

**THE GLOBAL POLITICAL AGREEMENT (GPA) CONSTITUTION IN ZIMBABWE: A  
NEW PEOPLE-DRIVEN CONSTITUTION OR A MISNOMER?**

**Wurayayi Zembe**

Christ University  
Hosur Main Road  
Bangalore  
Karnataka 560029  
India  
zembewt@gmail.com

**Octavious Chido Masunda**

National University of Science and  
Technology  
Corner Cecil Ave/ Gwanda Road  
Bulawayo  
Zimbabwe  
omasunda@gmail.com

**CONFERENCE ON CONSTITUTION-MAKING PROCESSES IN AFRICA**

**UNIVERSITY OF THE WESTERN CAPE  
FACULTY OF LAW**

**6 September 2013**

## ABSTRACT

The paper aims to provide an analytical assessment of the GPA constitution-making process that produced the Select Parliamentary Committee (COPAC) draft constitution with a view to explore whether the people of Zimbabwe now have a new people-driven constitution that was produced through a democratic people-driven constitution-making process or there is in place just another new amendment to the existing Lancaster House Colonial Constitution of Zimbabwe, amendment number 20. The Zimbabwean people are presently striving to establish a multiparty constitutional democracy based on the principle of a people-driven democratic constitution as a permanent solution to the nation's protracted challenges of governance, often violent electoral political conflicts, disputed elections, alleged governmental illegitimacy, corruption, economic decay, unemployment, and social disintegration. During the past two decades Zimbabweans have been unequivocal in demanding that they want a people-driven democratic constitution which is capable of producing legitimate elected governments through peaceful, credible, and free and fair multiparty democratic electoral processes. Under the tutelage of the Southern African Development Community (SADC) and the African Union (AU), and in the aftermath of violent and disputed harmonized elections held in Zimbabwe from 29 March to 27 June 2008, three belligerent political parties that participated in the violent elections entered into a pact dubbed, "Global Political Agreement (GPA)" on 15 September 2008 and agreed: to end political violence in Zimbabwe; to alter the Lancaster House Colonial Constitution of Zimbabwe through amendment number 19; to form one combined Inclusive Presidential Government; and to write a new constitution for the country. On 12 April 2009 a 25-member select constitution-making committee of parliament (COPAC) was appointed from the 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 recently put to a referendum. The paper assesses whether the COPAC constitution-making process was a people-driven and democratic process with regard to ownership and control of the constitution-making process itself, contents of the draft constitution, and the final constitution document. The paper also analyses the extent to which the GPA draft constitution go in meeting the expectations of Zimbabweans in achieving peace, fundamental human rights, credible multiparty elections, formation of legitimate government, and economic reconstruction and development. Does the GPA constitution represent the people's power strong enough to end political violence in Zimbabwe given the bickering and neglect of important voices representing the grassroots? Already sharp disagreements have emerged among the GPA parties regarding constitutional issues such as security sector reforms, elections roadmap, registration of voters and preparation of the voters roll. Is it not a misnomer that Zimbabwe now has a people-driven constitution?

## 1 INTRODUCTION

Constitutional reform as a product of democratisation has swept over Africa from the late 80s to the present. Between 1975 and the present, Widner (2007) notes that almost 200 constitutions appeared in countries at risk of intrastate violence, Zimbabwe included. Presently, national and international perception is 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 granted presidential assent. The constitutional development that produced the new national governance document originated from the Global Political Agreement (GPA) of the three political parties that was signed on 15 September 2008. Based on its origin, it is more appropriate to describe the new constitution as the GPA Constitution in Zimbabwe in this presentation.

The background to the clamour for a new constitution in Zimbabwe is linked to the existence of a preponderance of the country's political, economic, social, and foreign policy problems which emanated from the period when the country was under the British colonial rule to the post independence era since 18 April 1980. Berman (2009) aptly observes that 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 constitutional reform. It is evident that during the past 33 years of independence, Zimbabweans have been experiencing increasing problems of poor state governance, violent and bloody electoral conflicts, alleged governmental illegitimacy, disappearance of fundamental human rights and the rule of law, economic collapse, corruption, financial liquidity crunch, unemployment, social disintegration, and international isolation.

As a response to these serious national crises the people of Zimbabwe, during the recent past, began to call for a new people-driven constitution as a permanent solution to the nation's problems. Through a new people-driven constitution, Zimbabweans expected to achieve peace, observance of fundamental human rights, holding of credible multiparty free and fair democratic elections, formation of legitimate government, adherence to the principle of rule of law, and economic reconstruction and development. It is important to stress the fact that Zimbabweans have been very vocal and unequivocal in demanding what they branded as 'a people-driven democratic constitution', not just any other type of a constitution. As noted by Kamba (2006), during the past three decades the country witnessed an increasing clamour for change, creating and strengthening of democratic institutions and for meaningful popular participation in democratic processes, that is constitutionalism. The nation hoped that through a people-driven constitution, a multiparty constitutional democracy would be established in Zimbabwe.

