

# Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order

*Muna Ndulo*

This chapter is primarily focused on the need to examine the extent to which the process of constitution making can become a vehicle for national dialogue and the consolidation of peace, allowing competing perspectives and claims within a postwar society to be aired and incorporated. A number of issues affect the development of a country's constitution, especially when the country has undergone some degree of political turbulence. Nevertheless, most scholars would agree that one issue that stands out, and often bedevils post-conflict societies, is how to establish nation states with institutions that promote reconciliation, economic development, and good governance; facilitate political harmony and stability; manage diversity; process disputes between state and citizens and among citizens; and minimize the possibility of conflicts through enfranchisement of the people.<sup>1</sup> This chapter seeks to examine the experience of Zimbabwe in its efforts to develop a constitutional order that not only addresses the issues raised above

but also enjoys the allegiance and support of most Zimbabweans. It examines broadly the constitutional history of Zimbabwe and details the numerous efforts to develop an enduring constitution for that country, paying particular attention to the structures of the processes that have been employed; the scope, nature, and effectiveness of public participation in the constitution-making processes; the relevance of international human rights norms in the process; and the role the international community can or should play in constitution-making processes in post-conflict societies.

Who should initiate a constitution-making process? For how long should the process run? What kind of forum offers the best framework for the process? What are the mechanisms for maximizing citizen participation? How should the final adoption of the constitution be organized? We address these questions and also highlight the main issues, context, and substance regarding the Zimbabwe constitutional process. While rec-

ognizing the uniqueness of the Zimbabwean experience, we also attempt to draw common lessons learned from the process with respect to achieving an acceptable and durable constitution that can foster peace, stability, and prosperity for post-conflict societies.

This chapter is organized as follows: First, it will provide an overview of the most pressing challenges confronting Zimbabwe in terms of constitution making; second, it will assess the relevance of international human rights norms to the constitution-making process in post-conflict societies; third, it will summarize Zimbabwe's colonial history as it bears on current governance; fourth, it will assess the crisis of legitimacy surrounding the 1980 Lancaster House Constitution; fifth, it will assess the failure of the 1999 constitutional process, its impact on national reconciliation and the ongoing crisis which has resulted in the 2000 and 2008 elections' producing a government which lacks both national and international legitimacy; and sixth, it will make observations regarding the international community's role vis-à-vis an individual nation's constitution-making process. The chapter will conclude with a discussion of the lessons learned from the Zimbabwe experience.

### **The Colonial Period**

The colonial history of what is today Zimbabwe bears directly on the political, economic, and social development of the country and many of its current obstacles to effective democracy. Zimbabwe, formerly Southern Rhodesia, was originally inhabited by descendants of the great southern migration that populated most of present-day Zimbabwe and Central Africa. A highly organized Shona-speaking state developed with a tradition of self-government and independence going back to the kingdom of Monomotapa and centered on Great Zimbabwe. In ap-

proximately 1830, the Matebele ethnic group, an offshoot of the Zulu nation, established a centralized state in the southwestern part of modern day Zimbabwe, with Bulawayo as its capital. By 1888, Lobengula, the Ndebele king, claimed sovereignty over all the territory that now forms Zimbabwe, including what was known at the time as Matebeleland and Mashonaland.<sup>2</sup>

In October 1889, Cecil Rhodes obtained a royal charter of incorporation setting up the British South Africa Company<sup>3</sup> (BSA). Under the charter, the BSA was authorized and empowered to hold, use, and retain for its purposes the full benefit of the concessions and agreements it had already acquired from African chiefs insofar as they were valid. It was further empowered, subject to the approval of one of the principal secretaries of state, from time to time to acquire any powers of any kind or nature whatever, including powers necessary to govern and preserve public order.<sup>4</sup> In 1890, the Mashonaland part of present-day Zimbabwe was occupied by British South Africa forces, which founded the capital in Salisbury (now Harare); in the following year, the territory was declared a British protectorate. In 1893, hostilities between the BSA and the Ndebele led to the occupation of present-day Matebeleland.<sup>5</sup> Lobengula was forced to flee, the British declared the Matebeleland kingdom to be ended, and the company seized land and cattle. In 1895, the entire territory was named Southern Rhodesia. The establishment of BSA and British rule over the territory was fiercely resisted by the African population.<sup>6</sup> Nevertheless, until 1923, Southern Rhodesia was administered by the BSA.<sup>7</sup>

In 1922, when the BSA's mandate was about to end, a referendum was held regarding a new constitutional structure and the question of whether Rhodesia would become part of the union of South Africa. The majority of white settler voters opted for responsible

government rather than incorporation into the Union of South Africa, and Southern Rhodesia became a British colony. Accordingly, under letters patent (1923), the country became a self-governing colony. However, the constitution provided for such a high degree of internal autonomy that Southern Rhodesia held a special position among British dependencies. From 1923, the head of the government was called prime minister. Britain retained the power to veto legislation as a safeguard of African rights, but never exercised it, though the British government did exercise, in theory, a limited restraining influence. Thus, the overwhelming black majority found themselves governed under the loosest of imperial supervision by ministers responsible to a legislature elected by the white settlers and under the day-to-day control of an administration staffed by locally recruited whites. In 1953, Britain formed a federation of Southern Rhodesia, with the two northern territories of Northern Rhodesia and Nyasaland, both of which, unlike Southern Rhodesia, were administered as colonial protectorates. The federation failed as a consequence of the conflict between the growing African nationalism in the north and the hesitant white reformism of the South. In 1963, the federation was dissolved. The two northern territories soon became the independent states of Zambia and Malawi. Southern Rhodesia remained a self-governing colony and was not to become independent until after a protracted liberation war.

The issue of land ownership, which remains a matter of bitter dispute, has its roots in the BSA's expropriation of 39 million hectares of land from indigenous people, without compensation.<sup>8</sup> In 1930, the Land Apportionment Act formally introduced the principle of racial discrimination into land allocation by, among other things, assigning 50.8 percent of the land to the sole occupation of whites, who comprised less than 25 percent of the population.<sup>9</sup> This meant that

at independence in 1980, the most productive land remained in the hands of whites, whose interests were protected by complex provisions against compulsory land acquisition for a minimum of ten years contained in the 1979 independence constitution.<sup>10</sup>

In 1961, a new constitution provided for considerable internal sovereignty and, for the first time, included a justiciable declaration of rights.<sup>11</sup> Under the 1961 constitution, Britain relinquished virtually all its powers in return for a declaration of rights and a multiracial constitutional council that was charged with reviewing subsequent legislation in light of the declaration and assurances that Southern Rhodesia would enter a new phase in political and social development. The 1961 constitution was to be the first step toward ultimate majority rule, while the newly entrenched declaration of rights was to ensure the elimination of discrimination, equality before the law, and the protection of the rights and liberties of the individual.<sup>12</sup>

