in the first round. They had only won with 42% of the vote in the previous election.

As Zambians wondered if they would ever see the final draft of a new constitution, the *Zambian Watchdog* and *Lusaka Times* secured and leaked a copy on 15 January 2014. While the leaked draft was still considered progressive, some rights protections were missing, such as those covering marginalized groups. Despite such changes, the text was generally endorsed by civil society, which then demanded that the government release the draft and submit it to a referendum. Responsibility to move the process forward rested with the executive once the draft was complete; the people were now at the mercy of President Sata. While civil society may have initially trusted his government to shepherd the constitutional process appropriately, this delay demonstrated the need for an independent body to take control.

As the government continued to drag its feet, civil society came together and formed a Grand Coalition, which consisted of both opposition parties and civil society representatives who agreed that a referendum must be held. The Grand Coalition applied significant pressure on the PF government, demanding they honor the people driven process, and it ran several campaigns to this effect.

On Zambia's Independence Day 2014, the country appeared to have reached a low point. Civil society was locked in political battle with the government over the implementation of a restrictive NGO Act, but had just won a concession to re-negotiate. President Sata was out of the country receiving medical treatment, while the executive remained silent on his illness, and still no draft constitution was issued. On 23 October 2014, Acting President Lungu released the draft constitution to the public, offering some hope that the country could finally move forward. But President Sata died receiving medical treatment in London on 28 October 2014, and resources that might have been available for a referendum were used to hold a by-election by the end of January 2015.

The constitution remained a hot topic throughout the by-election campaign, with all candidates, except President Lungu, signing a pledge to submit the existing draft to a referendum upon taking office. Lungu remained silent on this issue, until eventually stating that the process was not in his control but that of Parliament. Despite his reluctance to commit to a constitutional referendum, Lungu was elected to carry out the remainder of Sata's term, and Zambia watchers became concerned that a referendum would not be held before Zambia's next presidential election.

At the commencement of President Lungu's administration, he was not straightforward about what would happen to the draft constitution. While the Grand Coalition pushed for a referendum, most agreed that the government did not have the time or funding to successfully hold a referendum ahead of elections scheduled for 2016. To begin, the initial date for the referendum was in January 2016, in the middle of the rainy season, which would present serious logistical challenges for voters and election officials alike. Further, in order for the referendum to be accepted, 50% of the voting age population (not just registered voters) must vote yes. Given Zambia's chronic struggles with voter apathy, this would have been a very difficult goal to realize on short notice. Some civil society representatives outside of the

Grand Coalition instead favored tying the referendum to the 2016 election, to ensure sufficient turnout. This too presented challenges, particularly in that the PF might not want to tie its presumed victory to the referendum.

The government subsequently missed several self-imposed deadlines related to the draft constitution. Only in mid-October 2015 did it table a constitutional amendment bill, signaling its intention to seek some 20 revisions to the current Constitution in Parliament. President Lungu signed Constitutional Bill No 17 of 2015, receiving a mixture of praise and criticism. While the amendment has brought necessary changes to the election of the executive and succession of office, many other changes were left out. While a referendum on the Bill of Rights attached to elections was scheduled for 11 August 11 2016, the referendum question was a particular confusing one for voters<sup>3</sup>. As significant provisions of the draft constitution are yet to be adopted, Zambia's constitutional process is not yet concluded.

## Conclusion

Overall, the content of Zambia's draft constitution brought it in line with other post-colonial constitutions in the region. While it falls short of recognizing all international human rights (such as abolition of the death penalty, the rights of the LGBTI community, and minorities), it recognized socio-economic rights and reflected a relatively consultative process with Zambian citizens. It also established a Constitutional Court to provide Zambians with a forum for judgment on constitutional matters. Further, the draft was widely endorsed by both civil society and opposition parties.

Further, Zambia's initial consultative process was extensive. The government allowed several forums for citizens to engage, and the Technical Committee took citizen feedback into account. Civil society was actively engaged, provided input into the draft constitution, and conducted citizen outreach on its content. While many Zambians appear to remain unaware of what a new constitution would mean for the protection of their rights, the efforts made to engage ordinary Zambians and to ensure that citizens were engaged in the constitution making process is laudable, and something to be learned from.

While the initial constitutional process was relatively collaborative, the executive's lack of transparency in the aftermath of the review process and ultimate adoption of only some provisions of the draft flawed the process. This could have been anticipated, given President Sata's decision to establish the Technical Committee under the Inquires Act, which allowed the executive to retain control of the process. The executive took what could have been a fully citizen-engaged process and denied citizens the right to remain involved through its completion. Further, the executive's use of Parliament denied citizens the right to identify which provisions of the constitution were most important to them, and instead subjugated these choices to priorities of the party in power. This negated many of the gains that had been made during the consultation process.

The executive's decision to unilaterally promote only some provisions through a parliamentary amendment elicited serious criticism from both civil society and political opposition members in government. Because many of the initially-proposed changes were not included in that amendment, Zambia is still waiting for genuine constitutional change. The failure of the referendum has further extended that wait.

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<sup>3</sup> "Do you agree to the amendment to the Constitution to enhance the Bill of rights contained in Part III of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia?"

## A Dream Denied – the Zimbabwean Constitution

Zimbabwe's constitution making process was part of a broader effort to address decades of political conflict that erupted in unprecedented violence in 2008. The Global Political Agreement (GPA), mediated by the Southern African Development Community (SADC), was a power-sharing accord to create the conditions necessary for Zimbabwe to hold free and fair elections, which were then intended to produce a representative government that Zimbabweans, the region, and the international community would deem legitimate. One of the primary deliverables of the GPA was a new constitution.

The process of creating the 2013 constitution involved a power struggle between the Zimbabwe African National Union – Patriotic Front (ZANU-PF) and the Morgan Tsvangirai faction of the Movement for Democratic Change (MDC-T) for control of the state, and a power struggle within Zimbabwean civil society fundamentally divided about participating in a government-led process, despite broad consensus among them about the need for a new constitution. GPA-mandated public hearings and consultations brought civil society, political party representatives and ordinary Zimbabweans together in two *All Stakeholders Conferences*, to determine the subjects that should be included in the new constitution. Attended by 4,000 delegates, the first conference included all Members of Parliament; throughout the conference the Constitutional Parliamentary Select Committee (COPAC) process determined procedures to create a platform for the development of a democratic constitution. COPAC had to ensure that 70% of the outreach teams, which were responsible for conducting consultative meetings that would gather Zimbabwean views and recommendations on a new constitution throughout the country, were comprised of civil society, and 30% of political party representatives. Two representatives from civil society sat on COPAC's Steering Committee, yet many others in civil society rejected them as their representatives, as they were not selected by civil society organizations (CSOs) themselves, and were therefore not accountable to them. In the end, despite resistance from many civil society organizations to participating, segments of civil society did engage in the process through a variety of public and private, formal and informal platforms. More than 600 CSOs were accredited to observe the COPAC outreach programs, and many key players in civil society altered their stance toward participating when they realized that the COPAC process would actually produce a new constitution.

