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Constitution-Building in Africa

Edited by: Jaap de Visser, Nico Steytler, Derek Powell and Ebenezer Durojaye

Nomos
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Introduction

In this book, 12 African scholars examine constitution-building in nine African jurisdictions. The chapters emanate from the International Conference on Constitution-Building in Africa, hosted by the Community Law Centre on 6 September 2013 at the University of the Western Cape (UWC). The Conference was part of the African Human Rights Moot Court, convened by the UWC Law Faculty in collaboration with the University of Pretoria’s Centre for Human Rights. The Conference was attended by more than 250 participants from across the continent who engaged with close to 30 papers in four working groups. Eleven chapters were selected for inclusion in this book.

These chapters contain a range of narratives located in five themes, namely the process of constitution-making; designing the structure of the state; the judiciary and constitutionalism; limiting executive power; and sustainable constitutionalism. What follows is an overview of the selected chapters and how they address critical questions about constitution-building in Africa.
1 Process of constitution-making

The process towards the adoption of a constitution is determined by the context in which the constitution is written. It navigates such issues as political engagement, keeping politically agreed timelines, ensuring the inclusion of a variety of constituencies and groups, the use of domestic and foreign technical expertise, and ensuring legitimacy and public awareness. This book examines examples of constitution-making processes around the continent and how they attempt(ed) to accommodate the many interests at play.

As such, the chapters offer a range of different constitution-making narratives. In Zimbabwe, the Global Political Agreement (GPA) provided for a parliamentary select committee, co-chaired by the three main political parties, to lead the drafting of a constitutional text. The process included public hearings and a referendum. In the case of Malawi, all of its five constitutional review projects were initiated by the presidential appointment of a constitutional review commission or technical drafting committee. The drafting of the country’s 1966 Constitution took place primarily under the auspices of the ruling Malawi Congress Party; the 1995 constitutional review process was led by a National Consultative Council and consisted of various consultative processes. While this review was markedly more inclusive, it still lacked legitimacy. The making of Kenya’s 2010 Constitution was, by all accounts, impressive in its inclusivity. With the horrors of the 2007/2008 post-election violence engraved in collective memory, and the experience of the impressive consultation, led by the Ghai Commission, still fresh in mind, Kenya’s Constitution was drafted on the basis of extensive consultation.

Zembe and Masunda examine the detail of Zimbabwe’s constitution-making process, including the political structure and consultation procedures that were used. The authors do so against the backdrop of the important but difficult balance that had to be struck between facilitating the broadest possible participation and securing a political settlement to end conflict. They argue that Zimbabwe’s Constitution Select Committee (COPAC), tasked with driving the drafting of the Constitution, was always ill-suited to strike that balance. Zembe and Masunda challenge the COPAC process as being strikingly partisan, statist and incapable of facilitating participation. For example, they point to the absence of predetermined rules of engagement within COPAC. They question the credibility of the outcome of the referendum, and substantiate this by referring to par-
Negotiations towards peace are never conducted between friends. Zembe and Masunda argue that, even so, the COPAC process lacked the required level of basic trust between the three partners. They describe violence and hostilities, interference by security agencies, donor pull-out and public condemnation by political principals, submitting that this undermined the credibility of the process and its outcome. Ultimately, they argue, the 2013 Constitution is an elite-negotiated settlement reflecting the views of political parties and power-holders, a contention the authors support by pointing to specific provisions that bear testimony to the overwhelming influence of partisan politics and the views of the incumbent president on the constitutional text.

Writing from the basis of the Malawian experience, Chilemba echoes these sentiments when he remarks that a constitution will have been made by ‘a majority’ but must have served ‘diverse interests’ rather than only those of powerful elites. He links the difficulties in limiting the power of the Malawian presidency to the constitution-making processes that led to the 1966 and 1995 Constitution. The process towards the 1966 Constitution served only the interests of the ruling party, ‘interests which included the desire to avoid division and create a unified, one-party state led by a hegemonic president’; the process towards the 1995 Constitution, while decidedly more open and inclusive, was nevertheless rushed and lacking in legitimacy.