However, the declaration of rights suffered two notable omissions from the traditional list of human rights: the right to freedom of movement and the right to free choice of employment. Even the protections that the declaration granted were rendered largely illusory by a number of careful and far-reaching exceptions and qualifications. In several sections, the legislature was given the power to derogate in normal times from the rights and liberties for stated purposes, such as the exercise of police powers.<sup>13</sup> A major weakness of the 1961 constitution was that it exempted all preexisting laws from the need to comply with the declaration of rights.<sup>14</sup> Consequently, all the existing machinery of repression and discrimination was safeguarded. The constitution was fatally flawed, however, in that its franchise provisions supposedly enshrined the principle of unimpeded progress to majority rule, but in practice, the educational and economic re-

quirements for voting all but guaranteed a permanently subordinate role for Africans.<sup>15</sup> During this period, the Southern Rhodesian government enacted and used increasingly repressive security legislation.<sup>16</sup> In particular, the government extensively used the 1960 Law and Order Maintenance Act, which provided for preventive detention.<sup>17</sup>

On November 11, 1965, the Rhodesian government, led by Ian Smith, declared unilateral independence against the British government and adopted the 1965 constitution.<sup>18</sup> The British government responded by making drastic changes to the 1961 constitution and declaring null and void and of no effect any law passed or promulgated by the illegal Smith regime.<sup>19</sup> It also revoked the legislative power of Southern Rhodesia's legislative assembly, enabled the British parliament to legislate for Rhodesia, and conferred executive power in Rhodesia upon the British secretary of state for commonwealth relations.<sup>20</sup> The Southern Rhodesian courts, however, recognized the Smith regime as valid. In 1966 and 1968, Southern Rhodesia's high court ruled that although the unilateral declaration of independence and the 1965 constitution were illegal, the revolution had achieved internal success and the Smith regime was the only effective government in Southern Rhodesia; therefore, necessity demanded that the de facto government be endowed with all the power of its predecessors under the 1961 constitution. In another decision in 1968, the high court finally gave the regime de jure recognition based on the argument that not only was the government in effective control, but there were no prospects that any actions by the mother country would alter that condition.<sup>21</sup> Matters came to a head in *Madzimbamuto v. Lardner-Burke*.<sup>22</sup> Here, the judicial committee of the privy council upheld the right of the UK parliament to exercise unfettered legislative power over Southern Rhodesia and to deny all legal validity to the actions of the Smith regime.

The majority of the Southern Rhodesian judiciary continued to recognize the legality of the Smith regime and ignored the privy council decision. The unilateral declaration of independence succeeded and lasted fifteen years. It did so largely because while the international community condemned Smith's unilateral declaration of independence, it did not take any positive action to end the rebellion.<sup>23</sup>

In 1970, the Smith regime purported to adopt a republican constitution, which precluded any prospect of majority rule.<sup>24</sup> The constitution had a declaration of rights, but rendered it ineffective by providing that "no court shall inquire into or pronounce upon the validity of any law on the ground that it is inconsistent with the Declaration of Rights."<sup>25</sup> Further, the bill of rights did not outlaw discrimination.<sup>26</sup> From 1970 to 1979, the Smith regime's violation of human rights was systematic and widespread: Captured and suspected guerrillas—as well as their supporters—were mercilessly tortured to extract confessions and information. The violation of human rights was a deliberate tactic aimed at intimidation and deterrence.<sup>27</sup>

Organized African resistance to white rule began around 1947 with the establishment of the African Workers Voice Association, which was an important forerunner to the African nationalist groups.<sup>28</sup> The organization was banned in 1952, but in 1957, the first African nationalist party, the African National Congress (ANC), was formed with Joshua Nkomo as president. The ANC was likewise later banned, as were its successors, the National Democratic Party (NDP) and the Zimbabwe African Peoples Union (ZAPU). In 1963, a split emerged in the nationalist movement with the founding of the Zimbabwe African National Union (ZANU). Both ZAPU and ZANU launched armed struggles, but it was not until 1980 that this finally led to independence.<sup>29</sup> In the 1970s, both ZAPU and ZANU forces inten-



sified the armed struggle within the country.<sup>30</sup> With the continuing success of the struggle and international pressure, in 1978, the Smith regime was forced to seek an internal settlement with a number of compliant African leaders.<sup>31</sup> As a result, a new constitution for the renamed Zimbabwe-Rhodesia was introduced.<sup>32</sup> The internal settlement failed largely because it lacked legitimacy and did not end the war, which was clearly intensifying, and it equally failed to receive any international recognition.

Thus, in 1979 an all-party constitutional conference was held at Lancaster House in London from September 10 to December 21, at which an independence constitution was agreed.<sup>33</sup> The conference followed a commonwealth heads of government meeting in Lusaka, at which it was agreed that Britain was responsible for granting legal independence to Zimbabwe. The conference was attended by delegations from ZANU led by Robert Mugabe, ZAPU, led by Nkomo, and the Zimbabwe-Rhodesia government, which included Ian Smith's Rhodesian Front and Muzorewa's United African National Congress. The conference was organized and negotiations mediated by the British government under the leadership of Lord Carrington. The constitutional negotiations did not provide for public participation.

The new constitution provided for a ceremonial president, a prime minister, and a bicameral legislature consisting of elected members of parliament and an indirectly elected senate. The legislative chambers were to be elected on two race-based rolls. Executive power was to reside in the prime minister, assisted by a cabinet chosen by the prime minister.<sup>34</sup> The liberation movements (ZANU and ZAPU) were virtually forced to accept its terms, including the restrictive land acquisition provisions.<sup>35</sup> Lord Carrington's strategy was to push for an agreement; he warned that if there was no agreement, the British government would recognize the Mu-

zorewa regime, which Ian Smith had installed in Zimbabwe, and call for the lifting of sanctions against Zimbabwe. The British government was aware that the frontline states could not provide the kind of support the liberation movements needed to continue the liberation war. Further, the states were unhappy with the provisions relating to the nature and extent of executive powers, the organization of the legislature and the judiciary, and the general protection of racial interests in the bill of rights, including guaranteeing a voter roll for the white population.<sup>36</sup> Even so, the most remarkable feature of the Lancaster House conference was that it produced a settlement that led to a peaceful transition to majority rule. Southern Rhodesia reverted to being a British colony, and a British governor was installed to run the country until independence.<sup>37</sup> ZANU won the elections that followed, and Zimbabwe became an independent state on April 19, 1980.