## 2 THE GENESIS OF GPA CONSTITUTION IN ZIMBABWE

Under the Lancaster House colonial constitution of Zimbabwe as amended, on 29 March to 27 June 2008 the nation of Zimbabwe held harmonised elections of the president, senators, members of assembly, and councillors of local authorities. The elections were largely not free and fair because they were marred by an orgy of violence in that there was general brutalisation of the populace, murder, abductions, torture, rape, arson, robbery, theft, mugging, intimidation, threats, generalised severe beatings, injury, arrests and displacement of the people (Amnesty International, 2008).

The results of the 2008 harmonised elections were withheld by the electoral body for six weeks before they were announced. Public perception in Zimbabwe is that those election results were manipulated in order to force the electorate into a presidential election run-off since the published results did not show a clear majority winner. Due to the intensity and magnitude of violence that characterised the presidential re-run election, Morgan Tsvangirai of the Movement for Democratic Change party, one of the candidates in the run-off election was forced to flee and sought refuge in Botswana. On return, he again sought refuge in a building of the Dutch foreign embassy in Zimbabwe before he finally withdrew his automatic candidature by announcing that he had pulled out of the presidential race because of the violence against him and his supporters. The remaining candidate Robert Mugabe of ZANU PF was declared the winner and sworn into office as President on 29 June 2008 whose five-year term ended on 29 June 2013. The international community rejected the results of the one man June 2008 runoff election as undemocratic and unacceptable.

In the aftermath of the June 2008 run-off election, and under the tutelage of the Southern African Development Community (SADC) supported by the African Union (AU), three belligerent political parties that participated in the 2008 violent elections and obtained seats in Parliament entered into a political pact dubbed 'Global Political Agreement (GPA)' on 15 September 2008. In the agreement 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 VI (GPA. 2008. 6) of the Global Political Agreement (GPA) of 15 September 2008 between three political parties, namely, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), and the two Movement for Democratic Change (MDC) Formations. The GPA agreement was witnessed by the SADC Facilitator and its implementation was guaranteed and underwritten by the Facilitator, SADC and the AU (GPA. 2008. s 22.6).

The GPA constitution making process was largely executive directed as shall be outlined below. Scholars argue as to which is the best approach in constitution making processes. Moehler (2006) notes that the arguments in favour of participatory constitution making derive from participatory theory and this route is most favourable for building constitutional legitimacy in the most challenging cases of democratisation. However this model has its critics who counter that participatory approaches can be counter-productive and wasteful resource-wise as there is a lengthy period required for mass participation, and in some cases these masses are ordinary people with little understanding of constitutional issues and can be easily frustrated or manipulated by leaders. In Zimbabwe's case, the GPA leaders created the impression that the process was to be people driven and participatory but the reality was that the product was a private and negotiated treaty by the GPA parties, and its formulation was no different from its predecessor, the Lancaster constitution, which Sachikonye (2004) labels as no more than a compromise between competing interests.

### **3 CONSTITUTION AMENDMENT 19**

While the GPA was a treaty between three political parties that is ZANU PF, MDC-T and MDC-N, its implementation was to be done through the structures, organs and institutions of the State. The parties unconditionally agreed (GPA. 2008. s 24.1) to pass the necessary constitutional amendments through Parliament and 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 Lancaster House Colonial Constitution of Zimbabwe states that 'there shall be a President, which Office shall continue to be occupied by *President Robert Gabriel Mugabe*'. Clause 20.1.6(3) states that 'there shall be a Prime Minister, which office shall be occupied by *Mr Morgan Tsvangirai*'. Other various 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 Constitution Amendment 19 was to put two names of individuals and three names of political parties in the constitution 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 a presidential government that was inaugurated on 29 June 2008 after the elections, and supported by the GPA of 15 September 2008 and the Constitution Amendment 19 of 2008, appointed an Inclusive Government (IG)

comprised of Vice Presidents, Prime Minister, Deputy Prime Ministers, Ministers, and Deputy Ministers from members of the three political parties in the GPA.

It is the GPA Inclusive Government which undertook to produce a GPA Constitution in Zimbabwe during its tenure of office from 29 June 2008 to 29 June 2013. It is important to highlight the fact that the GPA Inclusive Government operated, managed, and governed the country using the Lancaster House Colonial Constitution of Zimbabwe as amended together with its 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 (COPAC)**

ARTICLE VI: 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 ... .' Pursuant to 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 constitute the Constitution Parliamentary Select Committee (COPAC) with a mandate to spearhead the writing of a new constitution for Zimbabwe (COPAC Final Report, 2013).

The terms of reference for COPAC according to section 6.1(a) of the GPA included; setting up of subcommittees chaired by members of Parliament 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 as deemed necessary; convening an All Stakeholders Conference to consult stakeholders on their representation in the subcommittees to assist the Select Committee in its work; tabling of the draft constitution to a second All Stakeholders Conference; and reporting to Parliament on the Select Committee's recommendations over the content of a new constitution for Zimbabwe. The planned timeline for the COPAC constitution-making process was eighteen months but the process finally took four years to complete.

