



On the correct path or lost in the forest?

An assessment of State Compliance
with the New Constitution



CIVIC SOCIETY MONITORING MECHANISM (CISOMM)

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Compliance with the New
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About CISOMM

CISOMM is a group of Civil Society Organisations which, through shared and agreed benchmarks, focuses on monitoring and assessing the adherence to and implementation of the Interparty Political Agreement (IPA) by those bound to its provisions through the work of five (5) main Thematic Clusters. These are Economy and Development (incorporating Economic Recovery, Land, Humanitarian and Food Assistance), Constitutional Reform Process, Political Transition and Justice (incorporating Equality, National Healing, Cohesion and Unity, Traditional Leaders, and National Youth Programme), Institutional Transformation (incorporating Rule of Law, State Institutions, Legislative Agenda, the Media and National Institutions) and Respect for Human Rights and Operating Environment (incorporating Rule of Law, Freedom of Expression and Communication, Free Political Activity, Freedom of Assembly and Association, and Security of Persons and Prevention of Violence). It is now involved in constitutional literacy and monitoring the implementation of the Zimbabwe's new constitution.

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"... we have violated the constitution left, right and centre ... we have been criminals on this one"

– President Robert Mugabe¹

Introduction

Mr Robert Mugabe has been Zimbabwe's political leader for 34 years. In that time, there have been numerous instances of overreach beyond the already extensive powers granted to him as President. It is fair to state that where compliance with constitutional constraints was viewed as too inconvenient or politically costly, these constraints were ignored without significant or direct repercussion.² Several new constitutional constraints were placed upon presidential power during the era of the Inclusive Government. Schedule 8 to the then Constitution set out the manner in which the Inclusive Government was to be structured and the distribution of executive power. Its provisions, which overrode any others to the contrary, established a limitation upon the number of Ministers to be appointed (31). It required that the President obtain the consent or agreement of the Prime Minister (the President's partner in what some described as a power-sharing arrangement) before appointing permanent secretaries, provincial governors, judges, ambassadors and the heads of the security sector. These provisions were all disregarded by the President.³

The lack of compliance with provisions of the Constitution has been facilitated, since 2001, by the failure of the Courts to restrain the executive in accordance with the principle of the separation of powers. Thus any hope that the new Constitution adopted by Zimbabwe in mid-2013 would check executive excess appears to be ill-founded as there has been a seamless transition into the new constitutional era, with violations taking place from the very inception of the new Charter.

It is these violations which are detailed below.

The New Constitution

The new Constitution came into effect in two stages. Provisions relating to citizenship; the conduct of elections; provincial and local government; the election of Members of Parliament; summoning of Parliament; and the conduct of the security sector, amongst others, came into effect on 22 May 2013. This is when the new Constitution became law following publication in the Government

1 "I will Comply with Court Ruling" *The Herald* 03.06.13

2 An obvious example of this, is the President's failure to call three by-elections which became due in 2009. Despite attempts to have the Court compel these elections, delays in the legal process and repeated postponements allowed by the Courts meant that the by-elections had not been held by the time the Seventh Parliament was dissolved. For an analysis of how this was engineered with the assistance of the Courts, see *A Date With Mugabe* D. Matyszak RAU April, 2013.

3 The Prime Minister's consent was not sought for any of these appointments. 41 Ministers were appointed rather than 31. In dismissing a court application challenging the appointment of the additional Ministers, Chiweshe JP claimed a "liberal" rather than strict approach to constitutional interpretation and held that the purpose of the Constitution was to create stability and setting aside the "anomalous" appointments would cause "instability" and defeat the intentions of the Constitution. He also found that "in any event the figures have not been outrageously exceeded given the complexity of Government administration. Further, the proportion of representation as among the three parties remains largely the same" – *Kufa & Anor v The President of the Republic of Zimbabwe N.O. & Nine Ors* HC 3045/10. When the matter went on appeal none sought to advance the reasoning of Chiweshe JP. The Constitutional Court has yet to issue a judgment, despite the case having been heard in July 2012.

Gazette – "publication day". The remainder came into force on the "effective date" - the day the President was sworn into office. The elections pursuant to enactment of the Constitution took place on 31 July 2013. President Mugabe was, after a short delay,⁴ sworn into office on 22 August 2013.

The process of developing the new Constitution was more protracted than had been anticipated.⁵ The draft Constitution was only presented to Parliament on 8 May 2013. This was shortly before the mandatory dissolution of Parliament on 29 June 2013 when its five-year term would come to an end. Thus, there was very little time for the enactment of legislation required to give effect to several provisions of the new Constitution or to amend or repeal existing incompatible legislation. However, the content of the Constitution would have been known with a sufficient degree of accuracy several weeks ahead of the National Referendum of 16 March 2013 which approved the draft. A contrary outcome to the Referendum was extremely improbable given the political configuration of the time.⁶ Draft Bills necessitated by the new Constitution could have been prepared well in advance of the presentation of the Constitutional Bill to Parliament and its passage into law. They were not.

Two consequences of this failure to enact necessary legislation prior to the dissolution of Parliament need to be considered for present purposes.

First, the failure to amend legislation to align existing laws with the new Constitution does not necessarily result in constitutional violations as a matter of law (as opposed to practice). For instance, the new Constitution limits to 48 hours the time a suspect may remain in custody before being brought before a court. The provisions in the Criminal Procedure and Evidence Act⁷ allowing for a period of 96 hours before this obligation arises, and indefinite warrants for further detention, are clearly no longer in conformity with the Constitution. They do not violate the Constitution however; rather, they are void and unenforceable as a matter of law.⁸ If, in practice, the police detain any suspect longer than this period, the action will not only be unlawful but will also be a violation of the Constitution and the rights contained therein. In other words, the incompatible pre-existing laws are not a violation of the Constitution *per se*, but any action taken in terms thereof is. There are several hundred sections of various Acts which have become unconstitutional in this manner, and the government has announced an intention to introduce a General Laws Amendment Act as soon as possible to remedy this situation.⁹ If it does not do so, the Constitutional Court is likely to be inundated with applications for declaratory orders relating to the constitutionality of these laws.

Second, the absence of legislation necessary to give effect to the demands of the new Constitution meant that mandatory constitutional obligations were not implemented. Several clauses of the Constitution were thus violated the moment they became law. Contrary to the first consideration, while the Constitution automatically addresses the issue of the unconstitutionality of pre-existing laws, it cannot, in most instances, address the omission of laws which ought to have been brought into being to give effect to certain provisions.

4 Occasioned by the filing of a petition challenging the presidential election (discussed below)

5 The GPA of September 2008 (see below) established an 18 month timetable.

6 All the main political parties and many NGOs lobbied for a "yes" vote – see *Politicians Push For Yes Vote in Referendum* IRIN 13.03.13. Chapter 09:07 section 32.

8 Section 2(1) of the new Constitution.

9 See "Constitutional Laws Set For Harmonisation" *The Sunday Mail* 23.02.14. The Government stated some 400 amendments are required for this purpose, though the estimate has varied widely – see "Govt Sets Up Committee to Re-Align Laws" *The Sunday Mail* 27.10.13 where some 100 laws per Ministry is estimated.

Violations by Omission

Some violations of the Constitution by omission have been averted by a semantic ploy in relation to the establishment of bodies or Commissions. In the past, the obligation to create such bodies or Commissions has been established by the use of the word "shall". The Constitution previously stated, for example, that "There *shall* be a Public Service Commission...".¹⁰ In this way, an obligation was created to establish that Commission. Once the Constitution was in effect, this constitutional obligation remained unfulfilled for so long as no such Commission was in place. It appears that contemporary drafting prefers the present indicative "is" for clauses such as these.¹¹ Accordingly, the wording used in the establishment of Commissions under the new Constitution appears in this form: "There *is* a Commission." Similarly, the Constitution provides that "There is a National Prosecuting Authority". This formulation initially appears to allow the argument, for example, that the National Prosecuting Authority is established as a juristic entity, as a matter of law, simply by this constitutional diktat. On this reading, the NPA is established by the clause in the Constitution itself. However, although bodies such as the National Prosecuting Authority and some Commissions may be said to have been established by the Constitution itself, and that the Constitution cannot thus be said to have been violated by a failure to establish these entities, in each case further steps were required to prevent acting outside the provisions of the Constitution.

(a) The National Prosecuting Authority and the Attorney-General

The circumstances surrounding the newly created National Prosecuting Authority provide one of the most egregious examples of the government simply proceeding as is expedient rather than in accordance with constitutional requirements.

Under the previous Constitution, the Attorney-General was in charge of, and headed, all prosecutions in the country. He also undertook civil litigation, drafting and acted as the government's chief legal advisor.