Masengu’s chapter provides insight into five constitutional review processes in Zambia, including the one that was initiated in 2011 but which has subsequently been stalled. She focuses on the manner in which communities were consulted, giving a detailed account of how women have been consistently under-represented both in constitutional review bodies and petitions made to constitution-making processes. She acknowledges that representation is but one element of effective participation, yet makes the compelling point that being outnumbered even before the process begins does little to dispel the patriarchal attitudes that continue to prejudice women in Zambia.

Masengu takes the argument further by linking this exclusionary procedure to substantive failures. She discusses four major themes regularly highlighted by women’s groups in Zambia: the problematic exceptions to the anti-discrimination clause; the absence of reproductive rights in the Constitution; the uncertainty surrounding the status of customary law; and
gender discrimination in citizenship rules. Masengu shows how well-crafted proposals that were thoroughly canvassed with communities and women’s groups often met with a dismissive response from the government. Her chapter, complete with practical recommendations such as ensuring that there are female chairpersons or facilitators in consultation sessions, serves as a stark reminder of the importance of having a truly inclusive constitution-building process that emphasises substantive equality between men and women.

Musumba’s argument is located in Kenya’s experience of constitution-making. She argues for ‘pre-promulgation scenario-building’ and calls for the constitution-making process to be lifted out of, on the one hand, the sterility of the art of legal drafting, and, on the other, the exclusive emphasis on aspiration. By devoting more time and effort to the feasibility of implementing the suggested provisions, critical ruptures in constitution-building can be avoided, particularly in the early, delicate stages. She maintains that the process should include a practical assessment of the feasibility of each clause, based on the construction of scenarios.

For example, she discusses the legal dispute concerning the eligibility of William Ruto and Uhuru Kenyatta to stand for presidential election, a dispute which turned upon the leadership and integrity clauses in the Constitution. The Supreme Court’s ultimate reduction of these requirements to an absence of a criminal conviction, she argues, could have been avoided had greater care been taken to subject this provision to such a scenario-building exercise.

2 Structuring the state

Almost all constitution-building processes tend to raise questions about using multi-level government structures to respond to imperatives for peace, development and democracy.

Dersso, writing about the Kenyan Constitution, attributes Kenya’s problems in part to a fervent commitment to centralisation and a corresponding repudiation of aspirations for decentralisation. He finds the introduction of county government ‘potentially one of the most transformative changes in the organisation and distribution of government power’. Muchadenyika in turn examines how devolution featured in the process leading to the 2013 Constitution of Zimbabwe. He discusses various forms of decentralisation and their benefits for development and deepening de-
mocracy, but also warns against possible setbacks such as rising inequality, macroeconomic instability and the risk of local capture.

The author compares the viewpoints on devolution of the three main political actors assigned by the Global Agreement to negotiate the constitution, namely ZANU-PF, MDC-T and MDC-N. The public debate on devolution was largely based on misinformation, he argues. His conclusion is that the constitutional text left the devolution theme largely ‘unfinished’, despite having provided a promising starting point. The Zimbabwean Parliament thus faces the task of leading the local government reforms and dealing with critical themes such as the allocation of functions, the financing of local governments, and intergovernmental relations. However, with the Constitution providing little guidance and parliament controlled by a party fiercely opposed to devolution, the outcome is uncertain.

 Constitutional drafting often takes places in a context of strife between groups defined by religious, ethnic or other cultural differences; further complexity is added by the difficulty of accommodating minorities in representative democratic systems. This theme is taken up by Mahadew, who discusses a number of mechanisms for ensuring minority representation, such as communal rolls, reserved seats and mixed or mandated candidate lists. In particular, he examines the best-loser principle which has been included in the Constitution of Mauritius. This system operates in addition to Mauritius’s multi-member constituency system, and is an ingenious mechanism for distributing eight reserved parliamentary seats among Hindu, Muslim, Sino-Mauritian and a General Population category. Any form of specific electoral treatment of religious, ethnic or culturally defined groups requires these groups to be identified in one way or another and data on communal affiliation to be collected.