Considering the role of the executive arm of government, the COPAC constitution-making process business fell under the jurisdiction of the Minister of Constitutional and Parliamentary Affairs. In this regard, COPAC was a departmental project. However, COPAC did not have an instrument of governance that regulated its operations. In its Final Report to the GPA Parliament of Zimbabwe in June 2013, COPAC reported that all its deliberations and decisions were by consensus [suggesting compromises] and there was no voting to decide on any issue (COPAC Final Report, 2013). Moehler (2006) notes that much as many scholars and practitioners champion participatory constitution making, a much quieter but stronger voice questions this stance and

instead favours elite-negotiated settlements, and this is exactly how the process unfolded in Zimbabwe.

## **5 STRUCTURES AND INSTRUMENTS OF GPA CONSTITUTION-MAKING PROCESS**

### **5.1 Principals to the GPA**

The three Presidents of the political parties (ZANU PF, MDC-T, MDC-M) who signed the GPA of 15 September 2008 as Principals on behalf of their organisations.

### **5.2 The GPA of 15 September 2008**

The agreement was signed by the Presidents of the three political parties and witnessed by the SADC Facilitator. The implementation of the GPA agreement was guaranteed and underwritten by the Facilitator, SADC, and AU in terms of section 22.6 of the pact.

### **5.3 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.

### **5.4 GPA Political Parties**

The three political partners to the GPA were the Zimbabwe African National Union-Patriotic Front (ZANU-PF), the Movement for Democratic Change-Tsvangirai (MDC-T), and the Movement for Democratic Change-Mutambara (MDC-M). The parties agreed to operate by consensus.

### **5.5 Lancaster House Colonial Constitution of Zimbabwe as amended**

This is the constitutional and legal instrument that provided the framework in which the GPA constitution-making process was undertaken.

### **5.6 Cabinet of the Inclusive Government**

Inside the structure of government, the Cabinet provided collective executive power and authority over the GPA constitution-making process.

### **5.7 Ministry of Constitutional and Parliamentary Affairs**

The Ministry provided the supervisory and administrative oversight over the GPA constitution-making process because the business of making a constitution came under the executive function and mandate of the Minister.

## 5.8 GPA Parliament

Parliament appointed the Constitution Parliamentary Select Committee (COPAC) from its members on 12 April 2009 to spearhead the constitution-making process. The institution of Parliament provided the legislative services of law enactment to the GPA constitution-making process in Zimbabwe. After the referendum held on 16 March 2013, the final draft GPA constitution was presented to both Houses of Parliament through a Constitutional Bill referred to as the Constitutional Amendment Number 20. The Constitutional Bill was passed by the House of Assembly on 8 May 2013 and by the Senate on 14 May 2013.

## 5.9 Constitution Parliamentary Select Committee (COPAC)

COPAC was appointed by the Speaker of the House of Assembly on 12 April 2009 to spearhead the GPA constitution-making process. The Select Committee comprised 25 Members of Parliament from the three political parties in the GPA and one representative of the Traditional Chiefs Council who sat in Parliament. COPAC created five standing subcommittees made up of its members as follows: 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.

## 5.10 First All Stakeholders Conference

The First All Stakeholders Conference which was attended by 4 000 individuals drawn mainly from the three GPA political parties and their affiliate civil society organisations was held on 1 July 2009. The conference produced some discussion topics referred to as 'Thematic Areas'. The thematic areas were:

- i. Founding Principles of the Constitution
- ii. Separation of powers of the State
- iii. Systems of Government
- iv. Executive organs of the State, Public Service Commission, Police and Defence
- v. Elections, transitional mechanisms and independent commissions

- vi. Citizenship and Bill of Rights
- vii. Land and Natural Resources
- viii. Public finance and Management
- ix. Media
- x. Traditional institutions and customs
- xi. Labour
- xii. Youth
- xiii. Disabled
- xiv. War Veterans/Freedom Fighters
- xv. Local Languages, Arts and Culture
- xvi. Women and Gender
- xvii. Religion

Source: COPAC Final Report, June 2013.

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 including the principle of equal representation of men and women in all COPAC organs.

#### 5.11 Outreach Teams

Seventy (70) Outreach Teams were set up by COPAC to conduct the outreach exercise in the ten provinces of the country. Each Outreach 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 data collecting instrument containing 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.

## 5.12 Thematic Committees

These committees were set up to analyse data that came from the outreach consultations. Each Thematic Committee had a total of 425 members made up of 30 per cent Members of Parliament and 70 per cent members of civil society organisations. The analysed data were compiled into National Statistical Reports Versions One and Two. Version One used the quantitative descriptive statistical analysis based on frequency percentages denominated on the 1 950 wards nationally. Version Two used both quantitative and qualitative analysis of data based on provincial outcomes. This is how the importance of what went into the Draft GPA Constitution was decided, more quantitative than qualitative. The COPAC constitution-making process outreach programme was not a scientific study (COPAC Final Report, 2013).

## 5.13 Principal Drafters

COPAC set up a committee of three lawyers to draft the constitution. To guide the drafting exercise, the Principal Drafters were given three documents called Drafting Instruments made up of a 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 and Two before developing the other two documents on Constitutional Principles and Gap Filling.

## 5.14 Drafting Committee

The three political parties in the GPA appointed a Drafting Committee to assist the Principal Drafters in producing a draft constitution. The Drafting Committee comprised of five nominees from each political party represented in Parliament and two others nominated by the Traditional Chiefs Council.