In total, 4,943 constitutional outreach meetings were held in all ten provinces, reaching 1,118,760 people. Many of the meetings were highly politicized and polarized, particularly in the rural provinces of Manicaland, Masvingo, and Mashonaland. Political interference included the bussing of participants to counter-balance the views of the opposing political party in certain areas, the organizing of participants along party lines, harassment, free speech restrictions, and in some cases physical violence. These process violations were seen to undermine the prospects of a legitimate draft constitution. Despite these challenges, however, the constitution making process was ultimately broadly viewed as positive by the majority of Zimbabweans. A 2012 survey by Freedom House and the Mass Public Opinion Institute found that 50% of respondents had either some hope (33%) or strong hope (17%) that the constitution making process would lead to a better Zimbabwe. Only 20% expressed doubt that it would lead to a better Zimbabwe, with the remainder neutral or undecided (Booyesen 2012).

Parliament unanimously passed the draft constitution with minor amendments, and President Mugabe signed it into law on May 22, 2013. Zimbabwe's Constitution now includes some progressive reforms that, if fully implemented, would help to move the country along

the path to a democracy grounded in constitutionalism, rule of law, and respect for human rights.

Zimbabwe's Constitution includes provisions for the protection of fundamental human rights, including: the reinstatement of citizenship to thousands of Zimbabweans whose citizenship had been stripped away by amendments to the Citizenship Act in 2001 and 2003; a Declaration of Rights protecting civil and political rights, as well as economic, social, and cultural rights; clauses on business and human rights which allow for the development of a nuanced but highly robust jurisprudence; and a section focusing on achieving substantive equality and freedom from discrimination- imperative in a society with a history of significant gender and race discrimination- including an extensive list of grounds on which unfair discrimination is prohibited. The Constitution also includes mechanisms to ensure government accountability and transparency, established in section 3(2)(g) as founding values of the state and as principles of good governance binding for all government institutions at every level. The Declaration of Rights ensures the right to robust access to information for citizens and permanent residents, including juristic persons and the media. There are also other regrettable provisions, which would appear to fly in the face of the founding principles of the Constitution itself, provisions included as compromises in negotiations conducted in 2013, which will be discussed further on.

Despite other mechanisms bolstering the provisions of the Constitution, such as the establishment of an Anti-Corruption Commission, the executive has maintained significant and undue political influence in Zimbabwe. The Anti-Corruption Commission is, for example, entirely appointed by the President; instead of being used to bring corrupt individuals to account, it has been used almost exclusively as a political weapon against Mugabe's opponents. In addition, judicial independence remains precarious. While the appointment of judges, laid out in section 180 of the Constitution, is an improvement on the old Lancaster House Constitution, as the President can no longer appoint whomever he wishes and must choose from a list submitted by the Judicial Services Commission, the President still appoints the majority of Commissioners, leaving open the possibility of interference. The removal of judges is also subject to significant executive control. Together, a weak commitment to the rule of law and lack of judicial independence constitute a great threat to constitutional rights in Zimbabwe today. Instances of bribery, corruption, and judicial incompetence have further undermined the courts' ability to vigorously uphold the protection of fundamental rights and freedoms.

The primary challenge since the adoption of the 2013 Constitution, however, has been in its implementation, with the Zimbabwean government delaying alignment of a myriad of laws with the new Constitution, and thereby delaying its overall implementation. Inadequate public participation, the retention of draconian legislation, and routine violations of the Constitution by government officials have called the government's commitment to constitutional reform into deep question.

### The History of Constitutionalism in Zimbabwe

Zimbabwe's 2013 Constitution was influenced by the country's previous constitutions, and many of the current constitutional issues that Zimbabwe faces today have their roots in the constitutional history of the country. Prior to independence, Zimbabwe (previously called Southern Rhodesia) had a series of five constitutions from 1923 to 1979. All of these constitutions were fundamentally flawed in that, ultimately, they sought to protect the superior political and economic status of the white minority, while simultaneously oppressing

the black majority. Although some of these constitutions did include a declaration of rights, they failed to protect against the plethora of human rights violations that were perpetrated throughout the colonial era.

The country's first constitution, in 1923, founded a self-governing colony ruled by a small minority of white settlers. Theoretically, the British government maintained some veto power over the settler government to protect the interests of black people, but it never used this power. Over the subsequent decades, a myriad of draconian laws were passed to entrench minority rule. The 1961 constitution was to be the first step toward majority rule, and the new declaration of rights provided for the elimination of discrimination, equality before the law, and the protection of some rights and liberties. However, fundamental rights such as freedom of movement and freedom of employment were excluded. Even more problematic, existing legislation was exempt from having to be compliant with the Declaration of Rights; thus discriminatory laws such as the Land Apportionment Act remained intact. The 1965 constitution that emerged from the Unilateral Declaration of Independence (UDI) was a step backwards from democracy, constitutionalism and respect for fundamental rights. The unrecognized and illegal UDI government tried to legitimize itself by purporting to adopt a republican constitution in 1970, and then another in 1978 with the formation of Zimbabwe-Rhodesia, which included a few limited democratic gains. Eventually, the unrecognized government of Zimbabwe-Rhodesia was forced to the negotiating table with the two liberation movements, the Zimbabwe African National Union (ZANU) and the Zimbabwe African People's Union (ZAPU) who together formed the Patriotic Front.

The resultant constitutional conference at Lancaster House, London in 1979 brokered a peace agreement between the warring sides, and gave birth to Zimbabwe's first post-independence constitution (1980-2013), often referred to as the Lancaster House Constitution, paving the way for majority rule. However, the Lancaster House Constitution was defective from the outset. The constitution making process was entirely non-consultative, simply the result of a political settlement, inasmuch it only sought to defuse controversial issues not to solve them (Sims 2015). The Lancaster House Constitution did include a Declaration of Rights, however. It was amended 19 times during its lifetime, and was used to suppress people's rights rather than to protect them under the law. The constitution left key elements of white Rhodesian society intact, including control over the economy and land, establishing the basis for future conflict.