Mahadew’s chapter demonstrates that the precise method of identifying groups will always attract contention. The Mauritian case is no exception, as opposition to this electoral mechanism persists and the courts, politicians and international community appear divided on its merits. Mahadew’s message is to look beyond the system’s obvious inadequacies (such as the use of dated census statistics) and appreciate the contribution which, he argues, it has made to inclusive politics, stability and prosperity in Mauritius.
Constitutionalism is a precondition for successful constitution-building. Adherence to the rule of law and recognition of the primacy of the constitution are key ingredients for the successful implementation of a constitution. Two chapters examine the role of the judiciary in this regard. Mugyenyi examines the role of the judiciary in Kenya’s efforts to build and sustain the momentum of the 2010 Constitution, while Sermet examines its role in creating transitional constitutional law during times of immediate constitutional crisis.

Efforts at transforming the Kenyan judiciary are shaped by the latter’s history, and in Kenya that history is a problematic one, as explained by both Mugyenyi and Musumba; at the same time, Kenya needs judicial activism during this delicate state of constitution-building. Mugyenyi describes various attempts, before 2010, to undermine the judiciary and takes note of its persistently high levels of corruption, observing that, prior to the 2010 Constitution, the judiciary in essence had been ‘designed to fail’. She commends the constitutional elements which seek to change that design, these including improved arrangements concerning tenure and financial autonomy, judicial vetting and the insistence on bringing progressive judges onto the bench. Despite the recent difficulties described by Mugyenyi, the prospects remain good for Kenya’s judiciary to emerge as the country’s key guarantor of constitutionalism.

It is in times of major political crisis leading to ‘regime change’ that the limits of constitutionalism are tested most severely. Notwithstanding the unequivocal condemnation of ‘unconstitutional change’ in the African Charter on Democracy, Elections and Governance, the continent continues to be confronted with revolutionary changes and coups d’état. Sermet discusses the concept of transitional constitutional law and focuses on the judge-made variety of it. He examines two comparable incidents in the Comores and Madagascar in which courts acted outside of the prescripts of the constitutional text yet did do in order to preserve constitutional order in response to acute constitutional crises. His examination of these ‘acutely paradoxical’ scenarios leave one bewildered as to whether these courts advanced or frustrated constitutionalism. He locates his examination in a distinction between ‘controlled transgression’, with the actions of the court in the Comores as an example, and ‘uncontrolled transgression’, which occurred in Madagascar.
In the Comores example, the Court accepted as a fait accompli that the executive would remain in power unconstitutionally. Instead of ruling to nullify the executive’s authority (which could have deepened the crisis), it prescribed an interim regime and thus produced constitutional standards ‘out of nothing’. In Madagascar, the uncontrolled transgression of the Court was triggered by a presidential regulation that clearly went beyond what was constitutionally permitted. The Court ruled that the impermissibility could be ignored on the grounds of the ‘acknowledgment of circumstances’ and justified by ‘the principle of the continuity of the State’. It proceeded to issue a broad principle of legality, confirming that key tenets of the constitutional state remained.

It is clear that the courts in these examples felt forced to let facts triumph over law. They constructed their own prerogative to proclaim an interim constitutional order when faced by the prospect of constitutionalism’s total oblivion. Sermet notes the undeniable difficulty in accepting this, but also makes a plea to engage with and understand the problems that arise when the law encounters its limits and is powerless to counter political disorder. He posits the judge’s actions as a last line of defence in a crisis before the onset of arbitrary power. Perhaps one may take solace in the self-cleansing ability of the interim order in Madagascar: the Court later used this exact same set of transitional legal provisions to disqualify the three major contenders in a presidential election, thereby signalling that the utility of the transitional constitutional law went beyond averting immediate crisis.

4 Limiting executive power

Chilemba identifies the phenomenon of the powerful presidents as a major obstacle to constitutionalism in Africa. In particular, he discusses the powers allocated by the Malawian Constitution to the presidency. A series of presidential prerogatives – including powers over parliament and the judiciary, powers to appoint and dismiss, criminal provisions to protect the presidency, and dangerous ‘residual’ presidential powers – combine to produce what he terms a ‘hegemonic presidency’. He acknowledges the complicated interplay between laws that were not designed to create an imperial president but were used as such, and presents a number of examples of how presidents abused constitutional provisions to entrench their hegemony. He also points to the Bill of Rights and the courts as instituti-
ons that succeeded in limiting executive power, but while he commends the courts for acting as a bulwark against the imperial president, he bemoans the fact that the law itself seems to radiate little normative value.