## 5.15 Co-Chairpersons' Forum

The Co-Chairpersons' Forum made up of six members, two from each GPA political party was appointed to review the Preliminary Draft Constitution resulting in fresh instructions being issued to the Principal Drafters. A second Draft Constitution which was produced in April 2012 triggered some disagreements among the parties, causing the Management Committee to intervene. After the Management Committee's intervention, a third Draft Constitution was produced on 18 July 2012. That is the COPAC Draft Constitution that was taken to the Second All Stakeholders Conference held in October 2012.

### 5.16 Second All Stakeholders Conference

The conference was held from 21 to 23 October 2012 and attended by 1 400 representatives from the GPA political parties and their affiliate civil society organisations. The Second All Stakeholders Conference received reports on the constitution-making process from COPAC. The reports comprised the two versions of the National Statistical Report, Drafting Instruments, and the Draft Constitution. The conference made recommendations and changes to the Draft Constitution in disagreement. There was a deadlock which created an impasse on the GPA constitution-making process.

### 5.17 Committee of Seven

The Principals to the GPA appointed a committee of seven members on 25 November 2012 to unlock the constitution-making process deadlock. The Committee of Seven consisted of three Cabinet Ministers, one from each GPA political party, three co-chairpersons of COPAC, and the Minister of Constitutional and Parliamentary Affairs as convener and chair. The committee met with the Principals on 17 January 2013 and resolved the areas of disagreements. The third Draft Constitution that was produced on 18 July 2012 was changed paving way to the production of the fourth and Final Draft Constitution on 31 January 2013.

### 5.18 Referendum

The Referendum on the final GPA Draft Constitution was conducted on 16 March 2013. A total of 3 316 082 individuals (largely members of the GPA political parties) took part in the Referendum. The 'yes' vote received 3 079 966 votes while the 'no' vote got 179 489 votes and the spoilt ballots were 56 627. All the GPA political parties vigorously campaigned for the 'yes' vote using state machinery and institutions including public media. Those who campaigned for a 'no' vote were not given free space to do so. The people were not given adequate time to read the Draft Constitution, in addition, COPAC produced insufficient copies of the document due to financial constraints. Ihonvbere (2000) buttresses this point when he argues that in most constitution making processes in Africa, an overwhelming majority of the populace never see the constitution and they never have the opportunity to study and understand it. At the beginning of the constitution making exercise, Makumbe (2009) noted that the vigilance of civil society during this stage was to be crucial if a legitimately democratic constitution was to be drafted and adopted. In contrast civil society organisations such as the National Constitutional Assembly, the International Socialist Organisation and the Democracy Institute among others that clamoured for more copies of the draft and more time to be given to the people to analyse the draft were demonised and denied adequate media

space to voice their concerns. After the Referendum, the Draft Constitution was presented to Parliament.

#### 5.19 State President

Following the passing of the Constitutional Bill by both Houses of Parliament, on 22 May 2013 the state president assented by signing the Bill into the Constitution of Zimbabwe Amendment Number 20 Act of 2013.

#### 5.20 Financiers

The GPA constitution-making process was funded by the donors and the Inclusive Government of Zimbabwe through a 'Basket Fund' managed jointly by the United Nations Development Programme (UNDP), the Zimbabwe Institute (ZI), UNICEF, the Electoral Institute of Southern Africa (EISA), and the GPA Inclusive Government of Zimbabwe. A total of US\$51.9 million was used for the constitution-making process with contributions from the donors amounting to US\$23.2 million and US\$28.7 million from the Inclusive Zimbabwe Government.

## 6 ANALYSIS OF GPA CONSTITUTION-MAKING PROCESS

### 6.1 Definition of Terms and Methodology

Although the operating motto of COPAC was '*ensuring a people-driven constitution*', the GPA constitution-making process did not provide definitions of the terms; people, constitution, and people-driven. The only flimsy reference made in this regard was 'the description of a constitution as the supreme law of Zimbabwe', without elaboration. Other key concepts used by the constitution-making process that were not defined are; constitution-making, constitution-writing, process, constitution-making process, consultation, outreach, public, public consultation, public hearing, participation, All Stakeholders, democratic, and inclusive.

COPAC's constitution-making process was therefore an inquiry that groped in conceptual darkness and without a fundamental tool of the game. The definition of key operating terms and concepts would have constituted a theoretical framework, as principle, to guide implementation of the GPA constitution-making process, data collection, analysis and interpretation of empirical findings in an objective way. COPAC made an unscientific dive into a very important process of human inquiry relating to constitution-making without the necessary preparation.

The absence of contextual meanings of terms used in the constitution-making exercise makes it difficult or impossible to measure and establish the truth or knowledge from the results of COPAC's constitution-making process, raising a possibility that the process

may have missed its stated target of 'ensuring a people-driven constitution' by a wide margin.

On the methodology of data collection, the GPA terms of reference to COPAC stated, 'to hold such public hearings and such consultations as it may deem necessary ... .', giving unlimited discretionary power to the Select Committee to operate as it wished and without a prescribed systematic methodology. Lack of a clearly laid out design and method of collecting data, data collecting instruments, analysis, measurement, and interpretation of harvested data dealt a heavy blow to COPAC's constitution-making process.