The new Constitution removes criminal prosecutions from the purview of the Attorney-General. It establishes a National Prosecuting Authority for this task, headed by a Prosecutor-General. The Constitution sets out the qualifications which must be held by any appointee to this office, the manner of appointment, and the need to be sworn into office. However, the Constitution also includes, in the Sixth Schedule, various interim provisions to deal with the transition from the old to the new Constitution. The Sixth Schedule is to prevail, to the extent of any inconsistency, over all other provisions in the Constitution. Several clauses in this Schedule concern the position of those already in public office at the time provisions of the new Constitution come into effect. One of these specifically addresses the offices of the Attorney-General and Prosecutor-General, and is to the following effect:

The person who held office as Attorney-General immediately before the effective date continues in office as Prosecutor-General on and after that day.¹²

Accordingly, by virtue of this clause alone, and without the need for any further steps, the person who was the Attorney-General on 22 August 2103, Johannes Tomana, automatically became the Prosecutor-General on that date. He also then ceased to be the Attorney-General.¹³ However, notwithstanding this

10 Section 74 of the old Constitution.

11 The difficulty then, as will be seen, is that the clause appears descriptive rather than prescriptive.

12 Paragraph 19(2) of the Sixth Schedule.

13 It is not sustainable, notwithstanding paragraph 13 of the Sixth Schedule of the Constitution, to argue that Mr Tomana remained in office as AG while simultaneously occupying the post of PG. The intention of the Constitution is clearly otherwise, and was not the understanding of Mr Tomana himself – see the interview with Tomana *Law Enforcement: PG Scales up Effectiveness* reported in *The Herald* 30.11.13.

effect of the Constitution, after 22 August 2013, Mr Tomana continued to regard himself as the Attorney-General. This was a clear violation of the Constitution. Furthermore, Mr Tomana continued to carry out all criminal prosecutions through the office of the Attorney-General, even though the Attorney-General's power to do so had been removed and accorded to the National Prosecuting Authority.¹⁴ All prosecutions carried out under the authority of the Attorney-General, as if the new Constitution had not come into being, were thus unconstitutional over this period, and continue to be unconstitutional for as long as Mr Tomana continues as both the Prosecutor General and the Attorney General.

Despite what should have been Mr Tomana's automatic assumption of the Office of Prosecutor-General on 22 August 2013, the President purported to swear Mr Tomana into office on 13 November 2013, thus arbitrarily applying one of the requirements for the assumption of office by a Prosecutor-General (which had been rendered inapplicable for the first Prosecutor-General by the Sixth Schedule¹⁵) but not the others. Thus, in the face of an unambiguous constitutional provision to the contrary, until November 2013, the President and his Administration, decided that the position of Attorney-General would remain filled, and the position of Prosecutor-General would remain vacant until determined otherwise by the President - rather than as determined by the Constitution.

Further violations of the Constitution relating to the National Prosecuting Authority also arose through the failure to enact necessary legislation. The Constitution requires that there "must be"¹⁶ an Act of Parliament to provide for the conditions of service of the Prosecutor-General. In the absence of this legislation as required, it is unknown what Mr Tomana's conditions of service are, or by whom, or how, they have been set. The Prosecutor-General is not part of the civil service.¹⁷ The executive arm of Government appears to have simply assumed the authority to do that which the Constitution specifically vests in Parliament. As noted, it is the yet-to-be-appointed (by the President¹⁸) Attorney-General¹⁹ who has the responsibility for drafting the necessary legislation for passage by Parliament.²⁰

The Constitution also requires that the absent Act of Parliament provide for the structure and organisation of the National Prosecuting Authority.²¹ In whatever way the body directing prosecutions is currently being organised and structured and whoever has arrogated authority to him or herself to take responsibility for so doing, such actions are not authorised by the Constitution. The NPA Board, which the constitutionally required Act is to establish to employ persons to assist the Prosecutor-General in his or her functions, has thus also not been brought into being. Those engaged to assist the Prosecutor-General from the time the Constitution became effective have not been employed in accordance with the demands of the Constitution; neither do they hold the qualifications nor work under the conditions of service that the Constitution requires.²² Their authority to undertake criminal prosecutions is, consequently, constitutionally questionable.

A National Prosecuting Authority Bill, which will remedy these violations of the Constitution, was finally presented in Parliament on 26 February 2014, seven months after it ought to have been in place. It has yet to be passed into law.

14 Section 114(4) of the new Constitution. While an Act of Parliament may give prosecuting authority to the AG – sections 114(4)(e) and 263 (the latter section most probably being intended only to cater for private prosecutions in any event) no such legislation has been enacted.

15 Section 259(6) of the new Constitution. Compare that section with subsections 259(3) and 259(4).

16 Fortunately, in this instance, it does not purport to describe a non-existent reality, and claim that "there is" an Act of Parliament.

17 Section 259(2) of the Constitution.

18 Section 114(1).

19 Mr Tomana, by continuing with the duties of the Attorney-General thus had the opportunity of drafting the legislation which would determine his own conditions of service when he assumed those of the Prosecutor-General.

20 Section 114(3)(c) of the Constitution.

21 Section 259(10).

22 These too must be stipulated by an Act of Parliament.

It should also be noted that when Mr Tomana ceased to be Attorney-General and became Prosecutor-General, a further constitutional violation was highlighted - one which starkly reveals the anomaly of the use of the present indicative tense, not only for the establishment of bodies and Commissions, but in relation to staffing of these entities as well. Rather than stating that there "shall be an Attorney-General"²³ as in the previous Constitution, the new Constitution proclaims "There is an Attorney-General." There manifestly is not. No such appointment has been made.

The absence of an Attorney-General also gives rise to further violations of the Constitution. Specific functions are charged to the Attorney-General, or may be carried out only by those acting on the Attorney-General's instructions. Any of these functions carried out other than by the Attorney-General, or persons acting on his instructions, are of doubtful constitutionality. This would include the bills drafted in this period for presentation in Parliament. Since the Constitution has determined that "there is" an Attorney-General, presumably for this reason, it makes no provision as to what is to happen (for example, for authority to be assumed by a deputy AG) when there is not an Attorney-General - as is presently the case.

(b) The "Independent Commissions Supporting Democracy"²⁴

The Constitution is currently being violated by the fact that democracy is presently unsupported by three of the five Commissions which the drafters deemed necessary for this purpose. In the instances of two of these five,²⁵ the Gender Commission and the National Peace and Reconciliation Commission, the Constitution proclaims that "there is" such a Commission. However, neither has been constituted in practice as required. The comments made above regarding the use of the present indicative tense apply equally here in relation to the establishment and staffing of these Commissions. Further, no enabling Acts for each have been legislated; nor were they announced as forming part of Parliament's legislative agenda for the coming year.²⁶

(c) Other Commissions

Many of the other Commissions have also not been constituted in practice, or have not been rendered fully quorate, with the appointment of some members outstanding.

(i) The Zimbabwe Anti-Corruption Commission

The previous Constitution provided for a Zimbabwe Anti-Corruption Commission. The new Constitution has a Commission of the same name, but which is to be constituted differently. Thus it should be regarded as a new institution. Once again the use of the present indicative tense, that is, "There is a Commission...." causes difficulty. In this instance, the tense is possibly correct as at present there *is* a Zimbabwe Anti-Corruption Commission. However, the new Constitution provides that the Commission is "to be known" as the Zimbabwe Anti-Corruption Commission, suggesting that the body adopting this moniker is not the apparently extant Commission of the same name. Notwithstanding the establishment of a new and

23 Section 76 of the old Constitution.

24 The title of Chapter 12 of the Constitution, where provision is made for these Commissions.

25 The other three are the Zimbabwe Electoral Commission, the Zimbabwe Human Rights Commission and the Zimbabwe Media Commission.

26 Only 6 of 27 Bills mentioned by the President when opening the 8th Parliament on the 17th September, 2013 were relevant to compliance with Constitutional requirements - see *Bill Watch 47/2013* Veritas 20.11.13. There have been some suggestions that an enabling Bill for the National Peace and Reconciliation Commission is being drafted. However, the 2014 budget provided no funds for this Commission. When the Parliamentary Legal Committee held that the failure to allot funds for mandatory Constitutional Commissions would render any Apportionment Act unconstitutional, a paltry \$100 000 was allocated to this Commission, clearly insufficient to sustain any meaningful function.

differently constituted Zimbabwe Anti-Corruption Commission, the Commission of the same name under the old Constitution claims continued existence and continues to incur expenses.²⁷ However, even if still extant, the Commission is not properly constituted. The two-year terms of office of all Commissioners except the Chairperson²⁸, expired at the end of August 2013. None appears to have been properly²⁹ re-appointed for the further two years permitted by the Anti-Corruption Act.³⁰ It could be contended that members of the former Zimbabwe Anti-Corruption Commission continued in office as members of the new Commission. This notion gains some support from Paragraph 13 of the Sixth Schedule to the Constitution, which provides as follows:

Any person who, immediately before the effective date, held or acted in a public office under the former Constitution continues to hold or act in that office, **or the equivalent office under this Constitution**, on the same conditions of service until the expiry of his or her term of office under those conditions of service or until he or she resigns, retires or is removed from office in terms of this Constitution or those conditions of service, as the case may be

The continued existence of the Zimbabwe Anti-Corruption Commission leads to considerable legal confusion. However, the new Constitution requires a new Zimbabwe Anti-Corruption Commission differently constituted from the old. This Commission has not been constituted as required by the Constitution. This is a further violation of the Charter by omission. It is worth noting here that the Anti-Corruption Act requires amendment to meet the requirements of, and remove the conflicts with, the new Constitution.