Assefa’s chapter about Ethiopia’s parliamentary system contains an important lesson about constitutional texts: critical omissions, such as those on the removal of members of Ethiopia’s national executive, are not without consequence. They may very well have contributed to the executive predominance that characterises Ethiopian politics. However, Assefa locates his assessment of the origins of executive predominance mainly in the ruling party’s doctrine of ‘democratic centralism’: state institutions that command levers of power are seen as tools for achieving the party’s economic and political goals rather than as a manifestation of the limits placed on state power. Furthermore, party loyalty in parliament is not primarily about maintaining stability in government but about adherence to the sacred order that is party discipline.

Assefa argues that this threatens liberal notions of the ‘will of the people’ as expressed through democratically elected assemblies. He substantiates his assessment by pointing out, for instance, that Ethiopia’s House of Public Representatives does not seem to control its own operations: the executive operations necessarily take precedence or priority. His chapter also shows that when constitutional controls over executive law-making are weak and the principle of legality does not hold sway, parliament is marginalised and national executives become imbued with seemingly unfettered powers to make laws.

Assefa reviews a range of constitutional options to limit executive dominance, options drawn from democracies that have had more time to develop them, and argues that there is a need to debate Ethiopia’s electoral system and consider moving from the first-past-the-post system to proportional representation.

5 Sustainable constitutionalism

Dersso and Nabukenya discuss the ingredients that promote or frustrate the ability of a constitution to absorb the inevitable tension in complex African societies and keep a country on a sustainable trajectory towards peace and the realisation of human rights.

Dersso emphasises the distinction between decreeing a new constitutional order and achieving a complete break from the politics of old. The
first is a matter of constitutional quality and is relatively easily achieved; the second places requirements on the conduct of actors and is infinitely more difficult to accomplish. He concludes that, with the passage into law of its 2010 Constitution, Kenya succeeded in doing the first, that is, creating just institutions. He notes, for example, the genuine attempts that have been made to restore the judiciary and electoral management bodies through the creation of credible procedures to appoint and regulate them. However, until Kenya addresses issues such as the political manipulation of ethnicity and the widespread corruption among the country’s elite, the 2010 Constitution remains, for all intents and purposes, unimplemented.

Nabukenya engages with the concept of constitutional stability by examining Uganda, a country which has had four constitutions since independence. The fact that its current one has been amended more than 120 times raises questions about the point at which amendments cease to revitalise a constitution and begin to tarnish its very legitimacy. Nabukenya argues that, in Uganda, the amendments were informed by an incapacity to govern in accordance with the Constitution, and as such he presents the Ugandan tale as one of constitutional instability. He points to a range of factors that may, in varying degrees, apply to other post-independence states on the continent. These include colonial history, ethnicity, economic structure, manipulation by international actors and the behaviour and ideology of incumbents.

He also identifies design features that have bedevilled constitutionalism in Uganda. Uganda’s constitutional ambivalence towards multiparty democracy has left it bereft of well-functioning parties that contribute to stability and policy-making. Nabukenya submits as well that the absence of real constraints on executive authority, majoritarian politics, unresolved tension about federalism and decentralisation, and uncertainty about the role and status of traditional leadership are fault lines in the Constitution which prevent it from bringing about constitutional stability. In so doing, he raises important questions about the durability of constitutions that are grounded in international human-rights norms but out of sync with the cultural mores of their societies.
6 Conclusion

The chapters above are testimony to the abundance of critical thought and argument on the continent about issues relating to constitutionalism. Without fail, the authors celebrate the wave of constitutional reform sweeping over Africa and its potential to build more inclusive, resilient African states that are accountable to citizens and responsive to human rights. Without fail, too, they are vigorous in criticising undemocratic or unrealistic constitution-making processes, the autocratic behaviour of executives, the exclusion of marginalised groups, undue foreign interference and violations of basic tenets of constitutionalism such as separation of powers and respect for human rights.

The continent is propelling itself into a seemingly accelerating programme of constitutional reform, along with all the attendant challenges and pitfalls. At the same time, the margin of error is small and the time for learning short, given that popular demand for democratisation is growing and the need for home-grown solutions is urgent. It is hoped, then, that this book makes a useful contribution to constitutionalism in Africa.