The new majority government adopted a policy of reconciliation toward the white population and its black rivals. However, it retained the state of emergency, which the Smith regime had announced in 1965 before the declaration of unilateral independence; this continued until 1990, along with all the repressive security laws inherited from the previous regime.<sup>38</sup> Shortly after independence, violence erupted in Matebeleland. Emergency powers were widely used to quell the violence, including both preventive detention laws and restrictions on movement. A special unit sent to the area, known as the fifth brigade, was responsible for perpetrating widespread human rights violations. The problem was ended in 1987 by a unity agreement that led to ZAPU being merged<sup>39</sup> into ZANU, giving the ruling party an overwhelming parliamentary majority.<sup>40</sup> Not until the late 1990s did a viable new political party, Movement for Democratic Change (MDC), appear on the scene to seriously challenge ZANU's dominance. However, as

the economy has declined, opposition to government has increased. From the 1990s to date, Zimbabwe has experienced a total collapse of its economy and widespread human rights abuses as the government has sought to remain in power by any means.<sup>41</sup> By 2009, Zimbabwe had the highest inflation rate in the world, and its economy had shrunk by almost a third.<sup>42</sup> Two recent examples that highlight the human rights abuses and the regime's determination to stay in power are the breach of electoral laws by the government in the 2008 elections and the manner in which ZANU PF has continuously violated the Global Political Agreement to further its interests. The mediation between ZANU PF and MDC under the supervision of President Thabo Mbeki led, among other things, to the amendments of the Electoral Act in Zimbabwe.<sup>43</sup> Section 110 of the Electoral Act provided for a runoff election within twenty-one days of the announcement of the results if no single candidate managed to obtain 50.1 percent of the total votes cast in a presidential poll. When ZANU PF realized that they had lost the 2008 election and that there was a high probability of losing the runoff election as well, they delayed announcing the presidential election results by more than three weeks and, instead of holding elections within the stipulated twenty-one days, held the election three months later. The delay was designed to allow ZANU PF to purge the electorate of opposition support. Massive violence and killings were inflicted on opposition supporters, forcing the MDC to withdraw from the elections.<sup>44</sup> On the current government of national unity, ZANU PF has acted in bad faith before and after signing the Unity Agreement. President Mugabe went on to appoint permanent secretaries unilaterally, without consulting the other parties that are members of the government, in contravention of the Global Political Agreement.<sup>45</sup> In addition, the president unilaterally appointed the reserve bank governor, the attorney gen-

eral, and all the provincial governors without consulting the other parties that are members of the Unity Government.<sup>46</sup>

### **Constitution Making: The Challenges in Zimbabwe**

In 1980, after ninety years of colonial rule and decades of armed struggle against a white minority government regime, modern Zimbabwe inherited a constitution, which was a result of a negotiated settlement at Lancaster House in London.<sup>47</sup> The Lancaster House constitution-making process was dominated by the British government, which was associated at the time with the minority government of Southern Rhodesia.<sup>48</sup> A majority of the liberation movements perceived the constitution as unsatisfactory, as it lacked popular participation and contained unsavory provisions. The liberation groups believed that a new constitution was needed to consolidate a democratic state in Zimbabwe once independence was achieved. In significant respects, Zimbabwe's 1980 constitution continued the colonial legacy in the sense that some of its provisions maintained the economic status quo. Immediately after the Lancaster House constitution was adopted, elections were held and a populist government led by ZANU was elected to power: ZANU won fifty-seven seats, ZAPU twenty seats, ANC three seats, and the Rhodesian Front all the twenty seats reserved for whites.

Although a constitution is primarily a legal document, it is at the same time a political charter, particularly when it is expected to enact far-reaching change in the political and economic structure of society. Unfortunately, the Lancaster House Constitution did not create the potential for the necessary institutional change—not merely the institutions in the political realm, but also the institutions that govern the way the economy functions and influence productivity and equity. The Lancaster House Constitution

itself failed to serve as a framework for local political and economic actors to negotiate the transformation from a colonial state with great economic disparities to a more equitable Zimbabwe, largely because it contained entrenched provisions, which ensured certain policies could not be changed until a specified time.<sup>49</sup> As a result, the basic structure of Zimbabwean society, especially as it related to land ownership, remained the same. As protests mounted regarding the government's corruption and failure to improve the quality of life for the majority of Zimbabweans, the government became undemocratic and authoritarian, increasingly centralizing power in its attempt to stay in office. The attributes of the Zimbabwean state thus include the following: a highly centralized system of governance; excessive state control of all aspects of human endeavor, coupled with limited capacity to govern; excessive regulation of civil society; weak institutions of state and civil society; few countervailing forces to the power of the executive branch; limited participation in governance by the general citizenry; and preferential access to power and resources, often determined by religious, ethnic, and geographical considerations. The result has been unprecedented economic decline and increasing poverty among ordinary Zimbabweans.

Clearly, the Lancaster House Constitution failed to gain legitimacy or provide a framework for the democratic governance of Zimbabwe. The challenge for Zimbabwe remains how to achieve a stable political and constitutional order that promotes development and good governance and guarantees citizens government under the rule of law regardless of their gender, color, sexual orientation, sex, or ethnic origin. This calls for the development of political, economic, and administrative institutions for the proper governance of the state. The aim should be to achieve a constitutional order that is legitimate, credible, enduring, and structurally

accessible to the people without compromising the integrity and effectiveness of the process.

In Zimbabwe, a serious search for viable constitutional arrangements must begin with the frank recognition of the specific problems confronting the country. Foremost is the need for sufficient national unity or cohesion to generate social and political power strong enough to enable the diverse peoples that make up Zimbabwe to achieve a level of well-being and development beyond their reach as separate units. Any constitutional structure adopted in Zimbabwe likewise needs to accommodate the ethnic diversity of the country. The issue of ethnicity could potentially destabilize the democratic process; democracy could magnify the adverse effects of ethnicity. At the same time, there is the need to accommodate the racial minorities that exist in the country. The constitution-making process must deal with all these facts sensitively, consciously assuming the fears and apprehensions of minority groups, meeting their legitimate demands, and involving them in meaningful ways in the political system and nation building. Zimbabwe cannot ignore the disproportionate economic and social importance of public office to individuals in the midst of widespread poverty and ignorance. A serious search for a viable constitutional arrangement must respond to the need to decentralize power. It must find the means to eradicate the pervasive inequality of the sexes perpetuated by traditional roles assigned to women. The constitution-making process must also address the question of peaceful transfer of power from one leader to another. Several of its neighbors—Zambia,<sup>50</sup> Malawi,<sup>51</sup> and South Africa,<sup>52</sup>—have adopted term limits for presidents to ensure a change of leadership from time to time. The essence of government is power, and power, lodged as it must be in human hands, is always liable to abuse. Limits are therefore essential to minimize the danger of dictatorship and the

development of an oligarchy in a presidential system.