Social pressures, coupled with political and economic decline at the end of the 1990s, led to calls for a Zimbabwean-driven and owned constitutional reform process. In 1999, the Zimbabwean government established a commission that would eventually draft a constitution that was ultimately rejected by the majority of Zimbabweans. Following the defeat of the referendum on this draft constitution, the ruling ZANU-PF ushered in a decade characterised by state-sponsored violence that sought to destroy all opposition.

### Zimbabwe's Constitution-making Process: 2009-2013

The constitution making process that eventually resulted in Zimbabwe's new constitution in 2013 emerged out of the country's failed 2008 elections and the resulting constitutional crisis. The Zimbabwe Electoral Commission (ZEC) withheld the results of the March 29 presidential election for five weeks amid allegations that ZANU-PF was tampering with the numbers, having lost the election. Eventually, ZEC announced that, although the opposition candidate, Morgan Tsvangirai, had received the most votes, no candidate had crossed the 50%

threshold, thereby forcing a runoff election (Makumbe 2009). Disregarding a requirement that the second round had to be held within 21 days, the runoff election was scheduled for three months later. In the interim, ZANU-PF, assisted by state security agents through the Joint Operational Command (JOC)—consisting of the military, police, intelligence, and prison services—unleashed a brutal campaign of killings, torture and mass rape in the countryside, to crush the opposition and punish ZANU-PF supporters who had not voted for Mugabe (Solidarity Peace Trust 2008).

When South African President Thabo Mbeki appealed to Mugabe to call off the run-off elections and hold fresh elections in the absence of violence, Mugabe ironically claimed that to do so would violate Zimbabwe's constitution (Mbeki 2016). This demonstrates a continuation of the long trend of selectively using the constitution to subvert the will of the people. Tsvangirai withdrew from the electoral race in protest, allowing Mugabe to win a landslide victory as the only candidate. The international community, including for the first time African regional bodies the Southern African Development Community (SADC) and the African Union (AU), universally rejected the election results. Faced with a constitutional crisis as head of an illegitimate government, Mugabe was forced to the negotiating table. Mandated by the AU, SADC facilitated the signing of the Global Political Agreement (GPA) between ZANU-PF and two factions of the Movement for Democratic Change, the larger led by Morgan Tsvangirai (MDC-T) and the smaller by Arthur Mutambara (MDC). The purpose of the GPA was to create the conditions in Zimbabwe for free and fair elections, with one primary deliverable for that being a new democratic constitution. Thus, similar to the Lancaster House constitution, the 2013 constitution emerged out of a peace settlement and was negotiated by antagonistic parties.

Much emphasis was placed on the need for the constitution making process to be participatory and people-driven. The GPA asserted that "it is the fundamental right and duty of the Zimbabwean people to make a constitution by themselves and for themselves" and that "the process of making this constitution must be owned and driven by the people and must be inclusive and democratic." Unlike the 1999 Constitutional Commission that allowed the President to dominate the process, the GPA stated that the constitution making process should be driven by parliament, through the Constitutional Parliamentary Select Committee (COPAC). COPAC's 25 members reflected parliament's gender balance and the relative strengths of its three principal parties (Dzinesa 2012). The COPAC process established agreed-upon procedures for the development of a democratic constitution. However, some civil society activists argued that the COPAC process was captured by ZANU-PF and the MDC parties, narrowing the process to a struggle over party interests at the expense of the people. The process excluded smaller political parties, such as Mavambo Kusile Dawn, the Zimbabwe African People's Union and ZANU-Ndonga.

The 2013 constitution making process thus emerged as one of the primary battlegrounds between ZANU-PF and MDC-T, as each of the party's vied for control of the state. Although there was broad consensus among civil society actors about the need for a new constitution, they were deeply divided about participating in a government-led process.

The GPA mandated that public hearings and consultations must take place in the form of two *All Stakeholders Conferences*, the first in July 2009 and the second in October 2012. These public forums brought together representatives of civil society, political parties, and ordinary Zimbabweans "for the purpose of identifying issues that should be covered in the new Constitution." (COPAC 2013) The first All Stakeholder's Conference was attended by



approximately 4,000 delegates, including all Members of Parliament, representatives of political parties, and representatives from civil society.

A significant outcome of the first conference was the development and adoption of 17 thematic areas, which would serve as talking points and form the basis from which outreach teams would solicit the views of ordinary citizens about the new constitution. The Conference mandated that COPAC ensure 70% of the outreach teams responsible for conducting consultative meetings throughout Zimbabwe were to be comprised of civil society representatives, and 30% of political party members. COPAC was also bound by gender parity requirements within all of its structures.

Two representatives from civil society served as members of COPAC’s Steering Committee.<sup>4</sup> However, many from within civil society rejected them as their representatives, because they were not selected by CSOs, and therefore considered neither representative nor accountable to civil society (Institute for Security Studies 2012). At its conclusion, a total of 4,943 meetings were held in all 10 provinces, reaching 1,118,760 people (see Table 1).

**Table 1: COPAC Outreach Meetings**

Province	No. of Meetings	Total Participants	Average Meeting Attendance
Mashonaland East	567	181,756	321
Mashonaland West	509	121,647	239
Manicaland	677	152,130	225
Matabeleland South	477	48,211	101
Mashonaland Central	652	214,023	328
Matabeleland North	614	53,077	86
Masvingo	622	184,208	296
Midlands	672	102,453	152
Harare	96	49,699	518
Bulawayo	57	11,556	203
<b>TOTAL</b>	<b>4,943</b>	<b>1,118,760</b>	<b>226</b>

Source: Constitution Parliamentary Select Committee (2013)

Despite the hostility displayed by many civil society organisations toward participation in the constitution building process, segments of civil society did engage vis-à-vis various public and private, formal and informal, platforms. In total, upwards of 600 civil society organisations were accredited to observe the COPAC outreach programs. Representatives from civil society also participated in data capturing, thematic committee discussions, and both All Stakeholders Conferences. Many key players within civil society altered their stance towards participating after they realized that the COPAC process was ultimately going to produce a new constitution.

The constitutional outreach meetings were in many cases compromised from the outset. Particularly in the rural provinces of Manicaland, Masvingo and Mashonaland, meetings were highly politicised and polarised (Eppel 2010). Political interference relegated outreach

<sup>4</sup> The Steering Committee was responsible for overseeing the implementation of decisions of the Management Committee.



meetings to “partisan processes, in which tolerance was only accorded to contributions that fell within party-defined parameters” (ZZZICOMP 2010). Monitors noted many occasions during which outreach teams would arrive at designated venues in rural areas only to discover that local councillors had not informed their communities of the COPAC meetings in advance.