(ii) The Civil Service Commission

If Commissioners of the Anti-Corruption Commission have remained in office, albeit in the new Commission, by virtue of Paragraph 13 of Part Four of the Sixth Schedule (quoted above), then the Paragraph has been, somewhat, arbitrarily applied. The new Constitution replaces the Public Service Commission with a Civil Service Commission, which is differently constituted from its predecessor. However, the effect of Paragraph 13 seems to be that the former Chairperson of the Public Service Commission "continues to hold or act in that office, or the equivalent office under [the new] Constitution" i.e. continues to hold office as the Chairperson of the Civil Service Commission. Notwithstanding this provision, the government-controlled Herald newspaper reported an announcement by the Chief Secretary to the President and the Cabinet stating that the Chairperson of the Public Service Commission under the old Constitution had been "appointed" as Chairperson of the Civil Service Commission, in the following terms³¹:

It has pleased His Excellency the President and Commander-in-Chief of the Zimbabwe Defence Forces to appoint Dr Mariyawanda Nzuwah Chairperson of the Civil Service Commission in terms of Section (1) [*sic*] of the Constitution of Zimbabwe Amendment No (20) Act 2013.

There was no indication that the Chairperson had taken the oaths of loyalty and of office before the President as required by subsection 320(5) of the Constitution.

27 This has reportedly included salaries for the Commissioners whose terms of office have expired - see "Pay Scandal Rocks Anti-Graft Body" *The Herald* 27.02.14.

28 The Chairperson's term of office was three years; those of other Commissioners two - section 6 of the Anti-Corruption Act.

29 According to the Herald report above, the responsible Ministry, the Ministry for Home Affairs, has extended the contracts of the Commissioners. There is no provision in the Act for contracts to be "extended" in this manner. Under the Act the Commissioners may be "reappointed" for two years. This confusion is symptomatic of the legal mess created by the purported continued existence of the Commission established under the old Constitution. Appointments to the Anti-Corruption Commission must be made in terms of the new Constitution and not defunct provisions of the Act. But then such appointments ought to be made to the new Commission and not one which also ought to be defunct.

30 Chapter 9:22 section 6(2)

31 Dr. Misheck Sibanda. Dr Nzuwa returned the honour by making an equivalent announcement pertaining to Dr Sibanda - though without the error referencing the section of the Constitution, as reported in *The Herald*: "President Reappoints Sibanda, Nzuwa" *The Herald* 20.11.13.

(iii) The Security Service Commissions

Under both the old and the new Constitutions, the Chairperson of the Public or Civil Service Commission is *ex officio* the Chairperson of the security sector Commissions. These are (using the nomenclature of the new Constitution) the Police Service Commission, the Defence Forces Service Commission and the Prisons and Correctional Service Commission. While the Herald report stated that the Chairperson had been "appointed" (not sworn in) to these Commissions, there was no mention that other requisite members of these security sector Commissions had been appointed. It thus appears that all have yet to be constituted as required.

(iv) The Judicial Service Commission

Other than the three Commissions which were already in place and properly constituted when the new Constitution came into full effect,³² there has only been an attempt to constitute one of all the remaining Commissions; the Judicial Services Commission (JSC). However, this Commission is only partially, and thus improperly, constituted. Only 10 of the establishment of 13 Commissioners have been sworn³³ into office.³⁴ One of those missing is the Attorney-General, who will be an *ex officio* Commissioner of the JSC.³⁵ Accordingly, until an Attorney-General is appointed (see above) the JSC cannot be properly constituted. Furthermore, the five other *ex officio* members are all men as are three of the other sworn Commissioners.³⁶ Thus, even if the three remaining vacancies are filled by women, there will be no compliance with the requirement for gender balance stipulated by section 17(1)(b)(ii) of the Constitution:

[T]he State must take all measures, including legislative measures, needed to ensure that

(i) ...

(ii) **women constitute at least half the membership of all Commissions** and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament ...

(v) The Land Commission

As is the case with the Gender Commission and the National Peace and Reconciliation Commission, there has not been any attempt to constitute the Land Commission. Unlike the former two, the need to pass an enabling Act has, at least, been mentioned as part of the Eighth Parliament's legislative agenda³⁷ and by the Lands and Rural Resettlement Minister.³⁸ However, to date, this Bill has not been introduced in Parliament.

32 The Zimbabwe Electoral Commission, The Zimbabwe Media Commission and the Zimbabwe Human Rights Commission, on account of there being no change in the manner in which they are constituted and enabling legislation already being in place.

33 In terms of section 320(5) the oaths of loyalty and office are made before the President or person authorised by the President. It is assumed that the Chief Justice was so authorised, but unknown how the Chief Justice then took the oath of office.

34 They were sworn into office by the Chief Justice, Godfrey Chidyausiku, on 3 February 2014

35 The other two missing Commissioners are a lecturer in law to be appointed by a university association of law teachers, and a person with seven years experience in human resources management to be appointed by the President.

36 The sworn *ex officio* Commissioners are Chief Justice Godfrey Chidyausiku, Deputy Chief Justice Luke Malaba, Judge-President George Chiweshe, Chief Magistrate Mishrod Guvamombe, Chairperson of the Civil Service Commission, Dr Mariyawanda Nzuwah. The other males are the one judge nominated by judges, Happias Zhou and two of the three legal practitioners required, Mr Lloyd Mhishi and Mr Josphat Tshuma – the third legal practitioner is a woman, Ms Priscilla Madzonga. The only other woman at present is Ms Priscilla Mutembwa, the required accountant – see paragraphs 189(1)(a) – (k) of the Constitution.

37 During the President's address at the opening of the Eighth Parliament on 17.09.13 – see "Legislative Agenda for Eighth Parliament" *The Herald* 18.09.13

38 Dr. Douglas Mombeshora - see "Demand For Land Surges" *The Herald* 14.02.14.

(d) Devolution and Local Government

The question of devolution was fiercely debated by the main political parties during the constitution-making process.³⁹ The MDC formations, particularly that led by Professor Welshman Ncube, argued strongly for devolution and the movement of power away from central government. On the other hand, ZANU PF wished to retain the powerful control of central government over local government and rural administration. Other than in the metropolitan provinces, a key component of this control had been exercised previously by Provincial Governors appointed in terms of the Provincial Councils and Administration Act⁴⁰ for two-year terms of office. The importance of this means of control is reflected in President Mugabe's actions during the course of the Inclusive Government. When Provincial Governors' terms of office expired, President Mugabe proceeded to appoint party stalwarts into these posts contrary to the then provisions of the Constitution,⁴¹ and in violation of a reported understanding that these ten posts would be apportioned to the parties in an agreed ratio.

A second aspect of this administrative style should also be considered. Successive administrations under President Mugabe have tended to regard executive power as plenary – in other words, that government officials may do whatever they deem necessary to govern, unless constrained by legislation. For this reason, in addition to the Constitution, general statutes are frequently regarded by President Mugabe and his Administration as restricting executive power, rather than enabling and authorising its use.⁴²

For instance, in 2011, the Attorney-General's office, representing the Minister of State for National Security in the President's Office, opposed an application for the return of a laptop computer and other property seized by an intelligence operative from a human rights activist. He argued that there is no legislation governing the operations of the intelligence services and thus nothing which rendered the seizure unlawful.⁴³ Notably, a clause in an early draft of the new Constitution proposing legislation to govern the operations of the intelligence services was removed at the behest of ZANU PF negotiators, allowing the matter to be left to "Presidential Directive".⁴⁴

Similarly, there are Provincial and District Administrators stationed throughout the country appointed by the Minister of Local Government who previously operated in collaboration with the Provincial Governor. While the District Administrators were, and are, given functions and powers by numerous statutes, they are tautologically defined in these statutes as simply being "the person[s] appointed as such for the district". There is no legislation providing for these posts, or the qualifications or conditions of service of the incumbents. The government has simply conferred the discretion to appoint these officers and to determine their conditions of service to the Minister of Local Government without an enabling Act. Yet they exercised, and continue to exercise, a considerable amount of power in all rural areas of Zimbabwe.⁴⁵ The Provincial Governors, in practice, also exercised much more power than that conferred by the Act.

39 See for example "Devolution of Power Rejected" *The Herald* 14.05.12.

40 Chapter 29:11.

41 Schedule 8 to the Constitution as read with section 115, provided that appointments the President was required to make under and in terms of the Constitution or any Act of Parliament must be made after securing the consent or agreement of the Prime Minister. The High Court has yet to adjudicate on the legal challenge to these appointments.

42 This is notwithstanding the extensive powers often conferred by such statutes.

43 Fortunately, the defence was not accepted by the court – see *Farai Maguwu v the Co Ministers of Home Affairs (N.O.) & Four Ors HC 8895/11*.

44 Section 224(1). The Intelligence Services remain as a "Department for State Security in the President's Office". Interestingly the redaction of the clause providing for a law to establish the intelligence services and govern its operations was not catered for elsewhere in the Constitution, thus, for example, section 219(2)(a) requires the Police Service to "exercise its functions in co-operation with any intelligence service that may be established by law" – not a Presidential Directive, from which it is distinguished.

45 See *Formal Structures of Power in Zimbabwe's Rural Areas* D Matyszak, RAU, November 2010.

In the drawing of the new Constitution, the ZANU PF negotiating team was loathe to allow this method of control over rural areas to be extinguished by the MDCs' model for local government and devolution.

The compromise which emerged from the resultant contestation was a highly diluted form of devolution. The new Constitution does, however, state that the issue should be approached on the basis of this basic principle:

Whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively.