### **Constitution-Making and International Human Rights Norms**

It is important to ensure that a constitution-making process relies on international standards. This acts as a check on government and empowers minorities and other stakeholders. Democracy involves three central rights: the right to take part in government, the right to vote and to be elected, and the right to equal access to services. The Universal Declaration of Human Rights (UDHR) states that the will of the people shall be the basis for the authority of government.<sup>53</sup> A number of international instruments reflect the principal concerns underlying governance, including the right of peoples freely to determine their political status,<sup>54</sup> the right of all elements of society to participate actively in defining and achieving developmental goals,<sup>55</sup> and the right of all people to participate in the political life of their country. Thus, international instruments for promoting and protecting human rights within the UN system are replete with admonitions that popular political participation must be free.<sup>56</sup> While such instruments do not describe a particular methodology for ensuring such freedom, their essence is clear: To be free, participation in the political processes of a country must be conducted in an atmosphere characterized by the absence of intimidation and the presence of a wide range of fundamental human rights.<sup>57</sup>

While the UDHR enunciates the rights, the Covenants elaborate upon each of the rights, and regional conventions contribute to their protection. Some rights take on additional importance for political participation purposes, such as the rights to free opinion,<sup>58</sup> free expression,<sup>59</sup> information,<sup>60</sup> assembly and association,<sup>61</sup> independent judicial procedure,<sup>62</sup> and protection from discrimina-

tion.<sup>63</sup> The Human Rights Committee states that the right to hold opinions without interference permits no exception or restriction.<sup>64</sup> The committee also states that the right to freedom of expression includes not only freedom to impart information and ideas but also the freedom to seek and receive them.<sup>65</sup> To ensure the full participation of the people in a constitution-making process, all obstacles to individual participation in the affairs of the state must be removed. Public participation not only ensures that the development of basic law goes through a process of popularization and legitimization but facilitates consensus building. Only under such an atmosphere will participation be effective and contribute to the development of a durable and widely acceptable constitution. To that end, as Thomas Franck has argued, the idea that only democracy validates governance is an emerging norm.<sup>66</sup> A corollary norm may also be emerging that only a democratic constitution-making process validates a constitution. Governments increasingly recognize that their legitimacy depends on meeting the normative expectations of the international community and their own citizens.

### **The Postindependence Constitution-Making Process in Zimbabwe**

The 1979 constitution is commonly referred to as the Lancaster House Constitution. It contains a justiciable bill of rights, which recognizes a range of rights, including the rights to freedom of expression, association, and assembly.<sup>67</sup> Beginning in 1980, however, the government amended the Lancaster House Constitution repeatedly, on the pretext that it needed to be made more relevant to Zimbabwe's particular situation. In reality, the amendments concentrated more and more power in the executive.<sup>68</sup> By the 1990s, the Zimbabwe constitution, in important respects, bore little relationship to the original 1980 document. Sixteen separate amend-



ments, all of which made multiple constitutional changes, entirely reshaped the document. Given the circumstances of its birth, some amendments were inevitable and entirely desirable,<sup>69</sup> but the same cannot be said of the majority of the amendments.<sup>70</sup> In 1989, the constitution was amended to shield the president from questioning by and accountability to parliament.<sup>71</sup> Some provisions of the amendment placed the president above the judiciary, in that the judiciary was denied the right to question the substance of or the process through which presidential decisions were reached.<sup>72</sup> The constitution furthermore provides for presidential powers (i.e., temporary measures) that essentially give the president rule-making ability equal to that of the legislature.<sup>73</sup> The constitutional amendments have sought to limit the jurisdiction of the courts,<sup>74</sup> prevented the Supreme Court from hearing a particular case relating to fundamental rights provisions, and overturned the court's decisions regarding that case.<sup>75</sup> In 1990, in *S. v. Chibeya*, the Supreme Court asked for full argument on the issue of whether the use of hanging in the administering of the death penalty constituted inhuman or degrading treatment or punishment contrary to Section 15 (1) of the constitution. A date was set for the hearing. The government's response was immediate: Shortly before the hearing, a constitutional amendment bill was published that included a provision specifically upholding the constitutionality of execution by hanging. The minister of justice, legal, and parliamentary affairs informed parliament that any holding to the contrary would be untenable to government, which held the correct and firm view that parliament made the laws and the courts interpreted them. He added that abolishing the death sentence was a matter for the executive and legislature, and that the government could and would not countenance the death penalty's de facto abolition through a legal back door.<sup>76</sup>

In addition to amending the constitution, the government has resorted to legislative measures to overrule court decisions without any hesitation when it disagrees with those decisions. When the Supreme Court ruled in *S. v. Juvenile*<sup>77</sup> to outlaw judicial corporal punishment of juveniles and, in an *obiter dicta*, reached a similar conclusion regarding corporal punishment of school pupils, the legislative response of the government was to amend the constitution to permit corporal punishment to be imposed on children by their parents, guardians, and persons in loco parentis, and on male juveniles convicted of criminal offenses.<sup>78</sup> In September 2000, the government intervened in the case of *Capital Radio (Pvt) Ltd. v. Minister of Information & Others*,<sup>79</sup> in which a private radio station, Capital Radio, filed suit in the Supreme Court against Section 27 of the Broadcasting Act. Capital Radio argued that Section 27, which prohibited the unauthorized possession, establishment, and operation of signal transmitting stations, contravened Section 20 of the Zimbabwean constitution, which guarantees freedom of expression and information. The section effectively prohibited privately owned radio stations in Zimbabwe. The Supreme Court ruled in favor of Capital Radio,<sup>80</sup> enabling it to begin broadcasting as a radio station. In response, in October 2000, the government promulgated the Presidential Powers (Temporary Measures) Broadcasting Regulations, arguing that the Supreme Court's decision created a regulatory vacuum. Under the regulations, the government created a board consisting of members appointed by the minister of information, which was tasked with issuing licenses. The board declared independent radio stations illegal, ordered them switched off, and had their broadcasting equipment confiscated. The board promptly proceeded to revoke the license that had been issued to Capital Radio as a result of its Supreme Court case, reversing its victory.<sup>81</sup>

Yet another example of the government's defiance of the judiciary was its reaction to the Supreme Court's decision in *Rattigan and Others v. Chief Immigration Officer and Others*.<sup>82</sup> The court declared that a female citizen of Zimbabwe who was married to an alien was entitled, by virtue of the right to freedom of movement—protected under Section 22 (1) of the constitution—to reside permanently with her husband in any part of Zimbabwe.<sup>83</sup> The decision held that to prohibit the alien husband of a marriage genuinely entered into with the shared intention of establishing a matrimonial abode in Zimbabwe from residing in Zimbabwe would place the wife in the dilemma of having to decide whether to accompany her husband to a country other than Zimbabwe and live together there or to exercise her constitutional right to continue to reside in Zimbabwe without him. Within a matter of months, the ruling was extended in *Salem v. Chief Immigration Officer and Others*<sup>84</sup> to embrace the mobility rights of the citizen wife and the right of the alien husband to lawfully engage in employment or other gainful activity in any part of Zimbabwe. On December 6, 1996, the Constitution of Zimbabwe Amendment (No. 14) Act was promulgated.<sup>85</sup> The amended paragraph provided that

nothing contained in or done under the authority of any law shall be held to be in contravention of sub section (1) to the extent that the law in question makes provision for (i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe, whether or not he is married or related to another person who is a citizen or permanent resident in Zimbabwe.

