

## BRIEFING

# CONTINUITY OR REFORM IN ZIMBABWEAN POLITICS?

*An overview of the 2013 referendum*

*Lloyd M Sachikonye*

Lloyd M Sachikonye is an Associate Professor at the Institute of Development Studies, University of Zimbabwe  
e-mail: sachi@zol.co.zw

## INTRODUCTION

In the first post-independence constitutional referendum, held in February 2000, fewer than half the country's registered voters participated. The outcome of that referendum was that about 54% of voters voted against the draft constitution while 45% voted for it. The referendum proved to be a major watershed in Zimbabwean politics, partly because it signalled a decade-long slide into authoritarianism. It would take more than another decade for political parties to negotiate a fresh draft.

Relatively speaking, the 2013 referendum, held on 16 March, was, therefore, more successful in engendering greater participation and generating a positive result. An estimated 60% of the electorate participated, with an overwhelming 93% endorsing the draft constitution. What explains the upsurge in levels of voter participation in 2013 compared to 2000, and the different outcomes? Does the 2013 outcome signify a significant shift towards reform in Zimbabwean politics? These are the salient issues that this briefing seeks to address.

The briefing begins with a presentation of the highlights of the referendum results then chronicles the constitution-making process itself, reflecting on the key provisions contained in the draft. This forms the background for the reflections on whether these processes and the outcome signify a trend towards reform rather than a continuation of authoritarian politics.

## HIGHLIGHTS OF THE 2013 REFERENDUM RESULT

The high expectations of voter apathy were not borne out by a turnout of approximately 60% compared with the 26% turnout for the 2000 referendum.

Indeed, the 2013 turnout was a 'surprise' to some politicians and the media (Cross 2013).

Both urban and rural areas experienced a reasonable turnout and similar voting patterns. However, the turnout in Bulawayo and the two Matabeleland provinces was relatively lower, perhaps signifying less interest in the referendum. In total, some 3.07-million voted 'yes', while some 179 000 voted 'no'. There were 56 000 spoiled ballots.

Several factors contributed to the relatively higher turnout in the 2013 referendum. First, the rules about where to vote were relaxed and voters were simply required to produce a valid identity document before voting. Second, the balloting itself was straightforward: it was a simple 'yes' or 'no' to the draft. Third, the major political parties, the Movement for Democratic Change-Tsvangirai (MDC-T) and Zanu-PF had endorsed the draft and urged their members to do the same. Fourth, although low key, the campaigning itself had been comparatively free from intimidation and violence. Fifth, since the adoption of the draft was a prerequisite for holding general elections within the context of the Global Political Agreement (GPA), the electorate understood the significance of the referendum vote.

#### Distribution of the Vote in the 2013 Referendum

Province	Yes vote	No vote	Spoilt ballots
Harare	468 176	41 060	8 222
Manicaland	388 297	22 586	6 802
Midlands	378 445	22 139	6 938
Masvingo	376 713	20 717	7 459
Mashonaland East	374 045	15 405	7 377
Mashonaland West	340 597	17 662	5 365
Mashonaland Central	340 290	9 703	6 980
Matabeleland North	162 236	11 663	3 378
Matabeleland South	129 959	10 040	2 577
Bulawayo	121 108	8 514	1 529
Total	3 079 866	179 489	56 627

Source: *The Herald* 20 March 2013

The turnout was all the more impressive in view of the limited amount of time (only a little over one month) devoted to campaigning, sparse advertising of the issues in most media, and a paucity of copies of the draft constitution. Turnout could have been higher still if parties had campaigned more vigorously to persuade voters to come out, and if civil society organisations had not been subjected to suppression several months before the referendum. For instance, in the Kenyan referendum on a draft constitution in 2010, the turnout was 72%. Finally, Zimbabwean citizens in the diaspora were denied the right to vote.

### THE CONSTITUTION-MAKING PROCESS 2009-2013

The constitution-making process was chequered. Originally expected to last 18 months, as envisaged in the GPA, it took almost four years. Inter-party bickering and posturing delayed the start and the subsequent outreach programme as well as the drafting process itself. Some levels of intimidation were experienced during the First Stakeholder Conference in Harare, and sporadic violence during the outreach meetings. This was largely an outcome of a tacit strategy by Zanu-PF and its war-veteran allies to coerce speakers during outreach meetings to follow the 'party line' on such issues as presidential powers, checks and balances and devolution. A major constraint was that free expression and frank debate were discouraged, even penalised, by these elements. Furthermore, threats by a fringe of Zanu-PF, state media and securocrats that elections could be organised outside the terms of a new constitution raised the political temperature and spread confusion. The state media, especially radio and television, but also some newspapers, were partisan in their reporting on the process, broadly espousing a Zanu-PF position.

The financing of the exercise was contentious. In the face of enormous budgetary constraints, supplementary funding had to be sought. The United Nations Development Programme provided about \$21-million, nearly half of the total budget for the exercise. The conditions and expectations of accountability and frugality were a source of contention between donors and the state.