In accordance with this principle, the new Constitution provided for the establishment of Provincial Councils for each of the eight non-metropolitan provinces⁴⁶ composed of *ex officio* members drawn from the Senate and National of Assembly, and ten members appointed on the basis of proportional representation in ratios tied to the result of parliamentary elections. Most importantly, the post of Provincial Governor, so central to President Mugabe's *modus operandi* of rural governance was abolished. Instead the Provincial Councils are to be headed by a Chairperson chosen by the President from a list of two, compiled by the party with the majority of seats in the province.⁴⁷

President Mugabe and his Administration responded to these provisions in the new Constitution, which removed the centralised and powerful mechanisms of control over rural governance described above, by simply ignoring them. The new Constitution requires that "an Act of Parliament must make provision ... for the establishment and functions of Provincial Councils."⁴⁸ No such enabling Act has been passed or even seems to form part of the immediate agenda for the Eighth Parliament. There is no apparent allocation⁴⁹ for the operations of the Provincial Councils in the budget for 2014.⁵⁰ Furthermore, in direct conflict with the principles of devolution set out in the Constitution, President Mugabe appointed ten Ministers of State for Provincial Affairs. Many of the people appointed as these Ministers were in fact the Provincial Governors of their respective provinces before the abolition of these posts.⁵¹ They are essentially Provincial Governors in all but name, and have seamlessly continued with the same activities and functions carried out by Provincial Governors.⁵² They do so without any legislation which confers such power and have simply arrogated to themselves the authority they hold is necessary to exercise whatever power they deem appropriate to their position. The clear intention of the Constitution has thus been circumvented.

(e) Absent Acts of Parliament

The Constitution stipulates that Acts of Parliament "may" in some instances, and "must" in others, provide for a variety of statutory offices and functions. Where the prescription of offices and functions by statute is obligatory and cannot be accommodated by amendment to existing Acts, it is mandatory that new statutes are enacted to meet these constitutional requirements. Acts in this category, but which have not been enacted, are those required for the following:

- (i) The establishment a National Prosecuting Authority and its functions, as noted above;

46 Harare and Bulawayo Metropolitan Provinces.

47 Section 272 of the Constitution.

48 Section 273(1).

49 See *Blue Book: 2014 Estimates of Expenditure* Zimbabwe Government presented to Parliament on 19.12.14.

50 See also "No Budget for Provincial Councils" *The Zimbabwe Independent* 23.08.13.

51 Jason Machaya (Midlands), Chris Mushowe (Manicaland) Martin Dinha (Mashonaland Central) Faber Chidarikire (Mashonaland West) and Cain Mathema (Matabeleland North – moved from Bulawayo)

52 See for example "Flood Wreaks Havoc in Masvingo" *The Herald* 05.02.14; *Minister Threats to Expel NGOs* SWRadio 01.10.13 "Bhasikiti Vows to Fight Corruption" *The Zimbabwean* 26.11.13.

- (ii) The right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair together with rights of review,⁵³
- (iii) A code of conduct for Vice-Presidents, Ministers and Deputy Ministers.⁵⁴
- (iv) The conduct of elections and referendums.⁵⁵
- (v) An effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services and for remedying: any harm caused by such misconduct.
- (vi) The establishment, structure and staff of provincial and metropolitan councils and the manner in which they exercise their functions.

There are two ways in which the requirement for these statutes may be read. One is that it is an Act of Parliament which must provide as stipulated and the desired outcome is not to be achieved by any other instrument or in any other way. The other is to read the provisions as meaning that Acts of Parliament must be in place to deal with these issues. None of these measures are in place.

Violations by Commission

The violations by omission, which were automatic the moment the new Constitution came into force, were quickly followed by violations by commission.

(a) The Appointment of Ministers

It has already been noted above, that the appointments of Ministers of State for Provincial Affairs were not in keeping with the principles of devolution set out in the new Constitution. The appointment of other Ministers also violated the Constitution in several ways. Section 17 of the Constitution, noted above in regard to the JSC, provides:

- (1) The State must promote full gender balance in Zimbabwean society, and in particular—
 - (a) ...;
 - (b) the State must take all measures, including legislative measures, needed to ensure that—
 - (i) both genders are equally represented in all institutions and agencies of government at every level.

There was absolutely no regard to this requirement by the President when appointing the Cabinet constituting the new Government after the elections of 31 July 2013. Women only comprise 3 of Mugabe's 26-member Cabinet;⁵⁶ 1 of the 3 "Ministers of State"; 2 of the 10 Ministers of State for Provincial Affairs; and 5 of the 24 Deputy Ministers. In the face of resultant protests from women's groups⁵⁷ President Mugabe responded unabashedly:

53 Section 62 of the Constitution.

54 Section 106 of the Constitution.

55 Section 157 of the Constitution. The Regulations made by the President governing registration, proportional representation and other electoral matters, which purported to amend the Electoral Act for the 2013 election have, if they were not invalid from the first, lapsed in terms of the Presidential Powers (Temporary Measures) Act (see below). These issues are now not governed by any legislation, let alone an Act of Parliament as required. An appropriate amendment Bill has, however, been presented to Parliament.

56 Oppah Muchinguri (Women's Affairs), Olivia Muchena (Higher Education), and Sithembiso Nyoni (Small & Medium Enterprises).

57 See "Women Ministers: Mugabe Out of Line" *The Zimbabwean* 18.09.13.

Education is for all now. It is mixed. The yield is the same. It is no longer necessary for us to have affirmative action, it is now free for all. Let women contest alongside men without any preferential treatment.⁵⁸

The fact that the drafters of the Constitution and the legislature had thought otherwise had clearly not been taken into consideration.

Somewhat contrarily, at the same time, President Mugabe suggested that there were no other women sufficiently qualified for the posts:

... this time around, we had to do affirmative action but the women would not emerge ...⁵⁹

This was a view repeated during an interview marking his 90th birthday when asked to comment on his Cabinet:

Yes, it is a good blend I think. Unfortunately we do not have many ladies and the women are unhappy about that. But we had to vet them and we can't just get any person because of the dress. Who is that person in the dress?⁶⁰

Apart from the principle of affirmative action to ensure gender balance demanded by the Constitution, a second constitutional requirement was ignored by the President when making ministerial appointments. In Chapter Two of the Constitution, which sets out the country's National Objectives, section 9 provides:

The State must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution, and in particular—

(a) appointments to public offices must be made primarily on the basis of merit;

And under Chapter Nine the "Principles of Public Administration and Leadership", section 194(2) provides:

Appointments to offices in all tiers of government, including government institutions and agencies and government-controlled entities and other public enterprises, must be made primarily on the basis of merit.⁶¹

The subjectivity inherent in the term "merit" must be held to be qualified by section 9, which indicates that merit must be assessed by a Minister's ability to "*implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity*". After a lengthy delay before revealing the composition of the new Government, the new ministers were sworn in on 11 September 2013. President Mugabe justified his choice of Ministers by reference⁶² to loyalty to ZANU PF, education and community support and the need to balance representation from the provinces,⁶³ stating:

58 See *Shock as Mugabe Says Few Women Educated Enough to be Ministers* SWRadio 13.09.13.

59 "Mugabe Defends Appointments" *The Daily News* 12.09.13.

60 The interview was broadcast on ZBC ahead of Mugabe's birthday on the 20.02.13 and the transcript published in *The Herald* in three parts from the 22.02.13.

61 The phrasing "*primarily on merit*" allows for some cynical speculation as to the nature of the "non-meritorious" criteria.

62 Reported in the order which follows – see "Mugabe Explains Selection Criteria" *The Herald* 12.09.13.

63 Regarded by many as something of a euphemism for factional and ethnic considerations – see "Cabinet Appointments Bolster Mugabe Faction" *The Financial Gazette* 19.09.13.

... how much of Zanu PF are you⁶⁴ ... how long have you been with us and how educated are you?... Men, women the same ... we have good principles ... Was he a winner and also respected by his own community... are all our provinces represented as much as possible ...?⁶⁵

The representation of the different provinces could be held to be in conformity with section 18(1) of the Constitution which is to the following effect:

The State must promote the fair representation of all Zimbabwe's regions in all institutions and agencies of government at every level.

None of the other mandatory constitutional criteria are mentioned.

Furthermore, a Minister's duties are determined, to a great extent, by the legislation for which they have been assigned responsibility. Several Ministers have no Acts to administer, raising the question as to how they might be considered competent to carry out specified duties when those duties are unknown. One such Minister is the "Minister of State for Liaising on Psychomotor Activities in Education". The peculiar title of this post⁶⁶ suggests more a pressing need to find a post for an individual⁶⁷ than a pressing need to find an individual for a post – which is not in accordance with the principles of good governance provided for in section 9 of the Constitution.

(b) Members of Parliament and Local Authorities

Several Members of Parliament appear to occupy their seats other than in conformity with constitutional requirements. Some ten members reportedly⁶⁸ have yet to be sworn in as required by section 128 of the Constitution. Further, section 129 of the Constitution provides that the seat of a Member of Parliament will immediately become vacant if such a Member:

... was a public officer or a member or employee of a statutory body, a government-controlled entity, a provincial or metropolitan council or a local authority on the date he or she was declared as a Member of Parliament, and he or she fails to relinquish that office, membership or employment within thirty days after that date.

It appears that a considerable number of elected Members of Parliament were members or employees in the specified categories and thus were required to relinquish these offices, but did not do so within the stipulated period.