However, the effort to undo the court's decisions proved unsuccessful, as a subsequent Supreme Court case ruled that the new wording did not diminish the rights of the citizen wife.<sup>86</sup>

The Zimbabwean experience highlights the problem of centering the amendment procedure of the constitution solely in the legislature, even with special majorities, as opposed to providing checks such as requiring constitutional amendments to be approved in a referendum or by a high percentage of provincial legislatures where they exist. As one political party has dominated the first twenty years of independence, a two-thirds parliamentary majority has proved of no practical value to check retrogressive constitutional amendments. It is arguable that the ruling party's overwhelming parliamentary majority demonstrated that it enjoyed the popular support necessary to pass such amendments. However, this overlooks the reality of a dominant one-party state in which the party seeks to exercise complete control over voting in parliament: The result is that parliament rubber-stamps all constitutional amendments. Further, it is questionable that all members of parliament are able or prepared to undertake a critical and informed view of proposed constitutional changes, especially as such amendments are more often than not rushed through parliament.

Zimbabweans' desire in the 1990s for the elaboration and adoption of a new constitution arose not only because of the need to right the inequities of the 1980 constitution but also because, as mentioned above, the 1980 constitution had been made increasingly less democratic through numerous government amendments. As the Zimbabwe Council of Churches (ZCC) succinctly stated: "A just system is based on a just constitution." Agitation for a new democratic constitution was spearheaded by the non-governmental organization (NGO) community, which set up the National Constitutional Assembly (NCA), an NGO-driven constitution-making process comprised of a number of civil-society organizations, with the collective mission of developing a new democratic constitution for Zimbabwe.<sup>87</sup>

Clearly wishing to control the process, the government responded by establishing its own constitutional commission, with the majority of members being its own supporters.<sup>88</sup>

The main body of the commission was a plenary made up of about five hundred commissioners. The substantive work of the commission was to be carried out through nine thematic committees, each with about forty-three commissioners. The commission adopted nine themes: the nature of the executive organs of state; citizenship, fundamental, and directive rights; separation of levels of governments; public finance and management; customary law; independent commissions; separation of powers among the three branches of government; transitional arrangements; and legal matters.<sup>89</sup> The thematic committees were formed into one hundred provincial teams that held meetings in which they received submissions from the public. The provincial teams each had nine members, representing each of the nine major themes examined by the committee. While the commission's secretariat provided logistical support, the commission's coordinating committee, made up of about twenty-five commissioners, did the substantive organization and management of the commission's thematic work.

With the launching of the government's constitutional commission—and the NGO-sponsored NCA's decision to boycott it—two parallel processes were under way. The NCA concentrated on both providing civic education on the constitution throughout the country and gathering views on the constitution. Initially, the NCA spent most of its energy on the process of constitutional reform. Later, it turned to the problems of constitutional content, discussing in great depth the kind of constitution the people wanted. It sought to develop an alternative constitution to the document that the constitutional commission was developing. The NGO community and opposition parties rejected any par-

ticipation in the commission's process on the grounds that, first, the constitution should be developed by a constituent assembly along the lines of the South African model<sup>90</sup>; second, not all stakeholders agreed to the commission as an appropriate method to make the national constitution; third, the exercise of national consensus building on the values and provisions of a national constitution could not be done through a process that was exclusive, partisan, divisive, conflict ridden, and contested; fourth, the commission's appointment under the Commissions of Inquiry Act meant that the process and results were entirely subject to the president's powers to reject or modify the will of the people; fifth, the commission was dominated by members of one political party and was therefore not national in character; sixth, the fixed period of six months to complete the exercise was too short and inhibited full public participation; and seventh, there should have been legally binding guarantees that the commission's constitutional recommendations, as arrived at through public participation, would be final. The commission's opponents considered the legal framework of the Commissions of Inquiry Act<sup>91</sup> to be inadequate for constitution making, as it gave sweeping powers to the president to alter, revoke, or stop the process, and therefore, did not guarantee the effective participation of all stakeholders. Further, while the act provided for the commission to report to the president,<sup>92</sup> opponents noted the act's failure to oblige the president to publish the commission's findings. This undermined the constitution-making process by placing the president in a dominant and determinative role rather than a facilitative one.<sup>93</sup> Critics also objected to the commission's gender imbalance.<sup>94</sup>

In its work, the constitutional commission developed a program for public participation. The commission noted that getting the views of the public on the kind of constitution that Zimbabweans wanted should be

done in a manner that was both politically and scientifically credible.<sup>95</sup> It was mindful that how it gathered information would ultimately determine whether the public and the international community had confidence in the commission's process and results.<sup>96</sup> In its program, the commission used several sources of information, including written submissions, views of constitutional experts,<sup>97</sup> views by individuals and interest groups giving oral submissions before the commission, and academic publications relating to governance. The coordinating committee used two methods—an open-meetings approach and a scientific approach—to gather information from the public. The open-meetings approach took three forms: public hearings by the commission's thematic committees at various provincial locations, written submissions to the commission by members of the public, and submissions to the commission's Web site. The commission held well over five thousand meetings in all fifty-seven districts in Zimbabwe.<sup>98</sup> The scientific method consisted of a nationwide opinion poll and the administration of a questionnaire to people throughout the country.