The key coordinating force in the constitution-making exercise was the Select Committee of Parliament on the new Constitution (Copac). In the 1999-2000 exercise this role was played by a presidential commission answerable directly to the incumbent president. Copac, which consisted of 25 members drawn from all three parties represented in Parliament, was co-chaired by an MDC-T representative, Douglas Mwonzora, an MDC-Ncube representative, Edward Mkhosi, and a Zanu-PF representative, Paul Mangwana. Although somewhat unwieldy, Copac managed to navigate the constitution-making process from mid-2009 to January 2013. The three co-chairpersons were often put under intense pressure from the three parties to deliver at every stage of the process. Stalemates

occurred around contentious issues such as devolution, citizenship, the right of Zimbabweans in the diaspora to vote and the electoral system, among others. At one point, Zanu-PF reportedly proposed as many as 200 amendments to the draft.

As the clock ticked towards 2011 and then 2012 the pressure grew, especially from Zanu-PF, war veterans and the military, for elections 'with or without a new constitution'. However, Southern African Development Community mediation was instrumental in keeping the constitution-making process on course, or at least ensuring that it was a prerequisite for the 2013 election. With the deadline of the end of Parliament's tenure fast approaching inter-party agreement on the Constitution was reached on 31 January 2013. As it turned out, the government of national unity (GNU) and Parliament, which had originally been envisaged to run for between two and three years, eventually ran to a five-year term.

The interval between the agreement on the draft constitution and the referendum was very short. There were only six weeks in which to distribute copies of the draft and for voters to study them before the referendum on 16 March. There was limited time to debate the contents of the Constitution and the distribution of draft copies was inadequate.

One regional observer mission stated that:

some members of the public in remote areas decried not having had access to the actual COPAC draft constitution on which they were supposed to decide during the referendum. COPAC distributed about 70 000 copies of the Constitution as against more than 5 million voters. Some members claimed that most of the information in the Draft Constitution had not been translated into their vernacular languages ...

SADC 2013, p 11

The criticism that insufficient draft copies were distributed and there was not enough time to study and debate the contents rests on strong grounds. The bulldozing of the process reflected the paternalistic attitude of the parties to the voters, a paternalism at variance with the spirit of constitutionalism. Clearly, in spite of an extensive outreach exercise to canvass views about what the draft should contain, this latter stage fell short of consultative democratic practice.

#### CONTENTS OF THE DRAFT CONSTITUTION: SOME SALIENT ISSUES

Although this briefing does not provide a comprehensive summary of the contents of the draft constitution several salient issues stand out. These issues, which are contained in specific provisions, played a part in convincing voters to vote the

way that they did. They relate to provisions concerning presidential powers, the electoral system, devolution, the role of security institutions, land reform and various specialist commissions.

In the draft constitution the powers of the president remain undiminished. The draft retains the executive presidency, which has the power to appoint and dismiss public figures, including Cabinet ministers, ambassadors and security chiefs, as well as to declare war or states of emergency. The president has the final say in the appointment of all judges and commissions. Furthermore, the president is entitled to absolute immunity from prosecution for any acts of commission or omission while in office, and after leaving office, can plead that such acts were committed in 'good faith'. There was a strong push by Zanu-PF to retain this type of 'imperial presidency' and against the retention of the position of prime minister. In addition, because the provisions on the presidency will not be retrospective, Robert Mugabe will be at liberty to contest this year's election at 89 and also that in 2018, when he will be 94! In other words, the limit of two five-year terms will not apply to Africa's oldest long-serving leader.

Another key provision in the draft constitution relates to changes in the electoral system. There will be a mixture of first-past-the-post (FPTP) and proportional representation (PR). The FPTP system will apply to elections for the 210-member House of Assembly, while the PR system will apply to the 80-member Senate. Some 60 members of the Senate will be elected on the basis of PR. Six will be elected from each province, while 18, including the president and deputy president of the National Council of Chiefs, will be chiefs and two members will represent people with disabilities. The 60 members of the Senate will be elected under a party-list system based on the votes cast for candidates representing political parties in each of the provinces in a general election, and in which 'male and female candidates are listed alternately, every list being headed by a female candidate' (Draft Constitution 2013, s 120).

The draft constitution dwells on the centrality of the Zimbabwe Electoral Commission (ZEC) to the running of the electoral system. The ZEC is enjoined to ensure that appropriate systems and mechanisms are put in place to 'eliminate electoral violence and other electoral practices'. There should be a code of conduct for parties, candidates and other persons participating in elections or referenda.

The draft contains specific provisions concerning devolution. It states that 'whenever appropriate, governmental powers must be devolved to provincial and metropolitan councils and local authorities that are competent to carry out those responsibilities efficiently and effectively. Among the objectives of this devolution are:

to give powers of local governance to the people and enhance their

participation in the exercise of the powers of the State and in making decisions affecting them; to recognize the right of communities to manage their own affairs and to further development ; and to ensure the equitable sharing of local and national resources.

Draft Constitution, s 264.

Before a compromise was struck Zanu-PF had strenuously opposed devolution, which it viewed as a threat to its propensity for centralising power in an authoritarian presidency.