The implementers of the constitution-making process really had a tough task wobbling the whole way through from the start to the end of the entire process. For instance, COPAC crafted its group questionnaire instrument for data collection using 26 Talking Points that it deciphered from 17 Thematic Areas discerned, in turn, from the deliberations of the First All Stakeholders Conference that was initially marred by serious disturbances. The data that were gathered by outreach teams from 1 118 760 individual participants through the use of 26 Talking Points group of questions, were analysed by 17 Thematic Committees with 425 members each before the extraction of Constitutional Principles, Constitutional Issues, and Gap Filling of information was done.

Another major problem encountered by the implementers of the GPA constitution-making process due to lack of a clear methodology was on how to measure, analyse and interpret quantitative and qualitative data. In all its official reports from the constitution-making process, COPAC openly admitted that its process was not scientific. The Constitution Parliamentary Select Committee (COPAC)'s Final Report (June 2013) to Parliament boldly states:

*'Given the fact that this was not a scientific study, the Select Committee resolved that both the statistics (quantitative) and qualitative outcomes must be taken into account in deciding what would eventually go into the constitution. The interpretation of these statistics therefore had to take into account these limitations in methodology. Whilst a high frequency was a general guide that in itself was not the sole determinant of the importance of an issue enough to find its way into the new Constitution.'*

The absence of a theoretical framework covering the definition of key terms and methodology of collecting data resulted in too many ad hoc structures and committees being created in an adaptive, sometimes contradictory, manner thereby eroding the validity, reliability, and credibility of the GPA constitution-making process and its end result. The process just did not have a constitution-making process model upfront. If the purpose of COPAC's constitution-making process was for the Zimbabwean people

to make a constitution by themselves and for themselves, then the GPA process missed the target due to absence of a guiding theory and methodological framework that was needed to achieve the desired objective of 'ensuring a people-driven constitution'.

## 6.2 Ownership of GPA Constitution-Making Process

A preamble in ARTICLE VI of the GPA document (2008. 6) clearly states, *'Aware that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic;'*... . However, the COPAC constitution-making process was born out of Article VI of the Global Political Agreement (GPA) of the three political parties whose Presidents signed the agreement on 15 September 2008. Prior to the GPA and after, the people were not consulted to make an input in determining the COPAC constitution-making process. The process was prescribed in Article VI by the parties to the agreement. It was rather an elite Track One diplomacy initiative which sidelined the grassroots. Kamba (2006) argues that constitution making is itself a major part of constitutionalism and the process itself is therefore an important part in promoting consensus building by according and vesting ownership in the people. Yet the whole process was rather elite driven. Based on its clear origin, the GPA constitution-making process was not owned and driven by the people of Zimbabwe because the process did not come from them.

It may be argued that although the COPAC constitution-making process was founded by the GPA, the people of Zimbabwe later had a buy-in into the process to gain its ownership and control. Such an argument would be quickly dismissed if the structures and instruments of the GPA constitution-making process contained in item 5 above are considered together with how the whole process was implemented.

The Common Issues Platform (CIP) makes a strong point in its submissions of issues, and observations on Zimbabwe's political crisis to SADC Facilitator in July 2012 that,

*'COPAC constitution-making process has failed to be an inclusive arena for open popular people participation as the secretive, and often violent, process is serving partisan political power designs and electoral agendas of the 3-parties in the GPA/GNU.'*

The ownership of the GPA constitution-making process firmly remained in the tight hands of the partners to the agreement from conception throughout the implementation phase to the conclusion. Empirical evidence given above in this presentation is conclusive to the fact that the GPA political parties were the real owners of the COPAC constitution-making process.

### 6.3 Control of GPA Constitution-Making Process

Inside and outside the institution of Government, the Presidents of the three political parties who signed the GPA agreement as Principals remained in firm and full control of the COPAC constitution-making process from the beginning to the end. Inside government, the GPA Principals had final controlling executive power and authority on the constitution-making process that they exercised through the following structures and instruments:

- Lancaster House Colonial Constitution of Zimbabwe as amended
- Cabinet of the Inclusive Government
- Ministry of Constitutional and Parliamentary Affairs
- Parliament
- Government Finance
- COPAC

Outside government, the GPA Principals controlled the following constitution-making structures and instruments:

- GPA Agreement of 15 September 2008
- Top decision-making bodies of GPA Political Parties
- Committee of Seven
- Management Committee
- Co-Chairpersons of COPAC
- Drafting Committee
- First All Stakeholders Conference
- Second All Stakeholders Conference
- Donor Financiers

Even though the COPAC constitution-making process exhibited political polarisation, confusion, disagreement, and impasse, in the final analysis, the GPA Principals' wishes prevailed because they had contractual control of the process emanating from the provisions of the GPA agreement and constitutional and legal statutes.