The Independent Constitution Monitoring Project (ZZZICOMP), a coalition of Zimbabwean NGOs, recorded 7,768 abuses (ZZZICOMP 2010). Political interference in constitutional outreach meetings accounted for the majority, which included: chanting of political slogans; singing of political songs; bussing of people from other wards to tilt the scales against the opposing political party; organising participants along party lines; and use of opening prayers to express party positions on the constitution (ZZZICOMP 2010). Other abuses included: harassment, restrictions on free speech, and physical violence. In Harare, violence led to the suspension of 13 scheduled meetings in September 2010. As a result of such an inhospitable political climate, some citizens struggled to express their views on how they wanted to be governed.

As outreach meetings concluded and results were being tallied, civil society actors were still persecuted. In February 2012, Titus Maluleke, the Provincial Governor of Masvingo Province, banned 29 NGOs, including Zimbabwe Lawyers for Human Rights, Crisis in Zimbabwe Coalition, the National Association of Non-Governmental Organisations, and the Zimbabwe Election Support Network, from operating within the province, because they did not register their activities with the Governor’s office in advance (Chinaka 2012). This manoeuvre was criticized by the NGOs affected by the ban, many of which saw it as a clear example of political gamesmanship, ahead of further negotiations on the 2013 constitution. Together, these abuses undermined the prospects for producing a fully legitimate draft constitution.

Despite the major challenges faced by civil society and the public during the outreach process, the constitution making process overall was still broadly viewed positively by the majority of Zimbabweans. A 2012 survey by Freedom House and the Mass Public Opinion Institute found that 50% of respondents had either some hope (33%) or strong hope (17%) that the constitution making process would lead to a better Zimbabwe. Only 20% doubted it would lead to a better Zimbabwe, with the remainder of respondents reporting themselves as neutral or undecided (Booyesen 2012). Furthermore, several years later, a 2015 survey by the International Republican Institute and Target Research found that a majority of respondents felt that the constitution was developed in a participatory manner.

After the outreach program, tenuous negotiations between the principal political parties ensued and, in January 2013, they agreed to a final draft constitution, which was formally adopted by COPAC in February. The draft constitution was then submitted to a referendum on March 16-17, 2013, which the electorate overwhelmingly approved. A total of 3,316,082 people voted with 94.49% voting “YES.” The draft constitution was unanimously passed by Parliament with minor amendments, and signed into law by President Mugabe on May 22, 2013.

All three of the political parties that were part of the Government of National Unity campaigned for adoption of the new constitution. While the voting process was largely peaceful, the day following the vote, four members of Morgan Tsvangirai’s party were arrested by police on dubious charges, while prominent human rights lawyer, Beatrice Mtetwa, was taken into police custody for disputing the basis of the arrests; this signalled that the

repressive tactics previously used by ZANU-PF would likely continue even under a new constitutional paradigm.

## The 2013 Constitution

Since the adoption of the new constitution, the primary challenge to Zimbabwe's democratic transition has been the Zimbabwean government's delays in aligning a myriad of laws with the new constitution, and effectively seeing through on its implementation. The General Laws Amendment Bill was introduced in May 2015 to align 126 statutes with the new constitution, but has yet to be finalized. Inadequate public participation, retention of draconian legislation, and routine violations of the constitution by government officials call the government's commitment to genuine constitutional reform into question. Nevertheless, the 2013 constitution does include some progressive reforms, which, if fully implemented, would pave the way for the establishment of a vibrant democracy grounded in constitutionalism, rule of law and respect for human rights. Inevitably, as a negotiated document, the constitution also contains some regrettable provisions, which seem to fly in the face of the founding principles of the constitution itself. The content of the new constitution, as well as some progress made since its adoption, will be discussed further in the next section.

## Founding Provisions

Chapter One of Zimbabwe's 2013 constitution, which lays down the founding provisions for the state, clearly articulates the new culture of constitutionalism that it seeks to create. The chapter explicitly states that the constitution is "the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency." While the Lancaster House Constitution did include a clause establishing constitutional supremacy, it did not otherwise embody democratic principles, and therefore could not form a firm foundation for the development of a culture of constitutionalism. Chapter One goes on to detail Zimbabwe's founding values and principles including "the rule of law," "fundamental human rights and freedoms," "observance of the principle of separation of powers," and other values that capture the essence of constitutionalism. Furthermore, the chapter requires the state to "promote public awareness of the constitution," through translating it into all Zimbabwean languages, teaching it in schools, including it in curricula for members of the security forces and all public employees, and encouraging everyone to disseminate it as widely as possible. Thus, the constitution itself seems to promote the belief that, unless people know, cherish, uphold, and demand respect for their constitution, it will remain just an exalted piece of paper.

## Provision and Protection of Fundamental Rights

### Citizenship

The 2013 constitution reinstated citizenship to thousands of Zimbabweans whose citizenship had been stripped away by amendments to the Citizenship Act in 2001 and 2003. Many Zimbabweans, especially the children of immigrants from Malawi, Mozambique and Zambia, who came to the country in the 1950s and 1960s to work, had been left stateless for over a decade. The constitution also allows dual citizenship for citizens by birth. The Constitutional Court has confirmed in *Mawere v. Registrar General* CCZ 30/13 that citizens by birth are entitled to dual citizenship. In another case, *Madzimbamuto v. Registrar General & Others* CCZ 5/14, the same court stated: "A Zimbabwean citizen by birth does not lose his or her citizenship on acquiring a foreign citizenship. He or she is entitled to hold foreign citizenship

and a foreign passport. Indeed the Constitution has made it clear that Zimbabwean citizenship by birth cannot be lost" (Madzimbamuto v Registrar & et al.).

Nevertheless, the Registrar General Tobaiwa Mudede, who has held this position since 1980, continues to flout the Constitution and the Constitutional Court's ruling, by denying citizens by birth Zimbabwean passports on the grounds that they first need to renounce their foreign citizenship. Recently, President Mugabe reportedly told Zimbabwean students in South Africa, "Once you take up citizenship of another country, you cancel your citizenship. We don't accept multiple or dual citizenship" (Magaisa 2016). This is an example of how the development of constitutionalism in Zimbabwe continues to be undermined by government officials who refuse to acknowledge the constitution's supremacy.