Clearly, as a result of pressure from civil society, the constitutional commission attempted to ensure public participation in the process. But its efforts were defective: That the participation mechanism was set up under the Inquiry Act<sup>99</sup> implied that there was no obligation, if the president so wished, to actually publish what came out of it. In the end, in November 1999, the commission adopted a draft constitution, which was submitted to a referendum. On the whole, the draft constitution contained major improvements over the 1980 constitution. It recommended limiting a president to two five-year terms in office; a division of executive powers between the president and a prime minister; proportional representation; an independent electoral commission; and no land seizures without compensation. Despite a vigorous government

campaign to approve the constitution, it was rejected by 54 percent of the voters. This sparked a furious reaction from the government. Within days, large-scale invasions of white-owned farms began, headed by so-called war veterans who were fanatically loyal to Mugabe, as well as vitriolic attacks on the MDC and white farmers. The constitution-making project was abandoned. In September 2007, a ZANU PF-dominated parliament voted to pass constitutional amendments, paving the way for the holding of joint parliamentary and presidential elections in March 2008. The elections were held under increased levels of violence and human rights violations. Following these elections, the MDC became the largest party in the House of Assembly.<sup>100</sup> Both Mugabe and Tsvangirai claimed victory in the presidential elections. The results were not released for three weeks. On May 2, the presidential elections were finally announced. Neither candidate passed the 50 percent threshold to be elected in the first round. Violence increased before the scheduled June 27, 2008, runoff election. On June 22, Morgan Tsvangirai, MDC president, withdrew from the runoff, blaming violence and fraud.<sup>101</sup> On September 15, ZANU PF and the MDC signed a power-sharing agreement under the mediation of the South African president, Thabo Mbeki.<sup>102</sup> As part of the 2008 Unity Government Agreement, the parties agreed to come up with a new constitution in 2009. Once a new constitution is in place, the power-sharing government is expected to call fresh parliamentary, presidential, and local government elections. Already, differences are emerging on how the process of drafting a new constitution should proceed. The Congress of Trade Unions, student groups, and civil society are calling for an independent commission to lead the drafting of a new constitution for the country, rejecting plans by the government for parliament to spearhead the writing of the new constitution.<sup>103</sup> They argue that issues of national importance will be lost



in the corridors of power if parliament controls the process. On the other hand, the speaker of parliament has appointed a twenty-five-member committee of legislators drawn from ZANU PF and MDC that will oversee the drafting of the country's new constitution.<sup>104</sup> The speaker insists that parliament will drive the writing of the new constitution, as outlined in the power-sharing agreement signed by the three main political parties in 2008. The 1990 Zimbabwe experience illustrates how a government can use a commission to ostensibly consult with the people on constitutional reform while in reality ensuring that the government controls the process. The president's establishment of a commission in 1999, using his powers under the Commission of Inquiries Act, had two significant consequences. First, because the president appointed the commission's members, he could determine the commission's size and composition. As a result, the great majority of its five hundred members supported the ruling party. Second, establishing the commission enabled the president to pick and choose from among the commission's recommendations, as he was under no obligation to accept any or all of them. He rejected a number of recommendations, including the one prohibiting land seizures without compensation. The work of the hugely expensive commission was also seriously hampered by its ridiculously unwieldy size, a fact seemingly admitted even by the commission's chairman.<sup>105</sup> Why Mugabe deemed it necessary to appoint such a large number of commissioners is not clear. Seemingly, it was some kind of presidential overkill, designed to ensure a favorable report.

The commission's final draft was never put to a vote, but was instead forced through at a plenary session in which the chair declared the draft constitution adopted "by acclamation," despite a number of dissenting voices.<sup>106</sup> Although the commission under-

took an impressive and wide-ranging consultation exercise throughout the country, its work and report were undoubtedly tainted by the public's perception that it was a government-oriented body. Nonetheless, its draft constitution did not satisfy the president.<sup>107</sup> Despite prior assurances to the contrary, the government gazette a few weeks later published what were termed "corrections and clarifications" to the document.<sup>108</sup> Despite the rhetoric, these "corrections and clarifications" made several significant changes of substance to the draft constitution submitted with the constitutional commission's report explaining how it conducted its work. Both the draft constitution and the commission's report were available to the public. The president's power to place before the electorate whatever proposed constitution he wished was made clear following a legal challenge to the referendum, brought by some commission members on the grounds that the draft constitution had not been properly adopted. In rejecting the submission, Justice Bartlett in the Zimbabwe High Court stated:

The president is not in my view required to put before the voters a constitution approved by the Constitutional Commission. He is entitled to put forward any draft constitution he so wishes to ascertain the views of the voters. It may or may not be considered unwise to make changes to a document produced by a body specifically set up to produce a draft constitution but it is certainly not unlawful.<sup>109</sup>

### **The Failure of the 1999 Constitutional Process and Its Impact on National Reconciliation**

Zimbabwe has acceded to a number of international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on Human and Peoples' Rights (ACHPR).

nation of All Forms of Discrimination (CEAFD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on Human and People's Rights (ACHPR). A number of other specific commonwealth declarations and principles were until recently applicable to Zimbabwe.<sup>110</sup> Under these treaties, the government must guarantee equal protection of the law to all persons without discrimination and prosecute serious violations of the rights enumerated, including when the perpetrator is a private citizen. The independence of the judiciary is a cornerstone of these international provisions. The Zimbabwean constitution provides similar guarantees. Notwithstanding these frameworks for human rights, however, the unprecedented defeat of the government in the February 2000 referendum regarding whether to accept the government's draft constitution ushered in a rapid deterioration of the human rights situation in Zimbabwe<sup>111</sup> and ended all government efforts to replace the Lancaster House Constitution of 1980.

Since 2000, state-sponsored intimidation, arbitrary arrest, torture, and attacks on the political opposition, independent media, and human rights organizations have escalated.<sup>112</sup> The government has used its supporters as well as state agents—namely, so-called war veterans, youth militia, police, and the army—to wage a targeted campaign of repression in a bid to retain control. Parliamentary and presidential elections held in 2000 and 2002, respectively, were marred by politically motivated violence.<sup>113</sup> The government initiated a controversial land reform program that sparked illegal occupations of commercial farms by the veterans and other settlers, resulting in the forced evictions of hundreds of thousands of farm workers, farmers, and their families.<sup>114</sup> Human rights violations have become commonplace. A 2003 report of the Observatory of the Protection of

Human Rights Defenders, entitled *Human Rights*, highlighted the abuses suffered by human rights defenders in Zimbabwe.<sup>115</sup> It noted that since the 2002 presidential elections, the pressure on human rights defenders has not only significantly increased but also developed more subtle and sophisticated forms of oppression. The report stated that human rights defenders, including members of NGOs, lawyers, magistrates, journalists, and trade unionists, are constantly harassed and subjected to violence, arbitrary arrest, detention, fiscal pressure, or administrative sanctions. In 2005, in a move condemned by the United Nations and the international community, the government demolished the homes of 700,000 Zimbabwean city dwellers.<sup>116</sup> President Mugabe claimed that Operation Murambatsvina (Drive Out Rubbish) was needed to restore sanity to Zimbabwe's cities, which he claimed had been overrun by criminals. Human rights activists pointed out that it was no coincidence that opposition to his rule is strongest in urban areas—and that in the March 2005 elections, the MDC won almost all urban seats.<sup>117</sup> As in all previous elections in Zimbabwe, the March 2008 elections were marred by violence. In the period leading to the June 2008 runoff elections, political rallies by the opposition parties were virtually not permitted, and in rural areas and high-density areas, attendance at ruling-party rallies was compulsory. Opposition party supporters were subjected to beatings and had to flee their homes for safety. As mentioned above, this forced Tsvangirai to withdraw from the election. The elections went ahead with only Mugabe as the contestant.<sup>118</sup>

The United Nations Human Rights Committee, charged with monitoring member-state compliance with the ICCPR, noted in 2001 of Zimbabwe

that not all of the rights in the covenant have been made part of domestic law and cannot be invoked directly before domestic courts. Not-

withstanding the state party's policy of thorough legislative review in order to ensure compatibility of domestic legislation with the Covenant, the Committee notes the absence of effective institutional mechanisms to ensure systematic implementation and monitoring of its provisions.