There is some legal uncertainty, however, in regard to section 129. Section 129 only became effective when the President assumed office, i.e. on the "effective date". Parliamentary candidates were declared elected the moment the votes were tallied at constituency level during elections, before the President assumed office.⁶⁹ Thus section 129 was not in effect when Members were declared duly elected.⁷⁰ However, if section 129 was not in effect on the date a Member was declared duly elected then the old Constitution would apply. Its provisions provide similarly, i.e. that a parliamentary seat becomes vacant if a Member:

64 Recently presidential spokesperson, George Charamba, admitted that the appointment of senior government officials had been based on "political credentials" - see "Govt to review Appointment Criteria" *The Herald* 20.02.13.

65 Speaking partly in Shona and partly in English, quoted in "President Explains Selection Criteria" (fn 63 above).

66 President Mugabe was constrained to explain to the public what this post would entail - to "operationalise the Nziramasanga Commission Report on Education and Training" - see "President Explains Psychomotor Portfolio's Mandate" *The Herald* 08.10.13.

67 Former Provincial Governor Josiah Hungwe.

68 Per Gordon Moyo MDC-T MP for Makokoba at a SAPES seminar 27.02.14.

69 Section 66(1) of the Electoral Act [Chapter 2:13].

70 It is arguable however, that section 129 is a provision "relating to the election of Members of Parliament and the summoning of Parliament after a general election" and one which came into effect on publication day (Paragraph 3(1)(d) of Part 3 of the Sixth Schedule).

being a public officer or a member or employee of a statutory body or local authority at the time he became a member of Parliament, ... fails to terminate his appointment or employment as such within *fourteen days* of the date he became a member of Parliament.

The only difference is the shorter time period to relinquish office. There does not appear to have been compliance with this provision by the relevant members.⁷¹ Their seats should automatically have become vacant.

In terms of section 278(1) of the Constitution, section 129 applies equally, *mutatis mutandis*, to members of local authorities, many of whom were likewise members or employees of public bodies ahead of the election. Section 278 was effective at the time members of local authorities were declared elected. In regard to those elected to local authorities, the secretary to the Civil Service Commission stated as follows:

The Civil Service Commission which came into effect on 22 August 2013 is working towards aligning the Public Service Act and the Public Service Regulations with the new Constitution Amendment (No 20) Act 2013. In the interim, members of the civil service who participated in the 2013 harmonised elections in local authorities remain members of the civil service.⁷²

It is obviously not open to the secretary of the Civil Service Commission to suspend this provision of the Constitution.⁷³ The seats of those members of local authorities who failed to resign posts in statutory bodies within 30 days after being elected, automatically became vacant. The failure to apply this provision is a violation of the Constitution.

Violations Related to the Conduct of the Election

The Constitution specifically provided that elections must be: "peaceful, free and fair";⁷⁴ that all appropriate measures must be taken to ensure that all qualified persons may register to vote and that all such persons are afforded the opportunity to vote; that "all political parties and candidates contesting an election ... have reasonable access to all material and information necessary for them to participate effectively"⁷⁵; that "whatever voting method is used, it is simple, accurate, verifiable, secure and transparent"⁷⁶ and that the security sector should be non-partisan.⁷⁷ The Sixth Schedule also provides:

The first elections must be conducted in terms of an Electoral Law in conformity with this Constitution.⁷⁸

This last provision made compliance with the Electoral Act a constitutional imperative. Thus any violation of the Electoral Act during the 2013 general election was simultaneously a violation of the Constitution. Every one of the principles listed above was violated. The specific instances of non-compliance, however, are too numerous to detail here. Only major violations at a general and national level which affected all constituencies and wards will be considered in what follows.

71 It is not known how many MPs are affected by this provision.

72 See "Joy For Civil Servants Who Participated in Elections" *The Herald* 30.08.13.

73 It may be that the Secretary's remarks were directed only toward those whose candidacies were unsuccessful. In terms of sections 23 and 23A the Public Service Act [Chapter 16:04], members of the civil service are deemed to have resigned from their posts once they become candidates in a local government or parliamentary election but may apply to rejoin the civil service within 30 or 90 days respectively if the candidacy is unsuccessful. This being the case, the Secretary is announcing an unlawful intent not to apply these provisions of the Act which remain constitutional.

74 Section 155(1) of the Constitution.

75 Subsections 155(2)(a)-(c) of the Constitution.

76 Section 156(a) of the Constitution.

77 Section 208 of the Constitution.

78 Paragraph 8 of Part 3 of the Sixth Schedule.

The first violation relates to the very start of the electoral process, the timing of the election and the electoral law set to govern the conduct of the election.

(a) Initial Violations

(i) The Timing of the Election

The stated objective of the Inter-Party Political Agreement signed by the three main political parties in September 2008, commonly referred to as the GPA (Global Political Agreement), was to create the conditions for a free and fair election in Zimbabwe. This intention was captured in the Constitution. However, as noted above, few of the agreed reforms to ensure that this eventuated (which were further endorsed in "an agreed road map" to the election) had been implemented by the start of 2013, the year in which elections were due to be held. As the elections drew closer, ZANU PF and President Mugabe faced intense pressure from SADC, the guarantor of the GPA, and its facilitator South African President Jacob Zuma, to implement these reforms.⁷⁹ The obvious way to relieve this pressure and to go into the elections without the reforms was to set an election date which left insufficient time for such reforms to be implemented. To do so without an urgent and inescapable imperative, however, would have attracted a heavy political price and would have been a direct affront to SADC.

From March 2013, ZANU PF officials and the ZANU PF-controlled press began to advance an argument that elections, as a matter of law, had to be held before the automatic dissolution of Parliament at the end of its five year term, on 29 June 2013. Thus the Minister of Justice claimed:

It is imperative to have the elections by June 29 because we will no longer have a Parliament by then and a country cannot be run without Parliament," he said. "The life of Parliament will not be extended and without it you cannot make laws hence the elections should have been (*sic*) held by the end of June."⁸⁰

Section 58(1) of the Constitution provides as follows:

A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding *four months after* the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

Section 63(4) refers, as was the case in point, to the automatic dissolution of Parliament at the end of its five year term. The latest date for a general election thus appeared to be 29 October 2013.

Thus it was the stated desire of ZANU PF officials, including the President,⁸¹ to hold an election as soon as possible after the new Constitution was enacted. Soon thereafter, a Mr Jealousy Mawarire, a member of an obscure non-governmental organisation, the Centre for Election Democracy in Southern Africa, obligingly brought an application "against" the President demanding he call the election before the dissolution of Parliament. ZANU PF's overt desire to have an early election meant few viewed this application as little more than a transparent ruse to gain legal cover to do, under the guise of the law, that which could not be accomplished politically; that is, announce a precipitate election date.⁸²

79 "SADC Pins Mugabe Down On Elections" *The Zimbabwe Independent* 31.05.13.

80 "Elections By June 29: Chinamasa" *The Herald* 21.03.13.

81 See, as an example, of one of many pronouncements on this issue "Mugabe's Do or Die Date" *The Daily News* 05.05.13.

82 *CIO Sponsored NGO Suing Mugabe* <http://nehandaradio.com/> 18.05.13.

Unsurprisingly, the President's opposing papers, rather than disputing the Applicant's case, as is usual, wholeheartedly agreed with his argument. However, having agreed with the Applicant's interpretation of the law, the President did not proffer any reasons why he had then failed to comply with it,⁸³ subsequently admitting that on account of his failure to have called the election "we" had "violated the Constitution right, left and centre" and that "we have been criminals on this one".⁸⁴

Mr Mawarire met none of the procedural objections, particularly those related to *locus standi*,⁸⁵ so readily accepted and usually encountered by those bringing cases to the highest court involving challenges to executive authority or electoral issues.⁸⁶ The Court found in Mr Mawarire's favour.⁸⁷ However, two judges filing dissenting opinions.⁸⁸ The accompanying order of the court stated that, with 29 June 2013 no longer legally possible as a date for the poll, the election had to be held as soon as possible – and that, the Court held, was 31 July 2013.

In fact, the election could not be held on 31 July 2013 without violating other provisions of the Constitution or the Electoral Act. This is so because the Constitution provided that the first election after it was enacted had to be preceded by a 30-day intensive registration period which, at the time of the ruling, had yet to commence.⁸⁹ The Electoral Act provided that registration had to end the day before the Nomination Court sat, whilst the Constitution required that elections could be no sooner than 30 days after such sitting.⁹⁰ So there needed to be a 60-day period between the start of the intensive registration period and the election, if there was to be compliance with the Constitution and the Electoral Act. When the start of the intensive voter registration period was delayed until 9 June 2013, the Nomination Court could not sit before 9 July if registration was to be done over 30 days and end when required by the Electoral Act. Further, it could not sit before 9 July if there was to be compliance with the constitutional requirement of a 30-day hiatus between the sitting of the Nomination Court and the election. Thus the election could not be held before 9 August 2013 at the earliest.

President Mugabe sought to deal with these potential illegalities by perpetrating another. Under the cover of legislative powers granted to him under the Presidential Powers (Temporary) Measures Act,⁹¹ President Mugabe purported to effect extensive changes to the Electoral Act by Presidential Regulation.⁹² This way he provided, not only for the system of proportional representation required by the new Constitution, amongst other provisions, but also allowed voter registration to continue beyond the sitting of the Nomination Court.⁹³ On the same day, 13 June 2013, the election dates were proclaimed;⁹⁴ setting the sitting of the Nomination Court for 28 June, 2013, and thus leaving the 30-day period required until the elections, with a few days to spare.