The COPAC constitution-making process created confusion and uncertainties because on close examination the process appeared to be driven by various forces at play. It can be said that the process was: African Union (AU)-driven; Southern African Development Community (SADC)-driven; Ministry of Constitutional and Parliamentary Affairs-driven; Co-Chairpersons of COPAC-driven; Parliament-driven; top decision-making organs of the three political parties-driven; Management Committee-driven; Committee of Seven-driven; and GPA Principals-driven. From the analysis given above, this paper concludes that the COPAC constitution-making process was not owned, controlled, or driven by the people of Zimbabwe.

## **7 ANALYSIS OF GPA CONSTITUTION IN ZIMBABWE**

### **7.1 Nature and Status of GPA Constitution**

The top heading of the constitutional document is stated as ‘Constitution of Zimbabwe Amendment (No. 20) and its short title is “The Constitution of Zimbabwe Amendment (No. 20) Act, 2013”, indicating that it is an Act enacted by the President and the Parliament of Zimbabwe to repeal and substitute the Constitution of Zimbabwe. What is being referred to as the Constitution of Zimbabwe to be repealed and substituted is actually the Lancaster House colonial constitution of Zimbabwe.

From the above stated title of the document, two issues arise. First, whereas the GPA Constitution is titled, ‘*Constitution of Zimbabwe Amendment (No. 20) Act, 2013*’, that of the Lancaster House Colonial Constitution of Zimbabwe is simply, “*Constitution of Zimbabwe*”. The former is an amendment and the latter is an original. Secondly, the GPA Constitution is an Act of the President and the Parliament and the Lancaster House Colonial Constitution of Zimbabwe is not an Act.

There is a fundamental difference between an amendment and an original. An amendment document alters or changes contents of another document, but an original document is new to itself.

Another fundamental difference is between an Act of the President and the Parliament and a Constitution. If the institutions of the President and the Parliament are creatures of a Constitution, then it is not possible that the two institutions can create a Constitution. The greatest extent to which the two constitutional institutions can go is that of amending a Constitution from which they are created, provided that it is permissible to do so in terms of the Constitution itself. In deed, it appears that this is what the President and the Parliament of Zimbabwe did.

It is the Lancaster House Colonial Constitution of Zimbabwe that was amended by the GPA Constitution in Zimbabwe. Additional evidence of the above observation is

contained in the Sixth Schedule of the GPA Constitution. According to section 1 of the Schedule the term 'former Constitution' "means the Constitution of Zimbabwe that came into operation on the 18<sup>th</sup> April, 1980, as subsequently amended". The definition of former constitution sanitises a colonial document that the people of Zimbabwe seek to discard.

Another observation in support of the amendment status of the GPA Constitution is contained in sections 4, 9, and 10 of the Sixth Schedule.

*Section 4 says that 'subject to this Schedule, the former Constitution is repealed with effect from the effective date'. Section 9 states that "the Government constituted under this Constitution is in all respects the successor to the former Government of Zimbabwe". Section 10 stresses that 'subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution'.*

After considering the implications of the empirical evidence on the nature and status of the GPA Constitution in Zimbabwe given above, the authors could not escape the conclusion that the Constitution is not a new people-driven democratic governance charter but a mere amendment number 20 to the existing Lancaster House Colonial Constitution of Zimbabwe which hitherto had been amended 19 times. Consequently, national and international perception that there is a new people-driven democratic constitution is dismissed because it is a misnomer.

In a multiparty constitutional democracy system of governance the constitution can only legitimately come from the collective free will and action of the people. It is the people who create a constitution, and through it, establish institutions of government like the President and the Parliament. It cannot be vice versa. The President and the Parliament can certainly not create the people and a people-driven constitution. Sadly, this was not the case with the constitution making process in Zimbabwe. As observed by Ihonvbere (2000), the end product of such non-participatory approaches in most African constitutions lead to all sorts of contradictions and limitations which ultimately serve as compacts for managing a democratic system.

## 7.2 Sources of Ideas in the GPA Constitution

Two major sources of ideas that went into the GPA Constitution in Zimbabwe are the Lancaster House Colonial constitution of Zimbabwe as amended and all its subsidiary laws on the one hand and on the other, Principals of the GPA and their political parties. Item 7.1 above presented ample empirical evidence that the GPA Constitution is an amendment to an existing constitution.

As regards the GPA Principals and their political parties as sources of ideas, their views went into the GPA Constitution through the implementation of COPAC constitution-making process. After collecting data from their combined membership of 1 118 760 individuals in an outreach exercise, the information was subsequently collated and substituted through a maze of convoluted ad hoc structures of partisan negotiations. The GPA constitution-making process was a process of secretive negotiations, compromises, bargains, haggles, and deal-making episodes. Finally what the GPA Principals wanted prevailed, particularly what the State President desired because of the executive power, authority, and control vested in the office of the President.

In terms of the Lancaster House Colonial Constitution of Zimbabwe as amended under which the GPA Constitution of Zimbabwe Amendment (No.20) Act, 2013 was enacted, the President named as Robert Gabriel Mugabe (s 115: schedule 8: s 20.1.6(1)) was the Head of State and Head of Government and Commander-in-Chief of the Defence Forces (s 27(1)). The executive authority of Zimbabwe was vested in the President who exercised the authority directly or through the Cabinet, a Vice President, a Minister or a Deputy Minister (s 31H).