The Human Rights Committee expressed concern about the increasing trend to enact parliamentary legislation and constitutional amendments intended to frustrate Supreme Court decisions that uphold rights protected under the ICCPR and overturn certain laws incompatible with it.<sup>119</sup> Similarly, the African Commission on Human Rights and Peoples' Rights has criticized the Zimbabwean government. It has stated that, through the use of legislation curtailing the rights to freedom of expression, association, and assembly, the Zimbabwean government has violated the provisions of the African Charter on Human and Peoples' Rights, under which these rights are guaranteed.<sup>120</sup> Further criticism of the government has come from the International Labor Organization (ILO) Committee on Freedom of Association, which in November 2002 cited Zimbabwe for serious infringements of the principle of freedom of association and violations of trade union rights, asking the government to ensure that the principles of noninterference by the authorities in the meetings and internal affairs of trade unions are respected.<sup>121</sup>

With respect to the land issue, Zimbabwean human rights groups have observed that, although land ownership reforms are needed to address stark inequalities in land distribution and wealth, the crisis in Zimbabwe is not due to the land problem, but has been induced by bad governance and serious misuse of power.<sup>122</sup> As stated in the African Charter on Human and Peoples' Rights and reinforced by the ICCPR and other binding international treaties, the rules providing for compulsory purchase should be clearly set out in law, and those affected should have the right to voice their opposition to the acquisi-

tion and to challenge it before a competent and impartial court. In addition, the security forces and criminal justice system must provide equal protection to all those who are victims of violence, and the law should take its course without interference from political authorities. UN Secretary General Kofi Annan has questioned the Zimbabwean government's approach to land reform, noting that such reform must be credible and legal and entail adequate compensation to those whose land is being expropriated.<sup>123</sup> Nonetheless, the Mugabe regime continues to rule Zimbabwe and violate the rights of its people for the same reasons that led to the survival of Ian Smith's rebellious regime from 1965 to 1980. There has not been concerted international pressure on the regime. To begin to effect meaningful change, the international community must insist that the government abide by its constitution and international human rights norms. However, attempts to censure Zimbabwe have been blocked by African states whose response has been strongly shaped by the history of southern Africa and the long struggle to end colonial rule; except for Botswana and Zambia, the strong criticism of Zimbabwe by the United States, Britain, and the Commonwealth<sup>124</sup> has not been matched by similar statements from Zimbabwe's African neighbors. The situation is almost a complete replay of the failure of the international community to deal with Ian Smith after he declared independence in 1965.

### **Constitution Making and the International Community**

Although it is important that a constitution-making process be a local product driven by local stakeholders, the international community can play an important role.<sup>125</sup> It can encourage the observance of international standards as reflected in international human rights instruments and ensure that the

standards are well articulated; provide requisite expertise and resources for a successful constitution-making process; and help in capacity building, knowledge networking, and sharing of best practices. The international community should, however, remain mindful that its role is to support the process; it should refrain from being prescriptive. This avoids the danger of importing institutions without regard for local conditions. For there to be genuine ownership of a constitution, its making must be geared to the social, political, and economic conditions of the people that the constitution is intended to serve. The process should therefore be in the hands of those who live with the result. The influence of the international community is less likely to be resented when the international community focuses on the process rather than on results, in other words, ensuring that the process is inclusive and ensures the participation of all stakeholders rather than advocating a particular result.

In Zimbabwe's 1999 constitution-making process, experts from Africa, the United States, Asia, and Europe were invited to participate in the constitutional commission's plenary session, termed an "international conference on the Making of Zimbabwe New Democratic Constitution."<sup>126</sup> The experts gave advice but did not get involved in the process itself. At the time of the conference, the commission had completed its collection of views from the public and the various theme committees were considering their recommendations to the commission's drafting committee. The experts presented papers on areas of their expertise to a full commission meeting and participated in the discussions of the various theme committees. They also participated in various meetings scheduled by NGOs. Access to the experience of comparative constitution-making exercises is particularly useful during a constitution-making process, as it provides a wide range of information on possible options and les-

sons on what to do and what not to do, and the commission's chairperson acknowledges the value of the experts' comparative experience.<sup>127</sup> The international community has to be mindful, however, that in some situations, foreign experts are brought in to legitimize a flawed process. When this is clearly the intention, international experts should refrain from participating. This was, however, not the case in Zimbabwe; despite the president's heavy hand in the process, there was a genuine effort on the part of the commission to draw on comparative experience.

### **Lessons from the Failure of the Zimbabwean Constitutional Process**

Developing an effective procedure to prevent those in power from manipulating a constitution-making process is a considerable challenge—one that would be helped by articulating the principles and mechanisms that govern the process. Such articulation would enhance the process's quality and increase the possibility of its success. The conditions under which a constitution-making process is initiated are important. The process leading up to the 1980 Lancaster House Constitution would have benefited from separating the constitution-making process from the process of securing a cease-fire, as this would have helped prevent the dominant and belligerent groups from having an overwhelming influence on producing the country's constitution. Such a separation also enables or simply gives time for public participation where possible, or where there is willingness to develop a vision for a future society. The 1999 Zimbabwean constitution-making process failed partly because it came about as a government attempt to undercut while appearing to satisfy civil-society as well as opposition demands. It was not part of a larger political renewal process. The government also lacked the credibility to spearhead the process, in that civil-society's demands



for constitutional reform in 1999 coincided with the emergence of the first very strong opposition party in Zimbabwe. Zimbabwe's experience demonstrated that when leadership resists change and openly engages in repressive practices to prevent public discussion of reforms, it has already squandered the public's goodwill toward believing that constitutional change is genuine.