The Editors
Cape Town, November 2014
The Global Political Agreement (GPA) Constitutional in Zimbabwe: A New People-Driven Constitution or a Misnomer? Wurayayi Zembe and Octavious Chido Masunda

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Abstract

This chapter assesses whether the Select Parliamentary Committee (COPAC) constitution of Zimbabwe is truly democratic or simply a further amendment to the existing Lancaster House Colonial Constitution of Zimbabwe. The Zimbabwean people are striving to establish a multiparty constitutional democracy as a permanent solution to the nation’s longstanding problems in governance evidenced in violence during elections, disputed election results, allegations of illegitimate and corrupt governance, economic decay, unemployment and social unrest. Zimbabweans have been clear in their demand for a democratic constitution capable of producing a legitimate elected government through a peaceful and credible electoral process. Under the guidance of the Southern African Development Community (SADC) and the African Union (AU), and in the aftermath of violent and disputed elections in 2008, three rival political parties entered into a pact dubbed the Global Political Agreement (GPA) on 15 September 2008. The parties agreed to end political violence; alter the Lancaster House Colonial Constitution of Zimbabwe through amendment 19; form an Inclusive Presidential Government; and create a new constitution. On 12 April 2009 a 25-member select parliamentary committee (COPAC) was appointed comprising representatives of the three political parties in the legislature. The largely partisan COPAC constitution-making process took four years, instead of the planned eighteen months, to produce a draft constitution that was put to a referendum on 16 March 2013.
This chapter assesses whether the COPAC constitution-making process was democratically run and whether the draft constitution reflects Zimbabweans' demands for peace, fundamental human rights, credible multi-party elections, legitimate government, and economic reconstruction and development. Already the GPA parties have disagreed sharply on such issues as security sector reforms, an elections roadmap, the registration of voters and preparation of the voters' roll. How democratic, then, is Zimbabwe's current constitution?

1 Introduction

Constitutional reform has swept over Africa from the late 1980s to the present as a product of democratisation. Since 1975 almost 200 constitutions appeared in countries at risk of intra-state violence, including Zimbabwe.\(^1\) Presently, the national and international perceptions are that Zimbabwe has a new people-driven constitution that became effective and operational as a new governance charter on 22 May 2013, the date on which the document was given presidential assent. The constitutional development that produced the new national governance document originated from the Global Political Agreement (GPA) signed by three competing political parties on 15 September 2008.\(^2\)

The need for constitutional reform in Zimbabwe emerged from problems in economic, social, and foreign policy that had their roots in British colonial rule, which ended officially when the country gained full independence on 18 April 1980. Internal and external pressures on the independent African state, both of which were a result of increasing intra-state conflict and state decay, can be cited as reasons behind this need for constitutional reform.\(^3\) For the past 33 years of independence, Zimbabweans have experienced increasing problems of poor state governance, violent electoral conflicts, alleged governmental illegitimacy and corruption, dis-

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\(^2\) Given this origin, in this chapter the new constitution will be referred to as the GPA Constitution of Zimbabwe.

regard for human rights and the rule of law, economic collapse, unemployment, social disintegration, and international isolation.

As a response to these crises, the people of Zimbabwe in the recent past began to call for a new people-driven constitution as a permanent solution to the nation’s problems. By means of a democratic constitution, Zimbabweans hoped to ensure peace, observance of fundamental human rights, credible democratic elections, the formation of legitimate government, rule of law, and economic reconstruction and development. It is important to stress that Zimbabweans have been vocal and unequivocal in demanding what they branded as ‘a people-driven democratic constitution’. During the past three decades there has been an increasing demand in Zimbabwe for the creation and strengthening of democratic institutions and for meaningful popular participation in democratic processes, that is, for constitutionalism.4

This chapter provides an analytical assessment of the GPA constitution-making process with a view to determining whether the country now has a new people-driven constitution, as is claimed to be the case by those who were in control of the process. The chapter begins by identifying the legal instruments and structures of the constitution-making process. This is followed by a critical analysis of the process and the contents of the constitution.

2 Genesis of the GPA Constitution in Zimbabwe

Under the amended Lancaster House colonial constitution of Zimbabwe, elections took place between 29 March and 27 June 2008 for president, senators, members of the House of Assembly, and councillors of local authorities. The elections were marred by intimidation, beatings, arrests, abductions, torture, murder, rape, arson and the displacement of people. The election results were withheld by the electoral commission for six weeks, and the public perception was that they were manipulated in order to force the electorate into a presidential run-off election, given that the published results did not show a winner by a clear majority.