Section 27(1) of the former constitution was replicated in section 89 of the GPA Constitution which states that 'the President is the Head of State and Government and the Commander-in-Chief of the Defence Forces'. Section 31H of the former constitution was also replicated in section 88(2) of the GPA Constitution which says that 'the executive authority of Zimbabwe vests in the President who exercises it, subject to this Constitution, through the Cabinet'. Surely the Cabinet is made up of the President, Vice Presidents and Ministers, while Deputy Ministers are appointed by the President and they come under the executive authority of Ministers.

Another empirical evidence that it is the ideas of individual Principals of the GPA that went into the GPA Constitution is contained in section 14(1) of the Sixth Schedule which states that '*Notwithstanding section 92 [of the Constitution], in the first election and any presidential election within ten years after the first election, candidates for election as President do not nominate persons in terms of that section to stand for election as Vice Presidents*'.

Section 92 of the GPA Constitution states that every candidate for election as President must nominate two persons to stand for election jointly as running mates and designated as first and second Vice President. It is the interest of the incumbent State President that dictated the idea of suspending the operation of the running mates clause in elections for ten years. Clearly the idea did not come from the people consulted.

The other clear issue dictated by the GPA political parties in the GPA Constitution is that of the death sentence for men aged 21 to 70 years (s 48(c)). This is an open violation of the fundamental rights to life, equality before the law, human dignity, personal security, freedom from torture and inhuman cruel degrading treatment, and non-discrimination of persons in the prescribed age group. Considering that all newly born babies will inevitably enter the prescribed age group at some point in their future lives, one wonders what sort of a constitution is it that conspires to murder all its citizens when they turn 21-70 years. The other consequence of this brutal provision is that it discriminates as the other gender, despite committing similar crime, the death sentence will not apply to them. We conclude that the ideas used to amend the Lancaster House Colonial Constitution of Zimbabwe through the GPA Constitution certainly did not come from the collective thinking of all Zimbabweans. In this regard, the GPA Constitution failed to meet the expectations of the people of Zimbabwe to achieve, through a people-driven democratic constitution, peace and security, fundamental human rights, rule of law, credible multiparty elections, formation of legitimate government, employment, economic reconstruction, and social development.

### 7.3 Ownership of GPA Constitution

We believe that process ownership predetermines content and product ownership. From our above analysis, conclusions, and interpretations of the GPA constitution-making process and the resultant constitution, we conclude that the people of Zimbabwe do not own the current constitutional order governing the country. The Zimbabwean people neither made the Lancaster House Colonial Constitution of Zimbabwe nor the GPA Constitution of Zimbabwe Amendment No. 20 Act of 2013. The GPA constitutional order is owned jointly by the three political parties that made it, and severally by the Principals and Presidents of those political organisations. The GPA Constitution is a privatised and partisan document that cannot serve as an instrument for good public management and governance of a nation in a multiparty constitutional democracy.

## **8 CONSTITUTIONAL DISAGREEMENTS AMONG GPA POLITICAL PARTIES**

Soon after the enactment of the GPA Constitution on 22 May 2013, there were sharp disagreements among the three GPA political parties regarding the security sector reform, elections roadmap, registration of voters and preparation of the voters roll, media reforms, and scrapping and or amendments of statutes like the:

- Presidential Powers (Temporary Measures) Act
- Electoral Act

- Public Order and Security Act
- Access to Information and Protection of Privacy Act
- Criminal Law (Codification and Reform) Act
- Political Parties Finance Act
- Broadcasting Services Act
- Defence Act
- Police Act
- Prisons Act

Section 10 of the Sixth Schedule in the GPA Constitution states that ‘Subject to this Schedule, all existing laws continue in force but must be construed in conformity with this Constitution’.

Political violence has not stopped. More arrests of political opponents, human rights activists, and journalists are being witnessed. Top security sector officials are increasingly issuing public threats that if their party loses the forthcoming elections planned for 31 July 2013, they will resort to violence as they did in June 2008. Indications on the ground are that, once again, the nation might be headed for another disputed election during the coming harmonised polls. Because of the flawed constitution making process, the upcoming elections are likely to be heavily contested. Khabele (2004) correctly observed that constitutionalism ensures the necessary confidence of the electorate in the state and government thereby adding value to political stability and constructive conflict management. Had the process been people driven and not selfishly partisan, Zimbabwe could have found the elusive path to democratic governance.

The disagreements were exacerbated by the action of the State President who made a decree proclaiming the date of the next harmonised general elections as 31 July 2013. The proclamation was made after a ruling by the Constitutional Court that elections were to be held by 31 July 2013 in a matter brought to the court by a private citizen. Using the same powers of decree, the President amended the Electoral Act through enactment of four statutory instruments. Parliament dissolved by operation of law on 29 June 2013 and until the next general elections to be held on 31 July 2013, the President will be ruling the country by decree based on the provisions of the Presidential Powers (Temporary Measures) Act.