### *Declaration of Rights and the National Objectives*

The 2013 Constitution provides for a wide, comprehensive and fully justiciable Declaration of Rights, which includes civil and political rights, as well as economic, social and cultural (or socio-economic) rights. It is a vast improvement on the previous Declaration of Rights in the Lancaster House Constitution, which had been drastically curtailed by multiple amendments, many of which were made for the purpose of reversing court decisions in support of human rights.<sup>5</sup>

Additionally, the new Constitution includes a chapter on National Objectives, which sets out a list of obligations, to "guide the state ... in formulating and implementing laws and policy decisions." These obligations, however, do not create corresponding and individually justiciable rights enforceable in a court of law. Nevertheless, they remain important for the protection of rights for several reasons. First, courts are required by section 46(1) (d) to take the National Objectives into account when interpreting the Declaration of Rights. This can facilitate a more expansive interpretation of rights. Second, the Zimbabwean Constitution does not explicitly rule out the justiciability of the National Objectives. Other country's constitutions with similar chapters, such as Nigeria and India, include clauses that explicitly negate courts' jurisdiction over the enforcement of the rights and obligations contained therein. Zimbabwe's Constitution contains no such clause. In addition, consistent use of the word "must" throughout the National Objectives indicates that they are *mandatory* duties imposed on the state.

If adhered to, the Declaration of Rights and the National Objectives have real potential to increase ordinary people's enjoyment of their basic rights. While the Declaration of Rights can be amended, amendments must be put to a national referendum and approved by the majority of voters before any changes can take effect. Below some specific aspects of the Declaration of Rights will be discussed in further detail.

### *Business and Human Rights*

The new Constitution imposes far-reaching duties on both the state and private persons, including juristic persons, with regard to the Declaration of Rights. Section 44 requires that both the state and every person, including juristic persons, "must respect, protect, promote and fulfill the rights and freedoms set out in this Chapter." While this language is drawn from long-standing human rights traditions with regard to the duties of the state, the provision is among the few constitutions in the world that impose positive duties on private persons to protect, promote and fulfill human rights. The provision is moderated by section 45(2), which

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<sup>5</sup> For example, see constitutional amendments 16 (2000) and 17 (2005).

states that the Declaration of Rights binds natural and juristic persons “to the extent that it is applicable to them”. There is no such qualification in section 45(1) with regard to the duties of the state. This section allows for the development of a nuanced but highly robust jurisprudence on business and human rights. In the globalized world, multinational corporations may, in some circumstances, hold as much power as a state; it is therefore essential that there are mechanisms in place to hold juristic persons to account, not only for human rights abuses, but also to actively work to protect, promote and fulfill human rights.

### *Economic, Social and Cultural Rights*

The inclusion of justiciable economic, social and cultural (or socio-economic) rights in the Declaration of Rights represents a significant step forward as well. As with many other countries, Zimbabwe’s previous constitution and domestic law did not protect such rights, but the list of socio-economic rights protected by Zimbabwe’s new Constitution is fairly comprehensive, including rights to: education; healthcare; food and water; fair labor practices; freedom of profession, trade or occupation; language and culture; and marriage. There are also socio-economic rights protected for specific groups, such as a right to: nutrition and shelter for children; welfare for war veterans and people over the age of 70 years (as well as social security for the latter); and special educational and medical needs for persons with disabilities. Finally, certain rights are restricted to citizens and permanent residents, such as the rights to: education; and basic healthcare (other than for chronic illnesses and emergencies, in which case the right is protected for everyone).

Notably absent is a justiciable right to access to adequate housing. While Section 28 does place a duty on the state to “enable every person to have access to adequate shelter,” since this is contained within the National Objectives rather than the Declaration of Rights, it is not justiciable. Section 81 and 74 also provide limited justiciable protection of the right to adequate housing, by establishing, respectively, a right to shelter for children, and a general right to freedom from arbitrary eviction.

Zimbabwe’s new Constitution boasts similar language to that of the South African Constitution with regard to the progressive realization of socio-economic rights. This raises the question as to whether Zimbabwe’s Constitutional Court will follow the “reasonableness approach” developed by the South African Constitutional Court, and rejects the “minimum core approach” espoused by the United Nations Committee on Economic, Social and Cultural Rights (Ndhlovu 2016). Other domestic courts, such as the Colombian Constitutional Court, have adopted the “minimum core approach,” while still others, such as the Indian Supreme Court, have taken a mid-way approach.

### *Civil and Political Rights*

Zimbabwe’s Constitution also gives those arrested the right to contact relatives, advisers, and visitors, to be informed of their rights, and to be released after 48 hours, unless a court orders them to remain detained. The latter provision was recently used to free a detained mayor. Police, however, frequently abuse this process by repeatedly arresting and releasing people on trumped-up charges as a form of intimidation. Freedom of the media and freedom of expression are also protected with robust clauses requiring licencing procedures that are free from state control, and the Constitution states that state media should be independent and impartial, and present divergent views. Again, however, the government has largely disregarded these provisions since the Constitution came into force. The country’s repressive legal framework—including the Access to Information and Protection of Privacy Act, the

Official Secrets Act, the Public Order and Security Act, and the Criminal Law (Codification and Reform) Act—has yet to be reformed.

### *The Right to Life and the Death Penalty*

The new Constitution provides that everyone has the right to life. As Section 48(2) permits the imposition of the death penalty in only highly restricted circumstances, it is arguable that the provision effectively abolished the death penalty from Zimbabwean law; existing statutes overreach these restrictions to such an extent as to make them unconstitutional and void. It seems, however, that the General Laws Amendment Bill may reintroduce the death penalty. If passed in its current form, the Bill will revive the death penalty by bringing the currently voided provisions of the criminal code in line with the restrictions imposed by the Constitution. Civil society activists have lobbied Parliament not to reintroduce the death penalty into Zimbabwean law, but to expunge the death penalty from the law altogether. Other draconian qualifications on the right to life included in the previous constitution— such as the use of lethal force in “dispersing an unlawful gathering”— were repealed in the new Constitution.

### *Corporal Punishment and the Right to Freedom from Degrading Punishment*

Section 53 of the 2014 Constitution guarantees the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. Based on this provision, the High Court ruled in 2014 that a section of the criminal code permitting corporal punishment for male juvenile offenders was unconstitutional. The judgment also included *obiter dicta* (judicial comments that do not form binding precedent) that suggested corporal punishment by parents and schools may also be unconstitutional. The Constitutional Court, which must confirm High Court rulings, indefinitely postponed the matter. (Children Global Initiative to End All Corporal Punishment of 2016). As such, the status of corporal punishment remains unresolved in the courts. Nevertheless, section 53 is one of six protected rights that may not be limited under any circumstances (Magaisa, 2016).