Due to the intensity and magnitude of the violence that characterised the run-off election, one of the candidates, Morgan Tsvangirai of the Movement for Democratic Change (MDC), was forced to flee and sought refuge in Botswana. On returning to Zimbabwe, he found refuge in the Dutch foreign embassy before withdrawing his candidature in the light of the violence directed against him and his supporters. The remaining candidate, Robert Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF), was declared the winner and sworn into office as president on 29 June 2008. His five-year term ended on 29 June 2013. The international community rejected the results of the June 2008 run-off elections as undemocratic.

In the aftermath of these elections, and under the tutelage of the Southern African Development Community (SADC) and African Union (AU), the three political parties that had competed in the elections and obtained seats in parliament, entered into a pact dubbed the Global Political Agreement (GPA) on 15 September 2008. The parties agreed to: end political violence in Zimbabwe; alter the Lancaster House Colonial Constitution of Zimbabwe through Amendment 19; form one combined Inclusive Government (IG); and write a new constitution for the country. Thus, the GPA Constitution in Zimbabwe was born out of article 6 of the agreement of 15 September 2008 between ZANU-PF and the two MDC formations. The GPA was witnessed by the SADC Facilitator and its implementation was guaranteed and underwritten by the Facilitator, SADC and the AU.5

The GPA constitution-making process was largely controlled by party executives, as shall be outlined below. Scholars disagree as to which is the best approach in constitution-making processes. Those in favour of participatory constitution-making recommend it as the route to follow in building constitutional legitimacy in highly challenging cases of democratisation.6 However, this model has its critics, who counter that participatory approaches can be counter-productive and wasteful of resources as there is a lengthy period required for mass participation; in some cases, participants are ordinary people with little understanding of constitutional issues and can be easily frustrated or manipulated by their leaders. In the case of Zimbabwe, the GPA leaders created the impression that the process was to

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be participatory, but the reality is that the outcome was privately negotiated by the GPA parties and its formulation no different to that of its predecessor, the Lancaster House Colonial Constitution, which some scholars label as merely a compromise between competing interests.7

3 Constitutional Amendment 19

Although the GPA was a treaty between political parties, it was to be implemented through state structures. The parties unconditionally agreed8 that the necessary constitutional amendments would be passed through parliament, with presidential assent to pave way for the implementation of the agreement. Consequently, the GPA parliament amended the Lancaster House Colonial Constitution of Zimbabwe by consensus through the Constitution of Zimbabwe Amendment 19 of 2008.

Section 115: Schedule 8, clause 20.1.6(1) of the amended Constitution stated that there shall be a president, which office shall continue to be occupied by President Robert Gabriel Mugabe, and clause 20.1.6(3) stated that there shall be a prime minister, which office shall be occupied by Mr Morgan Tsvangirai. Other provisions of Schedule 8 name the three political parties in the GPA as ZANU-PF, MDC-T, and MDC-M. The material effect of the Amendment 19 was to put two names of individuals and three names of political parties in the Constitution, as indicated in section 115, thereby converting the document into a personal and partisan private constitution. As a result, the Lancaster House Colonial Constitution of Zimbabwe lost its public status.

On 11 February 2009, the presidential government inaugurated after the 2008 elections, and supported by the GPA of 15 September 2008 and Amendment 19, appointed an Inclusive Government (IG) that comprised vice-presidents, a prime minister, deputy prime ministers, ministers and deputy ministers drawn from members of the three political parties in the GPA. The IG undertook to produce a new people-driven constitution during its term of office from 29 June 2008 to 29 June 2013. It is important to highlight the fact that the IG governed the country using the Lancaster House Colonial Constitution of Zimbabwe as amended, together with its

7 Sachikonye L ‘Constitutionalism, the electoral system and challenges for governance and stability’ (2004) 4 Africa Journal on Conflict Resolution 171-95.
8 GPA section 24(1).
subsidiary laws, organs, structures, and institutions. This was the institutionalised political power that produced the GPA Constitution in Zimbabwe.