The Southern Eye (June 26, 2013) carried a front page report that the Constitutional Court of Zimbabwe will hear on the day six cases, including the one directed by SADC to have the date of elections moved to 14 August 2013. The matters relating to the date of election were heard and the court decided to postpone the hearing for consolidation of the issues raised by the applicants. Meanwhile, the nomination court sat on 28 June 2013 and received candidates contesting the harmonised presidential, parliamentary, and local council elections. More petitions were filed at the Constitutional Court to have the election date postponed and the presidential proclamation annulled. However, on 4 July 2013 the Constitutional Court ruled that the elections will be held on 31 July 2013 according to the electoral law, thereby dismissing all challenges opposing the proclamation of the elections date. The Herald (6 July 2013) reported that at a launch of his party's Manifesto on 5 July 2013 the President of ZANU-PF, one of the GPA parties, threatened to quit SADC if the regional body interferes with the July 31 2013 elections in Zimbabwe.

## 9 CONCLUSION

This paper concludes, from the above assessment and analysis of the GPA constitution-making process, that the nation of Zimbabwe does not have a new people-driven democratic constitution. As observed by Fombad (2007), the history of constitutionalism and constitutional democracy in Africa is not a particularly happy one, and Zimbabwe's case is no different. By and large the GPA Constitution is an amendment of the Lancaster House Colonial Constitution of Zimbabwe. It is our final view that it is a misnomer to call an amendment 'a new people-driven constitution'. There is an urgent need to embark on a genuine people-driven democratic constitution-making process in Zimbabwe if further social, economic, political, and constitutional disorder and instability, as currently being witnessed in Egypt, is to be avoided. In doing so, the following recommendations from the Commonwealth best practice guidelines of constitution making as cited by Widner (2007) should be considered:

1. Government must adopt credible constitution making; that is, a process that constructively engages the majority of the population'.
2. Government should assist and empower civil society groups to effectively participate in the constitution-making process and in the promotion of constitutionalism'.
3. The public should be regularly informed at every reasonable stage about the progress of the constitutional process.
4. Mechanisms used for adopting or ratifying constitutions should be credible and truly representative of the peoples' views'.

Writing in his book titled '*Constitutionalism in Zimbabwe: Unfinished Business*', Zembe (2009, 37) makes a strong point when he argues:

*'The rule of law is a value of society that must come from the people as owners of political, civil, economic, social, and cultural rights. The source of the law is the people. For the law to be legitimate, the citizens, who will become subjects of their own law, should participate in its evolution. The law should not be used to deny people their rights and freedoms. Citizens should enjoy even more freedoms. The law must lead to social, economic, and political development. In other words, the rule of law based on the legality and practice of constitutional law should lead to human development where all citizens are free to actualise their full potential in the fulfilment of their human needs. The principle of constitutional rule of law should create peace and prevent violence in society. The concept works well in a system of government where there is popular participation of citizens in public policy decision-making processes.'*

DO NOT DISTRIBUTE

## 10 REFERENCES

- Berman B J 'Ethnic Politics and the Making and Unmaking of Constitutions in Africa' (2011) 43 *Canadian Journal of African Studies* 441-461.
- Common Issues Platform. 2012. *Submission of Issues, Observations, and Way Forward Proposal on Zimbabwe's Political Crisis to SADC Facilitator*, Harare.
- Constitution of Zimbabwe Amendment (No. 20) Act. 2013. Government Printers, Harare.
- Constitution Parliamentary Select Committee. 2012. *Drafting Instruments*, Second All Stakeholders Conference, COPAC, Harare.
- Constitution Parliamentary Select Committee. 2013. *Final Report*, COPAC, Harare.
- Constitution Parliamentary Select Committee. 2012. *National Statistical Report Version 1*, Second All Stakeholders Conference, COPAC, Harare.
- Constitution Parliamentary Select Committee. 2012. *National Statistical Report Version 2*, All Stakeholders Conference, COPAC, Harare.
- Fombad C M 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Potential Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *The American journal of Comparative Law* 1-45.
- Global Political Agreement. 2008. Ministry of Constitutional and Parliamentary Affairs, Harare.
- Ihonvbere J O 'How to make and undemocratic constitution: The Nigerian example' (2000) 21 *Third World Quarterly* 343-366.
- Kamba W J *Constitutionalism in Zimbabwe* (unpublished inaugural paper, Africa University, 2006).
- Lancaster House Colonial Constitution of Zimbabwe (Revised). 2008. Government Printers, Harare.
- Makumbe J 'Transitional Arrangements' in Kersting W (ed) *Constitution in Transition* (2009) Friedrich-Ebert-Stiftung Harare.
- Matlosa K 'Electoral Systems, Constitutionalism and Conflict management in Southern Africa' (2004) 4 *Africa Journal on Conflict Resolution* 11-53.
- Moehler D C 'participation and Support for the Constitution of Uganda' (2006) 44 *The Journal of Modern African Studies* 275-308.
- Sachikonye L 'Constitutionalism, the Electoral System and Challenges for Governance and Stability' (2004) 4 *Africa Journal on Conflict Resolution* 171-195.

Widner J 'Constitution Writing and Conflict Resolution. The Round Table' (2007) 94 The Commonwealth Journal of International Affairs 505-518.

Zembe W *Constitutionalism in Zimbabwe: Unfinished Business; A People-Driven Process*, (2009) Koln: LAP LAMBERT Academic Publishing.

DO NOT DISTRIBUTE