### *Equality and Non-discrimination*

The rights to equality and freedom from discrimination are enshrined in section 56. Like the South African constitution, this provision focuses on the achievement of substantive equality, rather than mere formal equality, making explicit allowance for affirmative action measures. In societies such as Zimbabwe’s, with a history of discrimination, particularly on the grounds of gender and race, this is a positive development. Section 56 also includes an extensive list of grounds on which discrimination is prohibited, though this list does not explicitly include sexual orientation. Sex between men is still a criminal offense under law, punishable by fine, and up to one year in prison. The President has been vocal in his opposition to same-sex relations, and lesbian, gay, bisexual, and transgender groups have been subject to regular shaming and harassment by security forces. The non-discrimination provision has also been undermined by patently discriminatory clauses in other sections of the new Constitution. Section 48(2), for example, allows imposition of the death penalty on men, but not on women, and section 72(3)(c) expressly excludes the application of section 56 to the compulsory acquisition of land without compensation, opening the door to discriminatory land seizures on any number of grounds.

### *Mechanisms for Government Accountability and Transparency*

Accountability and transparency are established in section 3(2)(g) of the 2013 Constitution, as founding values of the state, and as principles of good governance which bind the state with

all institutions and agencies of government at every level. In addition to the mechanisms for government accountability and transparency found in the Constitution itself, the state is also required by section 9(1) to adopt policies and legislation to develop accountability, transparency, personal integrity and financial probity in every government agency or institution. Furthermore, section 9(2) of the Constitution requires that all agencies and institutions of government—especially independent commissions—be given adequate resources and facilities to carry out their functions diligently, the rationale being that if they have sufficient resources, they may be less prone to corruption. Additionally, sufficient funding for bodies set up under the Constitution to promote accountability—such as the Anti-Corruption Commission and the Auditor-General—will help to ensure that agencies and institutions of government can carry out their work effectively.

### *Access to Information*

The Declaration of Rights includes robust access to information. Section 62(1) states that “every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.” Additionally, section 62(2) states that every person has a right to information held by any person, including the state, in so far as it is required for the exercise or protection of a right. Section 62(4) allows a law to be passed to restrict this right, but only in the interests of defense, public security or professional accountability, and to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. However, AIPPA transgresses these constitutional restrictions. For example, Part III of AIPPA lists data that no one may have access to, such as deliberations of local councils, which undermines accountability. Additionally, alien persons and non-permanent residents are denied access to information from the state by AIPPA, even though section 62(2) of the Constitution protects their access to information if it is for the protection of a right. Such unconstitutional provisions were left intact when, in 2015, the Act was amended purportedly to bring it in line with the Constitution.

### *Accountability of Executive to Parliament - Section 107(2)*

The 2013 Constitution entrusts Parliament with the responsibility of an oversight role in holding Zimbabwe’s executive accountable. Section 107(2) requires every Vice President, Minister and Deputy Minister to “attend Parliament and parliamentary committees in order to answer questions concerning matters for which he or she is collectively or individually responsible.” Thus there is a constitutional obligation placed on every member of the executive branch to answer questions before Parliament. In their capacity as representatives of the people in their constituencies, parliamentarians should not simply toe the party line, but should represent the concerns and relay the questions of their constituents, in order to hold government to account. Additionally, section 140(4), states the President must attend Parliament at least once a year to give an address on the state of the nation. This represents an improvement on the previous constitution, under which the President had no obligation to attend Parliament at all, but section 140(3) also states that the President “may” answer questions, so is not required by the Constitution to answer questions in Parliament. This still limits Parliament’s ability to hold the executive branch to account.



### Anti-Corruption Commission

Zimbabwe's current Constitution also establishes an Anti-Corruption Commission, the functions of which include: investigating and exposing cases of corruption in public and private sectors; combatting corruption and abuses of power; directing the Commissioner General of Police to investigate cases of suspected corruption; and referring matters to the National Prosecuting Authority for prosecution. However, the Commission is entirely appointed by the President and lacks any independence. In recent years, the Commission has been used almost exclusively as a political weapon against the President's opponents, rather than as a mechanism to bring corrupt individuals to account. In July 2016, President Mugabe took control of the administration of the Anti-Corruption Commission himself, amid allegations that it was being used by warring factions within the ruling party as a political weapon against one another (Financial Gazette 2016).

### Auditor-General

Zimbabwe's Constitution provides for an Auditor-General whose functions, *inter alia*, are to: "audit the accounts, financial systems and financial management of all departments, institutions and agencies of government," and to "order the taking of measures to rectify any defects in the management and safeguarding of public funds and public property." Although the President appoints the Auditor-General, he or she does enjoy a fair degree of independence once appointed. The current Auditor-General, for example, has built a reputation for exposing mass corruption in government departments, with local authorities, and in parastatals. However, only very rarely does this lead to action by government officials to hold those implicated accountable (Auditor-General 2016).

### Devolution

Section 264 of the 2013 Constitution states that government powers and responsibilities must be devolved, wherever appropriate, to those authorities that are capable of exercising them. Theoretically, devolution of power should make local councils accountable to the electorate rather than the national government. To facilitate devolution, the Constitution organizes government at three levels, national, provincial, and local, with the provincial level having only been provided for under the new Constitution. However, three years after the adoption of the new constitution, the provincial level of government has yet to be operationalized. Further, the Ministry of Local Government recently fast-tracked a bill through Parliament, purporting to bring the Urban Councils Act and Rural District Councils Act into line with the Constitution, but which fails to implement real devolution of power.

### Judicial Independence

Section 164 of the 2013 Constitution states that "[t]he courts are independent and subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear of favour or prejudice". The process for the appointment of judges laid out in section 180 of the Constitution is a substantial improvement on the process in the Lancaster House Constitution. The President can no longer appoint whomsoever he wants, but must choose from a list submitted to him by the Judicial Services Commission (JSC). If the President does not approve of the list, he can request a new list from the JSC, from which he *must* make an appointment. Thus, lists are ultimately to be determined by the JSC. Magistrates and other judicial officers are appointed directly by the JSC.