4 GPA Constitution parliamentary select committee

Article 6: 6.1(a) of the GPA states, ‘The Parties hereby agree that they shall set up a Select Committee of Parliament composed of representatives of the Parties ... ’ In accordance with this provision, on 12 April 2009 the Speaker of House of Assembly of the GPA parliament appointed 25 members of parliament, representing the three political parties, to form the Constitution Parliamentary Select Committee (COPAC) with a mandate to spearhead the writing of a new constitution for Zimbabwe.9 According to section 6.1(a) of the GPA, COPAC’s tasks included: setting up sub-committees chaired by and composed of members of parliament and representatives of civil society, as deemed necessary to assist the Select Committee in performing its mandate; holding public hearings and consultations on constitution-making; convening an All Stakeholders Conference to consult stakeholders on their representation in the sub-committees; tabling the draft constitution at a second All Stakeholders Conference; and reporting to parliament on the Select Committee’s recommendations for the content of a new constitution. The planned timeline for the COPAC constitution-making process was 18 months, but the process took four years to complete.

Considering that the COPAC constitution-making process fell under the jurisdiction of the Minister of Constitutional and Parliamentary Affairs, COPAC can be viewed as a departmental project. However, COPAC did not have an instrument of governance that regulated its operations. In June 2013, COPAC reported to the GPA parliament that all its deliberations and decisions were by consensus – which suggests compromises – and that no voting took place to decide any issue.10 An important observation to note is that, as much as many scholars and practitioners champion participatory constitution-making, there are others who favour elite-negotiat-

ed settlements. The latter approach is exactly the one adopted in Zimbabwe.

5 Instruments of the GPA constitution-making process

The GPA constitution-making process was based on two legal instruments, one contractual and the other constitutional. The two legal instruments were the sources of power and regulations that guided the implementation of the constitution-making process. The contractual legal instrument used in the constitution-making process is the GPA of 15 September 2008 that was signed by the presidents of the three political parties and witnessed by the SADC Facilitator, Thabo Mbeki, the then president of South Africa. The implementation of the GPA agreement was underwritten by the SADC Facilitator and AU in terms of section 22.6 of the pact. The constitutional legal instrument that provided the framework within which the GPA constitution-making process was undertaken is the Lancaster House Colonial Constitution of Zimbabwe as amended by Amendment 19 (discussed in section 3).

6 Structures of the GPA constitution-making process

Based on the contractual and constitutional legal instruments detailed in section 5 above, the following organisational structures were used in the GPA constitution-making process.

6.1 Principals to the GPA

The three presidents of the political parties, namely Robert Mugabe of ZANU-PF, Morgan Tsvangirai of MDC-T, and Arthur Mutambara of MDC-M, who had signed the GPA of 15 September 2008 as principals on behalf of their organisations, constituted the top governance structure of the GPA constitution-making process. The three principals also held top cabinet posts in the IG, which controlled the entire constitution-making process. Robert Mugabe was the President, Head of State and Commander-in-chief of the Defence Forces. Morgan Tsvangirai was the Prime Minister and Arthur Mutambara was the Deputy Prime Minister.
Management Committee

The Principals of the GPA appointed a Management Committee to give policy and strategic direction to the constitution-making process. The Management Committee also served as a deadlock-breaking mechanism. The Committee was made up of two negotiators from each of the three GPA political parties, the Minister of Constitutional and Parliamentary Affairs, and the three co-chairpersons of COPAC.

GPA political parties

As mentioned, the political partners to the GPA were ZANU-PF, the Movement for Democratic Change-Tsvangirai faction (MDC-T) and the Movement for Democratic Change-Mutambara faction (MDC-M). The parties agreed to operate by consensus. These were the parties which had participated in the sham 2008 elections and obtained seats in parliament. The same parties had been involved previously in a bloody conflict in March 2007 at an aborted Save Zimbabwe Campaign prayer meeting held at the Zimbabwe Grounds in Highfield, a suburb of Harare. That violent event, in which leaders of the MDC-T, MDC-M, and civil society organisations were assaulted by the police and one opposition activist, Gift Tandare, shot dead, shook the world and led SADC to intervene in Zimbabwe’s political crisis. Throughout the GPA constitution-making process the three parties’ top decision-making organs met separately on several occasions to determine party positions on issues arising from the implementation of the process.