While this dealt with the possible illegality of a failure to hold the 30-day intensive voter registration period, it did so through a further illegality. The Constitution requires elections to be conducted under an

83 It should be noted that the dissolution of Parliament by Presidential Proclamation, as a prelude to elections, (as opposed to the automatic dissolution at the expiry of its term) required the consent of the Prime Minister, which was unlikely to have been forthcoming. However, this requirement of proceeding by consent had been repeatedly ignored by the President in other instances and is thus unlikely to have been a constraining factor here.

84 See "I will Comply with Court Ruling" *The Herald* 03.06.13.

85 "Legal standing" to bring a court application.

86 Compare the difficulties encountered by Morgan Tsvangirai in several election-related applications in past years and most recently his petition to the Constitutional Court challenging the presidential election – see below and *Morgan Tsvangirai v Robert Gabriel Mugabe & Three Ors* CCZ71/13.

87 *Mawarire v Robert Gabriel Mugabe NO and Ors* CCZ1/13.

88 For a discussion of the judgment see *Before and After: Old Wine in New Bottles* D Matyszak, RAU, June 2013.

89 Paragraph 6(3) of Part Three of the Sixth Schedule.

90 Section 157(3) of the Constitution.

91 Chapter 10:20.

92 SI 85 of 2013.

93 Section 26A of the amended Act.

94 SI 86 of 2013.

"Act of Parliament",⁹⁵ not Presidential Regulations. An "Act of Parliament" is specifically defined in the Constitution as a Bill which has been presented to and passed by Parliament and assented to and signed by the President.⁹⁶ Regulations made under the Presidential Powers (Temporary) Measures Act do not fall within this definition. It may be argued that the Regulations merely amended the Act of Parliament, and the elections were nonetheless conducted under that Act. Such an argument undermines the obvious intention of the legislature, more so considering that it is specifically provided in the Constitution that it is the Act of Parliament which must provide for issues such as voter registration. The Regulations introduced amendments specifically purporting to amend this part of the Act.

Furthermore, it should be noted that the Presidential Powers (Temporary) Measures Act itself provides that it may not be used to legislate any measures which must be done "by, rather than in terms of" an Act of Parliament.⁹⁷

It is also a constitutional requirement that elections be "conducted efficiently, freely, fairly, transparently and in accordance with the law."⁹⁸ As a matter of basic equity, a contestant in the election should not be allowed to set the rules. By introducing electoral law by way of Presidential Regulations at the same time as issuing the proclamation announcing the election date, a disregard for the requirement of fairness was signalled at the very outset of the election period.⁹⁹

The extension of the registration period beyond Nomination Day provided for by these Presidential Regulations,¹⁰⁰ also introduced a structural unfairness into the electoral process. This amendment effectively allowed registration to continue up to 18 days prior to voting. Yet there was no corresponding amendment to section 28(5) of the Electoral Act. That section required that any objection to the inclusion of a voter on a roll had to be made 30 days ahead of the poll. There was thus a 12-day window during which a constituency could include voters who were not entitled to be registered there, without any means of complaint, other than to rely upon the constitutional requirement that the electoral management body, the Zimbabwe Electoral Commission, (ZEC) conduct the elections fairly.

A further violation of the Constitution is of importance in this regard. Section 157(4) prohibits any amendment to electoral law unless ZEC has been consulted and any recommendations made by the Commission have been duly considered. The purpose of this provision is precisely to avoid the kind of structural unfairness introduced by the Presidential Regulations and to ensure that other inappropriate and impractical provisions are not introduced. There was no such consultation with ZEC as required, which should have rendered the amendments invalid on this basis alone.

(ii) Partisanship of The Security Services

The neutrality of the security sector is provided for in section 208 of the Constitution. Subsection 208(2) is as follows:

Neither the security services nor any of their members may, in the exercise of their functions—

- (a) act in a partisan manner;
- (b) further the interests of any political party or cause;
- (c) ...

95 Section 157(1) of the Constitution.

96 Section 131(1) of the Constitution.

97 See *The 2013 Elections: Zimbabwe's Ground Hog Day* D Matyszak, RAU, July 2013.

98 Section 239(a) of the new Constitution.

99 The election period commences from the date of such pronouncement – section 4(1) of the Electoral Act.

100 Section 26A of the Regulations. Electoral Law could not, in terms of the Constitution (section 157(5)) be altered after the announcement of the election date, hence the proclamation of the date and the amending Regulations simultaneously.

This provision has been violated in numerous ways,¹⁰¹ the most flagrant of which was the use of the Intelligence Services to vet aspiring ZANU PF candidates ahead of the party's primary elections.¹⁰² Uniformed members of the Zimbabwe Republic Police (ZRP) supervised many of the primary elections (for the ZANU PF candidates), providing logistics and counting ballot papers.¹⁰³ Such partisanship continued after the national general election, with ZANU PF's party Provincial Elections being held under the auspices of the ZRP, with uniformed members acting as election officers.¹⁰⁴ Further, a photograph was captured in a local newspaper showing members of the Zimbabwe Republic Police at an agricultural show. They were grouped with the ZANU PF Women's League with fists clenched in the manner of the ZANU PF party symbol and apparently chanting party slogans in unison with the Women's League members. This seems to indicate that the ZRP feels that such displays of partisanship are neither wrong nor need to be concealed. In fact they violate both the Constitution and the Police Act.¹⁰⁵

(b) The requirement to take all appropriate measures to ensure qualified voters are able to register and to vote

Section 67(3) confers upon every Zimbabwean citizen who is of, or over, eighteen years of age the right to vote in all elections. This right is not qualified by absence from the country or incarceration at the time of the poll. The State is required to take all appropriate measures, including legislative measures to ensure that this right may be exercised.

Shortly before the elections, the Constitutional Court dismissed an application¹⁰⁶ to compel ZEC to make arrangements for people outside Zimbabwe and those who could not conveniently return to the country on polling day to cast a ballot. The application was declined despite a precedent emanating from the South African courts based upon the same wording in the South African Constitution which had allowed a similar application. No reasons have been furnished for the Zimbabwean Constitutional Court's decision.¹⁰⁷

Similarly, the ZEC chairperson announced that it would not allow Zimbabwean citizens over the age of 18, but imprisoned, to cast a ballot, citing logistical considerations.

As ZEC, we acknowledge that Chapter 4, section 4.18¹⁰⁸ of the new charter states that every Zimbabwean has the right to vote," said Makarau. "However, we do not have mechanisms for prisoners to vote in this year's elections. We have already started engaging with relevant stakeholders to enable prisoners to vote in future. There are many things involved before allowing prisoners to vote, which is why, as ZEC, we are saying they will not be able to vote now, but in future."¹⁰⁹

101 The examples of bias by the police are again too numerous for all to be outlined here, but include the banning of MDC rallies and meetings, the confiscation of shortwave radio sets, the arrest of MDC activists on spurious charges, the failure to arrest ZANU PF members involved in politically-motivated violence, declarations of loyalty to ZANU PF (in violation of the Police Act as well as the Constitution) by senior officers and instructions by these officers to their subordinates to vote for ZANU PF.

102 See "CIO deployed to Vet Aspiring Candidates" *The Independent* 26.04.13

103 See "ZANU PF Abusing the Police – Makone" *The Daily News* 28.06.13.

104 See "ZANU PF – Provincial Elections" *The Herald* 30.11.13 the "live update" included pictures of uniformed members performing this role.

105 Schedule to the Police Act Chapter 11:10.

106 *Tavengwa Bukaibenyu v Chairperson, Zimbabwe Electoral Commission and 3 Others* SC126/13.

107 The Constitutional Court has delivered the reasons for its judgments in only 4 of 24 cases it has ruled upon to date.

108 The reference does not exist in the new Constitution. Makarau was referring to the equivalent section number in a draft produced in 2012.

109 "Prison Inmates Won't Vote: Makarau" *The Zimbabwe Independent* 12.07.13.

This constituted an admission by ZEC that it was practically possible to take appropriate measures to register prisoners and to enable them to vote, but that the Commission had simply decided not to comply with the Constitution for the impending ballot.

When voter registration ended on 9 July 2013, numerous people, particularly in urban centres had been unable to register to vote. Video footage showed throngs of would-be voters complaining that appropriate measures had not been taken to ensure their right to register as provided by the Constitution.¹¹⁰ The Chairperson of ZEC responded unequivocally:

The law stipulates that voter registration and inspection would end on 9 July and we do not operate outside the law.¹¹¹

An equivalent provision, requiring that all appropriate measures are taken to ensure that those qualified to vote are afforded the opportunity to do so, sits immediately adjacent to that pertaining to registration in the Constitution. It has already been noted that ZEC showed no enthusiasm for enforcing the provision pertaining to voting for those Zimbabweans in the "Diaspora" or for provisions allowing prisoners to vote. However, when there was a failure to implement the measures ZEC had intended would ensure that every qualified voter in the Zimbabwe Republic Police was afforded the opportunity to vote, the response by ZEC was markedly different, as the following demonstrates.