However, the composition of the JSC undermines the judiciary's independence. Of the 13 commissioners, six are appointed directly by the President, two are appointed indirectly by

the President (i.e. by a body appointed by the President), and the remaining five are appointed by persons nominated by representative bodies of lawyers, law lecturers, accountants and auditors, and a judge who is nominated by an association of superior court judges. Although the composition of the JSC is significantly more independent now than under the previous constitution, a majority of its commissioners are still appointed, either directly or indirectly, by the President. Further, a clause contained in the Sixth Schedule stipulates that for the first 7 years of transition, the Constitutional Court will be filled from the same bench as the Supreme Court under the old constitution. Thus, improved mechanisms for judicial independence are effectively delayed for seven years, as these judges were all appointed under the old constitution, which placed little restraint on the President making political appointments to the judiciary.

Removal of judges is also still subject to significant executive control. Section 187 states that the President can appoint a tribunal to recommend to him whether or not a judge should be removed. While the President must follow the recommendation of the tribunal, since the President can appoint the tribunal, it can be used toward political ends.

Judicial weakness and lack of judicial independence are likely the greatest threats to constitutionally-protected rights in Zimbabwe today. Cases of bribery, corruption and judicial incompetence have further undermined the courts' ability to vigorously uphold the protection of human rights.

## Separation of Powers

The doctrine of separation of powers consists of several principles, including: institutional division of state governance; independence of each branch from control by another; financial independence; oversight; and checks and balances. Although the executive remains the most powerful branch of government in Zimbabwe, the new Constitution does provide some checks on executive power, and oversight mechanisms to hold each of the three branches to account.

### *Institutional Division of State Governance*

The new Constitution clearly outlines three distinct arms of government: the executive, the legislature and the judiciary. The authority of all three arms of government is derived from the people. Executive authority is vested in the President, who exercises it, subject to the Constitution, through a Cabinet. Legislative authority is vested in Parliament, consisting of the National Assembly and the Senate. Judicial authority is vested in the courts, which consist of the Constitutional Court (the highest court in constitutional matters), the Supreme Court, the High Court and various other courts.

Legislative authority is more clearly reserved for Parliament in the Zimbabwe's new Constitution. The Lancaster House Constitution expressly stated that Parliament could confer legislative functions on any person or authority. Section 134 of the 2013 Constitution allows parliament to delegate power to make statutory instruments, such as regulations, but severe restrictions are placed on any such delegation. Parliament's primary law-making power cannot be delegated. For example, the Presidential Powers (Temporary Measures) Act—a remnant of colonial rule that enabled the President to make regulations considered necessary to deal with any situation that might compromise national security, public safety and order, public morality, health or the economy—is now deemed unconstitutional. Nonetheless, Section 134 allows Parliament to delegate its legislative authority through an Act of Parliament, which may allow the President, or other persons, to enact subsidiary



legislation, as long as that is consistent with related original legislation passed by Parliament, and consistent with the Constitution.

### *Independence of Each Branch from Undue Control*

Another aspect of separation of powers is that each arm of government should be independent of undue influence or control from other arms of government. The new Constitution ensures that the legislature has greater independence than under the previous constitution. The President no longer holds constitutional power to directly appoint individuals into the Senate. The Senate does, however, include 16 chiefs who are appointed, not popularly elected, and who are on the executive payroll, thus undermining much of Parliament's independence. While under the new Constitution the President may only dissolve Parliament under restricted circumstances, he may dissolve Parliament when it has refused to pass an appropriations bill. All such circumstances are to begin with Parliament initiating its own dissolution by resolving or passing a vote of no confidence in the government. Judicial independence is discussed at length elsewhere. The executive, as the most powerful branch of government, is less vulnerable overall to attempted control by other branches of government.

### *Checks and Balances*

Several constitutional provisions now curb the power of the executive. Notably, the President may only hold office for a maximum of two 5-year terms, although this does not apply to President Mugabe's previous five terms in office under the previous constitution. Mugabe may serve up to two terms under the current Constitution, but no more.

Parliament is provided with two checks on the executive's power. First, Parliament may remove the President through a process of impeachment, which requires a two-thirds majority in a joint session. Should the President be impeached, under section 101 of the 2013 Constitution, the first Vice President assumes office until the end of the President's current term. However, another clause, which remains in effect for 10 years during the transition, determines that the Vice President becomes acting President for 90 days until a new President is put forward by the political party the former President represented when he or she stood for election. This transitional clause is highly problematic, as it provides insufficient clarity regarding how the new President should be determined, leaving it entirely up to internal mechanisms of the ruling political party. With factionalism rife within the current ruling party, an aging President, and no clear succession plan or democratic process within the party for electing a new President, this clause poses a serious risk of constitutional crisis in the wake of the death, resignation or removal of President Mugabe. Second, Parliament may pass a vote of no confidence in the government, which also requires two-thirds of a joint session to pass. If the resolution does pass, the President must either replace his entire Cabinet or dissolve Parliament and call a new election.

The presidential assent to legislation provides a check on Parliament's power to pass legislation, as a safeguard against the passing of unconstitutional legislation. If the President has reservations about a bill that is submitted to him for assent, he may send it back to Parliament. If, on second submission, the President's reservations have still not been addressed in full, the President may refer the bill to the Constitutional Court for a ruling on its constitutionality.

The judiciary is constitutionally authorized to provide an important counter balance to both the executive and the legislature in Zimbabwe. The Constitutional Court is, in effect, the last

line of defence against violations of the Constitution. It has the authority to advise on the constitutionality of legislation, strike down unconstitutional laws, and determines whether Parliament or the executive has failed to fulfil its constitutional obligations.

## Provision of Independent Constitutional Institutions and the Rule of Law

Chapter 12 of the new Constitution establishes various “independent commissions supporting democracy”. These include, *inter alia*, the Human Rights Commission, the Gender Commission and the National Peace and Reconciliation Commission. Section 235 states that the commissions “are independent and are not subject to the direction or control of anyone.” Members of the commissions are appointed by the President and may be removed using the same procedures that are used to remove judges. The President retains excessive influence over these bodies through selection and removal procedures mandated by the Constitution.

### Human Rights Commission

The Human Rights Commission was established under the previous constitution but only became fully operational in 2014 under the new Constitution. The Commission is composed of a Chairperson appointed by the President in consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders. Eight additional members are appointed by the President from a list of 12 or more nominees submitted by the Committee on Standing Rules and Orders. All members must be selected for their “integrity and their knowledge and understanding of, and experience in, the promotion of human rights.” Commissioners may not be members of political parties and must, on appointment, resign any memberships that they hold within 30 days of appointment. Commissioners may serve no more than two terms of 5-years each.