The props of authoritarianism in Zimbabwe are rooted in the 'deep state', which includes the police, military and intelligence services as well as a partisan public service. In the past decade the top echelons of these services have publicly expressed their membership of Zanu-PF and thus their allegiance to it.

Between and during elections these services have displayed partisanship which has been expressed in the repression of other parties on political grounds. The draft constitution requires security services to discharge their duties on neutral and non-partisan grounds. The provisions are quite explicit on this matter in that they specify that:

neither the security forces nor any of their members may, in the exercise of their functions, act in a partisan manner; further the interests of any political party or cause; or violate the fundamental rights or freedoms of any person; and members of security services must not be active members or office-bearers of any political party or organization.

Draft Constitution 2013, s 208

If these provisions are followed strictly they will undermine the cosy relationship between Zanu-PF and the security services.

Other constitutional provisions of interest relate to the land reform and specialist commissions. It is specified that the Constitution will not allow compensation to be paid for land compulsorily acquired for resettlement under the agrarian reform of 2000 except 'for improvements effected on it before its acquisition'. However, there is still no finality on the land issue as issues of compensation are bound to arise in future discussions on bilateral and multilateral investment as well as on freehold ownership.

The draft provides for the setting up of 'independent commissions', whose objectives will be to support and entrench human rights and democracy, to promote constitutionalism, to promote transparency and accountability in public institutions, to secure the observance and principles by the state and all institutions

and agencies of government and to ensure that injustices are remedied (Draft Constitution, s 233).

Although these are laudable objectives, the real test is whether these commissions have sufficient resources, will and autonomy from the government of the day to carry out their mandates. In recent years commissions such as the Zimbabwe Electoral Commission, the Zimbabwe Human Rights Commission and the Zimbabwe Media Commission have been starved of the resources, rendering them ineffective and depriving them of credibility.

Finally, one of the commissions to be established within the framework of the new Constitution will be a National Peace and Reconciliation Commission which will, among other functions: ensure post-conflict justice, healing and reconciliation, develop and implement programmes to promote national healing, unity and cohesion in Zimbabwe and the peaceful settlement of disputes and bring about national reconciliation by encouraging people to tell the truth about the past and facilitate the making of amends and provision of justice (Draft Constitution 2013, s 252). While these aims are laudable, the commission's success will depend largely on the cooperation and commitment of the institutions of Zimbabwe's 'deep state' to own up to the excesses they perpetrated in the post-independence period.

### CONCLUSION: CONTINUITY OR REFORM?

How significant is Zimbabwe's new Constitution to progress towards political reform? Or is the Constitution essentially a landmark in continuity with the country's authoritarian past and political culture? These are germane but difficult questions. There are two main positions on the issue. The first is based on a reading of past and present trends in Zimbabwean politics. It is a position that argues that the 'zanufication of the state has been so entrenched that it is unlikely that the values and principles normally associated with a democratic constitutional order will automatically emerge' with the adoption of the new Constitution (Mawere 2013). 'Zanufication' here refers to the process whereby Zanu-PF's authoritarian values and tendencies permeate the practices and outlook of the state bureaucracy, police and army as well as political discourse in state media. For instance, a wave of arrests of human rights leaders and harassment of civil society organisations since January 2013 smacks of planned intimidation and political destabilisation in the run-up to the elections in mid-2013. Within hours of the announcement of the results of the referendum the apparatus of the 'police state' was at work detaining staff from the prime minister's office and from the Zimbabwe Anti-Corruption Commission, who were investigating alleged corruption by some government ministers. A human rights lawyer, Beatrice Mtetwa, who represented the detainees, was refused bail and incarcerated for a week in jail.

Furthermore, a generation of politicians and public servants has been nurtured under the Zanu-PF ideology of pseudo-socialism, a liberation-war ethos and personality cultism and patronage. Other political parties have known no other alternative party or economic model. Unless there are substantive security reforms to dismantle Zimbabwe's police state or 'deep state', a formidable threat to democracy and constitutionalism will remain.

A second related position is that while a good constitution is *necessary* for reform, it is not a *sufficient* condition. In this context, although the draft constitution represents a qualitative advance over the Lancaster House Constitution, the litmus test will be how it will be implemented. Some regimes have simply ignored their constitutions or have torn them up as soon as the ink was dry. As one analyst put it: 'although it is important to recognise that constitution-drafting is part of a broader democratic process and that, no matter how plausible the new charter may be, it is not self-implementing ...' (Dzinesa 2013).

Thus, it remains to be seen whether constitutionalism will take root and whether there will be consensus about its interpretation and implementation.

The first series of tests will be *whether* and *how* the new Constitution facilitates the holding of credible, fair and transparent elections in mid-2013. If there is no obstruction by institutions of Zimbabwe's 'deep state' and no partisanship by the electoral commission or political violence in those elections the Constitution will have passed this early test. That will lay the foundation for more substantive reforms and viable constitutionalism. It remains to be seen whether that will, indeed, be possible.

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