Cabinet of the Inclusive Government

In the IG, the cabinet provided collective executive power and authority over the GPA constitution-making process. All cabinet ministers were members of the three political parties in the GPA agreement.
6.5 Ministry of Constitutional and Parliamentary Affairs

The Ministry provided supervisory and administrative oversight over the GPA constitution-making process inasmuch as the business of making a constitution fell under the executive function and mandate of the Minister. The minister was a member of one of the three GPA parties.

6.6 GPA parliament

On 12 April 2009, parliament appointed COPAC from its members to spearhead the constitution-making process. After the referendum on 16 March 2013, the final draft GPA constitution was presented to both houses of parliament through a constitutional bill referred to as Constitutional Amendment Number 20. It was passed by the House of Assembly on 8 May 2013 and by the Senate on 14 May 2013. All parliamentarians were members of the three political parties in the GPA agreement.

6.7 COPAC

As mentioned, COPAC was appointed by the House of Assembly in April 2009 to drive the GPA constitution-making process. The Select Committee comprised 25 MPs from the three political parties in the GPA and one representative of the Traditional Chiefs Council, who was also a ZANU-PF party member with a seat in parliament. COPAC created five standing subcommittees made up of its members: Budget and Finance; Human Resources; Stakeholders; Information and Publicity; and Legal. In December 2009 COPAC appointed its own secretariat of 24 employees and established a head office in Harare. Its activities were conducted in an ad hoc manner based on policy directives from the GPA principals. In the analysis below, it will be observed that a direct effect of the latter structural weakness was that the three political parties ended up monopolising the process to the exclusion of other parties, such as the Democratic Party, that had been calling for constitutional reform since the early 1990s.
6.8 First All Stakeholders Conference

The First All Stakeholders Conference, which was attended by 4,000 individuals drawn mainly from the GPA parties and their affiliate civil society organisations, was held on 21 July 2009. The conference produced discussion topics in the following thematic areas:

- founding principles of the constitution;
- separation of powers of the state;
- systems of government;
- executive organs of the state, public service commission, police and defence;
- elections, transitional mechanisms and independent commissions;
- citizenship and a bill of rights;
- land and natural resources;
- public finance and management;
- media;
- traditional institutions and customs;
- labour;
- youth;
- the disabled;
- war veterans/freedom fighters;
- local languages, arts and culture;
- women and gender; and
- religion.11

The 17 thematic areas became the basis upon which the COPAC outreach consultation was done. The First All Stakeholders Conference also instructed COPAC to ensure that in all its processes GPA political parties constituted 30 per cent and their affiliate civil society organisations 70 per cent, following the principle of equal representation of men and women in all COPAC organs.

6.9 Outreach teams

Seventy outreach teams were set up by COPAC to conduct outreach exercises in the 10 provinces of the country. Each team was made up of 16 members, comprising three team leaders, six ordinary team members, three rapporteurs, three drivers and one technician. A group questionnaire of 26 questions, referred to as ‘Talking Points’, was developed from the 17 thematic areas. The Talking Points questions were used to collect group responses from 1,118,760 individual participants who attended the 4,943 meetings held in 1,950 local authority council wards countrywide.

6.10 Thematic committees

Thematic committees were formed to analyse the data emerging from outreach consultations. Each committee had a total of 425 members, made up of 30 per cent members of parliament and 70 per cent members of affiliate civil society organisations. The analysed data were compiled into National Statistical Reports Versions One and Two. Version One used a quantitative descriptive statistical analysis based on frequency percentages relating to the 1,950 wards nationally. Version Two used both quantitative and qualitative analysis of data based on provincial outcomes. In the preparation of the Draft GPA Constitution, greater importance was attached to quantitative than qualitative data. The COPAC constitution-making process outreach programme was not scientific.12

6.11 Principal drafters

COPAC set up a committee of three lawyers to draft the constitution. To guide this drafting exercise, the principal drafters were given a document entitled *Drafting Instruments* and made up of the following sections: List of Proposed Constitutional Issues; Revised Gap Filling on Identified Issues; and Constitutional Principles. COPAC extracted what it deemed to be constitutional issues from the National Statistical Reports Versions One