The Electoral Act provided a "special vote" for those members of the Zimbabwe Republic Police who would be unable to vote on polling day¹¹² due to absence from their constituencies on security-related duties on that date. ZEC received some 69 222 applications for special votes from the Zimbabwe Republic Police, in other words, the entire Force.¹¹³ It is not plausible that ZEC believed, as was required under the Act, that all would be unable to vote in their constituencies on polling day because they would be away from their constituencies performing election security-related duties.¹¹⁴

This created an intractable problem. The Special Voting process required a customised envelope to be prepared for each special voter and to be dispatched to the correct polling station designated for the special voter. This was logistically impossible in the time available. As a result, because the election material had not been prepared, only 29 000 members of the ZRP cast their ballots as special voters.¹¹⁵

To deal with this predicament, ZEC sought to apply the section in the Constitution which required it to ensure that those qualified to vote be afforded the opportunity to do so – the same section (155(2)) which it chose to neglect in regard to registration, those in the Diaspora, and those in custody. On this basis, it applied to the Constitutional Court to allow members of the ZRP who had not cast their special vote, to vote normally on polling day, 31 July 2013.¹¹⁶ In so doing, ZEC appeared to have forgotten that the precise basis upon which they had been granted a special vote in the first place was because ZEC believed that they were unable to vote on that day. Once a person has been granted a special vote, the die is cast. Section 81H(1) of the Act provides, that any person granted a special vote who:

110 See "An Incredible Election" available at <http://www.youtube.com/watch?v=Ro9MRcHN0R0>.

111 "No Extension to Voter Registration" *The Chronicle* 11.07.13.

112 Section 8 of the Electoral Act.

113 A number which appeared massively inflated against what the Minister of Finance claimed was an establishment on the payroll of no more than 44 133 – see *Special Vote Court Case Postponed as ZEC U-turns on Voters' Roll* SWRadio 17.087.13.

114 For the March, 2008 election ZEC had issued only 4 350 postal votes (the procedure then used in this regard) for the entire security sector. The fact that every member of the police force is apparently registered as voter, despite registration being, in theory, voluntary, also seems to have passed without comment.

115 *Over 50 Percent of Zimbabwe Forces Denied Early Vote* <http://en.starafrica.com/news/over-50-percent-of-zimbabwe-forces-denied-early-vote.html>.

116 "Zec Gives Relief to Special Voters" *The Herald* 17.07.13

casts or attempts to cast a vote at an ordinary polling station, shall (whether or not he or she has cast a special vote at the same election) be guilty of an offence.

The Act does not provide for the withdrawal of special votes.

The Constitutional Court was thus faced with a breach of one or the other provisions of the Constitution. One was that the election had to be conducted in accordance with the Electoral Act, the other that appropriate measures must be taken to ensure that all those eligible to cast a vote are afforded the opportunity to do so. ZEC's application was granted. The provisions of the Electoral Act were not to be followed, and those members of the ZRP who had failed to cast their special vote were to be allowed to vote on polling day. The fact that they had previously claimed to be unable to do so, but that this disability had now apparently vanished, passed without comment by the Constitutional Court; as too did the fact that the reason why ZEC had been unable to comply with the Electoral Act and prepare the vast number of special votes was on account of unlawfully accepting that each and every member of the Police Service would be out of his or her constituency on polling day. This assertion was proven false by the Constitutional Court application itself.

(c) Access to voting material and information

The voters' rolls constitute essential voting materials. They contain essential information to which political parties and candidates require access if they are to participate effectively in an election and that election is to be considered free and fair. For this reason, the Electoral Act provides¹¹⁷ that ZEC must supply an electronic copy of the voters' roll in a searchable and analysable form either as soon as possible after the announcement of the election dates or as soon as possible after Nomination Day.¹¹⁸

Section 20 of the Electoral Act requires ZEC to "keep and maintain in printed and electronic form a voters' roll for each ward and constituency". The particulars of this stipulation are expanded in section 20(4) to mean that ZEC is required to keep, in printed and electronic form, a copy of every ward and constituency roll at both its head office and at all the Commission's offices and a copy of the consolidated national roll at its head office. There should thus have been three electronic copies of the constituency rolls available to ZEC – those at the constituency offices, those at its head office and those contained in the consolidated national roll.

The electronic roll was not supplied, despite numerous requests in this regard after nomination day by the MDC-T and ZAPU parties. On the eve of the election, a court application was made to compel ZEC to supply the electronic roll.¹¹⁹ ZEC claimed an inability to comply on the basis that its (ZEC's) IT system had developed a fault. However, ZEC remarkably stated that notwithstanding this fault, they could supply a hard copy of the national roll. It is difficult to understand how data could be sent to a printer but not to a memory storage device. Nonetheless, without requiring further evidence on the point, the judge accepted the *ipse dixit* of the ZEC Chairperson, Rita Makarau, and ordered that the electronic copy of the roll be supplied once ZEC's IT system was functioning. The mystery of why this malfunction had prevented the supply of any one of the three electronic copies of the roll, which should have been held by ZEC at different locations, was solved in a reply by Makarau to one of the many continued requests for the roll after the election:

We regret to advise that the Commission is unable to give you an electronic copy of the National voters roll that was used for the elections held on 31 July. You are aware that the

¹¹⁷ Section 21.

¹¹⁸ This latter date presupposes that registration is complete at that date. As noted above, since registration was extended beyond nomination day by the President, there was no longer any provision to ensure that candidates were supplied with finalised electronic rolls.

¹¹⁹ *High Court Orders Zec to Furnish MDC-T with Voters' Roll on Election* ZLHR Election Alert 9 of 2103 30.07.13.

voters' roll used for the election was compiled and maintained by the office of the Registrar General of Voters who has indicated that his machines are still down even as I write to you. We simply cannot give you copies of the roll as the Registrar is unable to produce the same. We have never deviated from this position that whilst we have obligation to provide you with the roll, it is physically impossible to do so.¹²⁰

From this it is readily apparent that the claimed fault lay with computer equipment at the Registrar-General office, and not at ZEC, as originally claimed in the court hearing. That claim had presumably been made because the responsibility to keep, maintain and supply the rolls was that of ZEC and not the Registrar-General. The statement made it clear that ZEC had unlawfully abdicated this responsibility to the Registrar-General, and thus did not have the three electronic copies of the rolls it was legally obliged to keep. In an election petition for Mount Pleasant Constituency, the Registrar-General testified to the High Court that his computers had developed the fault a few days before the election.¹²¹ Had there been compliance with the Electoral Act, ZEC thus should have had electronic copies, up to date as at the date of this alleged fault. It was this failure, and not the alleged failure of the Registrar-General's "machines" which resulted in the violation of the constitutional stipulation that political parties and candidates must be able to access material and information to allow them to participate effectively in the poll.

(d) The requirement that whatever voting method is used, it is simple, accurate, verifiable, secure and transparent

Section 93 of the Constitution requires that petitions challenging the result of the presidential election must be lodged within seven days, and the issue adjudicated upon by the Constitutional Court within 14 days of the lodging of the petition. This leaves an inordinately short period of time for a losing candidate to consider whether to bring such a petition, determine the evidence required, gather such evidence and prepare the paper work for lodging with the Court. Although the Electoral Act provides for a Presidential Election Petition to proceed by way of a "trial"¹²² which term in legal parlance is generally held to mean that oral evidence will be led and witnesses cross-examined, the Constitutional Court held that no trial could take place and that the issue would be determined on the basis of documentary evidence alone.¹²³ Even with this procedure adopted, the time period for the exchange of the required opposing and answering affidavits and filing of heads of argument and delivery of the judgment is extremely tight.

Five days after the announcement of the results, Morgan Tsvangirai filed two urgent applications (treated as one by the Electoral Court) for material and information relating to the election. This included an electronic copy of the voters' roll, the full results of the presidential election at ward level, information relating to the special vote, the register of people turned away and assisted voters. The request was fully in accord with the constitutional requirement that the voting method is verifiable and transparent. Notwithstanding the fact that Tsvangirai was required to file his Presidential Election Petition the following day, the judge ruled that he would give his judgment on the matter six days later. When he did so his determination¹²⁴ was that since the application had only been brought five days after the results had been announced Tsvangirai had not treated the matter as urgent, and that the court

120 *2013 Voters Roll: Mudede Refuses Says Machine Still Broken Down* <http://www.zimeye.org/zimbabwe-2013-voters-roll-mudede-refuses-says-machine-still-broken-down>

121 Information supplied by those attending the hearing May 2013.

122 Section 111(2).

123 It is unusual for a court such as the Constitutional Court to hear oral evidence. However, all petitions at a constituency level are determined by way of a trial (section 171(2)) so it was not unreasonable to suppose that this would be the procedure for a Presidential Election Petition.

124 *Morgan Tsvangirai v The Chairperson of the Electoral Commission & Three Ors* EC 27 & 28/13.

would thus decline to do so also, thus dismissing the application.¹²⁵ This view was upheld on appeal to the Supreme Court in January 2014. Once again a technical objection (the first being the alleged inability to supply the electronic voters' rolls) trumped the constitutional provision requiring access to voting material and information and that voting methods should be transparent and verifiable.

The Use of the Presidential Powers (Temporary Measures) Act

The use of this Act ahead of the election has already been touched upon. However, once the President was sworn into office, and the Constitution became fully effective, the use of this Act to make law generally was rendered wholly unconstitutional by virtue of sections 117 and 134 of the new Constitution. As a fundamental principle rooted in the doctrine of the separation of powers, law-making authority lies with the legislature. However, section 117 vests in the legislature the power to confer *subordinate* legislative powers upon another body or authority. Here subordinate legislative authority refers to statutory instruments whose authority in turn derives from enabling Acts of Parliament. The authority granted to the President to make regulations under the Presidential Powers (Temporary Measures) Act is clearly not a subordinate legislative power. The Act expressly provides the opposite; that Presidential Regulations made in this manner "*prevail over any other law to the contrary*".¹²⁶ The Act thus purports to delegate a super-ordinate and primary law-making function to the President. This delegation of the legislature's primary law-making function is specifically precluded by the Constitution.