The Commission’s current constitutional mandate is fairly broad, but the enabling act, passed under the old constitution, had limited the Commission’s mandate to investigating alleged human rights abuses that took place since February 2009. (The Zimbabwe Human Rights Commission Act). This has prevented the Commission from investigating previous serious human rights abuses, including: election-related violence in 2000, 2002, 2005, and 2008; the massacre of an estimated 20,000 people in the Matabeleland and Midlands provinces in the 1980s; and mass demolitions of homes and evictions in 2005. The current Commission inherited over 500 open case files from the former Public Protector, and, on average, now receives some thirty new cases each month. Despite a lack of adequate financial and human resources, it has already recorded over 400 complaints since it became operational in July 2014 (The Danish Institute for Human Rights 2016). The Commission demonstrated its independence in 2015 with one damning report on human rights abuses committed during a by-election, concluding: “In light of the prevailing human rights situation in Hurungwe West, it is the opinion of ZHRC that the possibility of a truly free and fair election in the Constituency remains remote” (Zimbabwe Human Rights Commission 2016).

### National Peace and Reconciliation Commission

The National Peace and Reconciliation Commission, established as an independent body under the 2013 Constitution, are temporary and will expire in 2023. The Commission’s primary functions are to develop and implement programmes to: promote national healing, unity and cohesion, and the peaceful resolution of disputes; develop procedures and institutions at a national level to facilitate dialogue among political parties, communities, organizations and other groups, to prevent conflicts and disputes arising in the future; ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support; to receive and consider complaints from the public and take such action as it

considers appropriate; and recommend legislation to ensure that assistance, including documentation, is rendered to persons affected by conflicts, pandemics or other circumstances.

### *Gender Commission*

The Gender Commission's mandate is narrow. Its investigations, which are the subject of its reports, may only address systemic barriers to gender equality, not wider violations of rights pertaining to gender equality as provided in the Constitution (Unit Research and Advocacy 2016). The Commission is also responsible for overseeing Zimbabwe's adherence to regional and international gender equality instruments and agreements. However, the Gender Commission Act of 2014, which is responsible for propagating the Commission, fails to ensure the Commission's independence, or provide the Commission with sufficient scope to address systemic gender inequalities.

### *International Law and the Protection of Fundamental Rights*

The 2013 Constitution is the supreme law in Zimbabwe, and international law is only applicable in so far as it is consistent with the Constitution and other national legislation. Section 362(1) of the Constitution states that customary international law is part of the law in Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament. Further, section 327 states that an international treaty which has been concluded or executed by the President is not binding on Zimbabwe until it has been approved by Parliament, and does not form part of the law of Zimbabwe unless it is incorporated through an Act of Parliament.

Nevertheless, the Constitution does provide several mechanisms through which international human rights norms can be incorporated into, or protected by, Zimbabwe's domestic law. First, section 326(2) and 327(6) require that every Zimbabwean court and tribunal must adopt any reasonable interpretation of legislation that is consistent with customary international law or any international convention, treaty or agreement that is binding on Zimbabwe. This means that even an existing interpretation of an Act of Parliament will be overruled if it is inconsistent with Zimbabwe's obligations under international law, and where there exists a reasonable interpretation that is consistent with international law.

Second, section 34 places an obligation on the state to "ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law". This means that the state is now constitutionally required to ratify and incorporate treaties, such as the Rome Statute of the International Criminal Court, which Zimbabwe has signed, but not yet ratified.

Third, section 46(c) states that when a court is interpreting the Declaration of Rights, it "must take into account international law and all treaties and conventions to which Zimbabwe is a party." In light of section 34 mentioned above, it seems that "conventions to which Zimbabwe is a party" include conventions that have been signed but not yet ratified or incorporated by Parliament. As the courts are required to interpret the Declaration of Rights in light of international law, courts may give effect to international law or conventions through judicial interpretation of rights. This occurred recently in the landmark Constitutional Court case of *Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*. In this case, the court banned child marriage in Zimbabwe, based largely on international law and international norms. Last, section 12(1) (b) directs that Zimbabwe's foreign policy must be based on respect for international law. This means that Zimbabwean troops abroad must also respect human rights.

## Processes for Bringing the Constitution into Force

Schedule six of the 2013 Constitution deals with the commencement of implementation of the 2013 Constitution and its transitional provisions.

Due to the highly contentious nature of the development of the Constitution, the Schedule makes particular provision for the enactment of chapters that address significant change from the Lancaster House Constitution. These chapters came into operation on publication day, March 26, 2013, and include chapters relating to: citizenship; the Declaration of Rights; election and assumption of office of the President; election of Members of Parliament; other elections; principles of public administration and leadership; conduct of members of the security services; the Zimbabwe Electoral Commission; and provisions relating to provincial and local government.

The remaining sections of the 2013 Constitution will come into operation on the day on which the first President elected under the new Constitution assumes office (Section 3ss 2). Some sections of the new Constitution are overridden by transitional clauses in the Sixth Schedule for specified periods of time. Two of the most significant of these were discussed above, the retention of the previous Supreme Court as the Constitutional Court (delayed for 7 years after the Constitution came into force), and the special provisions for the election and tenure of the President (delayed for 10 years).

## Conclusion

The 2009-2013 constitution making process resulted in the most progressive constitution in Zimbabwe's history. Provisions for the protection of fundamental human rights, including a Declaration of Rights protecting civil and political rights, as well as economic, social, and cultural, in the 2013 Constitution create a strong framework for human rights in Zimbabwe. Other positive provisions include the reinstatement of citizenship to thousands of Zimbabweans, clauses on business and human rights paving the way for the development of a nuanced and robust jurisprudence; and a section on achieving substantive equality and freedom from discrimination. Mechanisms to ensure government accountability and transparency stand as values of the state and principles of good governance that are binding at every level.

The Constitution struggles, however, with a combination of regrettable provisions, out-dated and unconstitutional laws and draconian legislation that compete with the Constitution such as the Public Order and Security Act. Excessive manipulation of mechanisms mandated in the Constitution, such as the Anti-Corruption Commission, through extreme executive branch involvement and constant challenges to any sort of checks and balances dilute the power of these mechanisms in practice. This weak commitment to rule of law and lack of judicial independence constitute a great threat to constitutional rights in Zimbabwe. The primary challenge since the adoption of the Constitution in 2013 has been implementation, with the government delaying laws mandated in the new Constitution and subsequently delaying its full implementation and beneficial effects. The retention of oppressive legislation and routine violations of the Constitution itself by the government have seriously called their commitment to legitimate reform into question.

Zimbabwe's 2013 Constitution was the result of a participatory process however contested but the ideals it enshrines must be implemented in practice for it to truly serve as the legitimate foundation of governance and protection of the rights of its people.

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