Notwithstanding the unconstitutionality of the Presidential Powers (Temporary Measures) Act, in January 2014, the President purported to bring three sets of Regulations into law – The Presidential Powers (Temporary Measures) (Amendment of Money Laundering and Proceeds of Crime Act) Regulations; The Presidential Powers (Temporary Measures) (Amendment of Criminal Law (Codification and Reform Act) Regulations; and Presidential Powers (Temporary Measures) (Trafficking in Persons Act) Regulations.¹²⁷ The legislation was required urgently¹²⁸ to meet obligations and deadlines set under international agreements to which Zimbabwe is a party. Thus there does not appear to be compliance with one of the few¹²⁹ reductions of executive powers introduced by the new Constitution.

General Breaches

This report details only the most obvious violations of the Constitution to date. It does not consider in detail whether there has been full compliance with the strengthened protection of fundamental rights and freedoms afforded under the new Constitution, such as the less restrictive provisions relating to bail applications and improved rights of accused persons generally.¹³⁰ Initial indications are not promising in this and other respects.

125 Unable to lead oral evidence or to obtain access to vital documentary evidence, Tsvangirai sought to withdraw the petition. The Constitutional Court however, ruled that a Presidential Election Petition could not be withdrawn and proceeded to issue a ruling even without the petitioner's evidence. This approach was justified on the basis that the Electoral Act had specific provisions for the withdrawal of a Constituency Election Petition but none in the case of a Presidential Election Petition.

126 Section 5.

127 [Chapter 9:24] SI 2/2014; [Chapter 9:23] SI 3/2014; and SI 4/2014 respectively.

128 The Presidential Powers (Temporary Measures) Act was only intended to be used in cases of such urgency that precluded the enactment of appropriate legislation through Parliament. It was obviously not intended that the government could itself create the urgency by being dilatory in introducing required Bills to the legislature.

129 See *Presidential Power and Zimbabwe's Draft Constitution* D Matyszak, RAU, March 2013.

130 This is judged from press reports which suggests that the denial of bail remains the rule, rather than, as required by the Constitution, the exception.

A local government campaign initiated in several cities and towns in 2014 seeking to demolish "illegal" buildings and structures pays no regard to the new provisions in the Constitution establishing a right to shelter and housing.¹³¹

The approach of the President's Administration to freedom of assembly and expression manifested in the form of demonstrations and public meetings appears unchanged.¹³² A comment by President Mugabe arising from the inability of government to pay civil servants an agreed wage, is telling:¹³³

Our workers are understanding. We do not want unnecessary demonstrations and strikes. When they have grievances that are well-based, you know, that are genuine, well what right you have to say *kuti totuma mapurisa (that the police must be sent)* to go and quell them when they have genuine grievances? No we can't do that!

This suggests that the President has no appreciation that the Constitution provides for a right to demonstrate which is not contingent upon the President's view of the validity of the grievances of the demonstrators. The President's comment implies that he regards all demonstrations as unlawful and liable to be quelled, unless the executive deems the demonstration justified.¹³⁴

This conduct has not been limited to a few provisions of the Constitution. Far from it, most of the entitlements in the Constitution have been violated as though the supreme law is not in existence at all.

The inclusion of justiciable social and economic rights has been much touted by the authorities as a highlight of the new Constitution. Nevertheless, school children continue to be denied access to basic education for a litany of reasons ranging from non-payment of school fees to failure to adorn an appearance in compliance with school rules and regulations, whilst many people have failed to access health services and treatment due to arbitrary fees levied by hospitals in various districts across the country. Further, there are no discernible steps being taken by the government which show any inclination to avail clean, safe and potable water to the people of Zimbabwe. As a result, people continue to suffer the abominable scourge of water-borne diseases.

Many former 'aliens' who should benefit from an improved constitutional framework relating to citizenship still face an uncooperative Registrar General when trying to legitimately access travel and identity documents.

The media and ordinary citizens exercising their right to freely express themselves remain the subject of constant harassment through arbitrary arrests, detention and prosecution under such laws as criminal defamation and "insult" laws which clearly fall foul of the new Constitution.

The panoply of violations of the Constitution represent a rule of law deficit which requires urgent attention and practical plans for action.

131 See *Constitution Watch 2/2014* Veritas February 2013. Demolitions of houses and small businesses have occurred and/or been threatened in Harare high-density suburbs, Chitungwiza, Ruwa, and parts of Manicaland and Matabeleland, requiring legal intervention by Zimbabwe Lawyers for Human Rights to protect and assert the new protections offered under the Constitution and prevent arbitrary administrative action by various authorities.

132 The Police have continued to unlawfully arrogate to themselves the power to arbitrarily ban meetings and demonstrations that they deem undesirable despite strengthened protections of the freedom of assembly and association which requires authorities to allow all such gatherings so long as they are peaceful - see as but one recent example of this *Police Block Another Gukurahundi Memorial* SWRadio 04.03.13.

133 In the interview marking his 90th birthday (see above).

134 This was the position under Zimbabwe's previous public order legislation, the Law and Order Maintenance Act Chapter 11:07 (see esp. section 6).

Conclusion

The enactment of a new Constitution in Zimbabwe is a progressive step towards the realisation of fundamental rights and freedom as well as improved accountability, transparency and efficiency from the State. This is particularly so, given the new comprehensive Declaration of Rights, introduction of various commissions and other institutions supporting democracy, as well as the provisions guaranteeing gender balance as well as devolution and decentralisation of power.

However, as detailed above, this litany of progressive protections has not been complimented with respect, improved compliance and strong, impartial enforcement by the State. Such non-compliance will present a significant threat to the rule of law and constitutionalism and is likely to undermine public confidence and dash the hopes of those who believe a new Constitution will bring a new era of respect and protection of their rights and ensure better lives and livelihoods for all the people of Zimbabwe.

A multi-pronged approach is required to ensure greater respect for the tenets of the Constitution of Zimbabwe and that a new culture of constitutionalism takes root.

Engagement with key members of government and state institutions is essential to promote and encourage behavioural change in the conduct of the State and its agents.

Constitutional and other public interest litigation remains vital to protect and expand the constitution, enforce rights guaranteed in the Charter, and make it a living document that can make a difference in people's lives. So, too, is the public process of evaluating and assessing the jurisprudence emerging from the new Constitutional Court.

There is also a need for a comprehensive and sustained constitutional literacy drive. The popularisation of the Constitution and its contents will endear the general populace to its own supreme law and make people more vested in the respect and promotion of their own rights. State institutions and actors must also be a primary target of such literacy efforts in order to ensure that they are aware of their obligations and act accordingly.

The State's performance vis-à-vis compliance with the Constitution must be constantly monitored, evaluated, its actions critiqued and the resultant assessment publicised and widely distributed in reports and various other updates. Coupled with robust engagement, this will allow for areas of weakness to be identified and addressed over time.

This concerted effort by a broad spectrum of Zimbabweans is the arduous work required to bridge the gap and address the stark contrast between the provisions the Constitution and the situation as it obtains on the ground. In this way, the spirit of the Constitution will be lived, its objectives realised, its guaranteed rights fulfilled, and the livelihoods of the people of Zimbabwe markedly improved.

Participating Organisations

Bulawayo Agenda (BA)
Centre for Community Development in Zimbabwe (CCDZ)
Centre for Research and Development (CRD)
Christian Alliance (CA)
Civic Education Network Trust (CIVNET)
Counselling Services Unit (CSU)
Crisis in Zimbabwe Coalition (CZC)
Female Students' Network (FSN)
General Agriculture and Plantation Workers Union (GAPWUZ)
Justice for Children Trust (JCT)
Legal Resources Foundation (LRF)
Mass Public Opinion Institute (MPOI)
Media Institute of Southern Africa – Zimbabwe Chapter (MISA-Zimbabwe)
Media Monitoring Project Zimbabwe (MMPZ)
National Association of Non-Governmental Organisations (NANGO)
National NGO Food Security Network (FOSENET)
Oxfam International (OI)
Progressive Teachers' Association of Zimbabwe (PTUZ)
Research and Advocacy Unit (RAU)
Restoration of Human Rights Zimbabwe (ROHR)
Save Zimbabwe Campaign (SZC)
Students Christian Movement of Zimbabwe (SCMZ)
Students Solidarity Trust (SST)
Transparency International
Veritas
Voluntary Media Council of Zimbabwe (VMCZ)
Women's Coalition
Women of Zimbabwe Arise (WOZA)
Youth Agenda Trust (YAT)
Zimbabwe Association of Doctor for Human Rights (ZADHR)
Zimbabwe Coalition for Debt and Development (ZIMCODD)
Zimbabwe Election Support Network (ZESN)
Zimbabwe Human Rights Association (ZimRights)
Zimbabwe Human Rights NGO Forum (ZHRF)
Zimbabwe Lawyers for Human Rights (ZLHR)
Zimbabwe National Students Union (ZINASU)
Zimbabwe Peace Project (ZPP)
Zimbabwe Women Lawyers Association (ZWLA)
Zimbabwe Young Women's Network for Peace Building (ZYWNP)

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