A central lesson of the Zimbabwean case is that before any post-conflict society launches a constitution-making process, the society must debate and come to an understanding about what kind of society it wants to create. The constitution must be an exercise in building national consensus on the values and provisions to be included in the document. One of Zimbabwe's continuing constitutional problems involved the question of who was and was not a Zimbabwean and whether or not Zimbabwe was to be a nonracial society, with all its citizens having equal rights and protection under the law regardless of racial identity<sup>128</sup>—a problem not discussed at Lancaster. By contrast, part of South Africa's constitution-making process was devoted to debating the kind of society South Africa was to create.<sup>129</sup> One can argue that the African National Congress (ANC) was clearly dedicated to establishing a nonracial society as long ago as 1955 through the adoption of the Freedom Charter,<sup>130</sup> and some of the discussions in the 1993 Multi-Party Negotiating Forum focused on identifying institutions and legislation that needed to be changed to create a nonracial and democratic South Africa.<sup>131</sup> Consideration of the type of society to be created enables the process to look at conditions in the country and the types of institutions and legislation required to bring about the change envisioned.

Zimbabwe's failed constitution-making process under Mugabe also reveals that a constitutional commission must be fully representative of society and account for the concerns of the widest possible segment of

the population. Moreover, the work of the commission must be transparent toward the population and the international community; the commission must make public and expert consultations meaningful and properly structure its methods to ensure effective participation by all stakeholders in the country. These factors are important to maintain the process's integrity. In addition, participation of the people in the process is good civic education for the populace. Citizens begin not only to understand the process but to understand and appreciate its importance to their lives and communities. They also begin to see the values that the constitution seeks to protect and promote, and such values are better protected when they have become entrenched in the culture of the society. Another lesson learned is that a commission that reports to the president can be susceptible to manipulation by the party in power, resulting in the government imposing its preferred constitutional model. Matters are made worse by the common perception that such commissions are often filled by people sympathetic to the ruling party.

Furthermore, the report and draft constitution developed by a constitutional commission must not be subject to unilateral executive interference and must be guided by a reasonable time frame. The Zimbabwean constitutional commission was given six months to complete its work.<sup>132</sup> Although the commission met its deadline, the time frame was clearly unrealistic; the deadline was met at the expense of adequate public consultation. It is possible that if the commission had been given more time to do its work, it could have organized more consultations, perhaps resolved existing disagreements with groups that opposed the process, and gained legitimacy. As it stood, civil society in Zimbabwe was clearly opposed to the process. The NCA argued that "a defective process will lead to a defective constitution which does not reflect the wishes of the people."<sup>133</sup> Time

does not always guarantee quality, but there is no doubt that a truly participatory and consultative approach in pluralist developing countries requires sufficient time to give meaning to the process and bring alienated interests and communities into it. A rushed process often leaves many issues unresolved and leads to quick compromises that do not stand the test of time. The 1979 Lancaster House constitutional negotiations had only three months to complete their work, leaving unresolved several important issues, such as property rights and land reform, past human rights violations perpetrated in the long and brutal liberation wars, and ensuring the economic empowerment of the black majority after decades of discrimination that left them landless and poor. Finally, rushed processes often tend to compromise opportunities to engage in mass education to build ownership around the final constitution.

A third lesson from the Zimbabwean experience is that the process of adopting a constitution is as important as the substance of it. A defective process is unlikely to lead to a constitution that reflects the wishes of the people. Clearly, a constitution that is perceived as being imposed on a large segment of the population, or having been adopted through manipulation of the process by one of the stakeholders, is unlikely to gain sufficient popularity or legitimacy to endure. In the Lancaster House Constitution process, there was no public participation in developing the terms and conditions set therein to govern the people's relationship with their rulers. The constitution-making process remained the preserve of politicians, with the people as bystanders. The Mugabe government has perpetuated the status quo, with parliament enacting sixteen amendments with no participation of the people.<sup>134</sup> The people have to feel that they own a document before they can respect, defend, or obey it. In this regard, the 1999 constitution, which was put to the 2000 referendum, had several ma-

jor improvements in substance over the 1980 Lancaster House Constitution. First, it significantly reduced the power of the executive to avoid abuse and the concentration of power in a single person or institution and adopted a two-term limit for the presidency.<sup>135</sup> Second, it recommended two houses in parliament, a lower house and an upper house, with the upper house acting as a house of review over the functions and actions of the lower house. Third, it recommended a mixed proportional representation and constituency-based electoral system. Fourth, it recommended several measures, such as the ratification of constitutional office holders by parliament, to ensure that parliament was the center of power rather than the president. Fifth, it adopted provisions guaranteeing the independence of the judiciary and security of tenure. However, all these improvements were lost in the dispute over the process.

A fourth lesson from the commission approach is that, on practical grounds, using a commission with a broad and unregimented agenda is inappropriate for elaborating a document as complex as a constitution. With thousands of submissions to the commission, it is possible to write any number of versions of a constitution and find justification for each in the submissions made to the commission. The Zimbabwean government's so-called clarifications and corrections to the 1999 commission report illustrate this point. A further point, learned from the manner in which Mugabe changed provisions adopted in the 1999 constitution, is that it must be agreed at the start of the constitution-making process how decisions are going to be made, and once made, that those decisions should be final. Again, the South African process is instructive, as it was based on an agreement that all decisions of the constituent assembly were to be by consensus, and once the draft constitution was adopted, all stakeholders would support the enactment of the constitution in parliament and would not

seek to amend the text. In the South African process, the African National Congress (ANC) did not dictate the process and had no power whatsoever over its results.

In Zimbabwe, because the 1999 constitutional process was bogged down by disagreements over the process, exclusive attention was directed at the land issue and questions of executive power, overlooking other equally important constitutional issues. The need to deal with gender inequality and adopt measures to ensure its elimination in Zimbabwean society did not receive as much attention as it deserved.<sup>136</sup> This was true of the 1980 Lancaster House constitutional conference as well, at which there were only two women among the sixty-five delegates. Even though women form 52 percent of the population, are the main providers of labor for farming (approximately 70 percent), and are the primary managers of homes in communal areas,<sup>137</sup> they suffer from pervasive inequality perpetuated by the traditional roles assigned to them. On the land, women are treated as dependants of men, not as landholders or farmers in their own right. Section 23 of the Lancaster House constitution prohibits discrimination, but recognizes exceptions to this general principle in issues relating to, among other things, the application of African customary law.<sup>138</sup> In 1999, the Supreme Court, basing its judgment on this exception, ruled in *Magaya v. Magaya*<sup>139</sup> that a woman could not inherit land from her deceased father. The Administration of Estates Act of 1997, which passed after the *Magaya* case, has changed this position in relation to inheritance specifically, but only for deaths that occurred after November 1, 1997. Under this law, a widow retains rights to land upon the death of her husband. But in reality, women still occupy a subordinate position in communal areas and generally only have access to land through their husbands. In another 1999 Supreme Court case, *Mablangu v. Khumalo*,<sup>140</sup> the court ruled that

Section 23 of the constitution still exempted African customary law from the principles of nondiscrimination; in addition, other legislation still discriminates on gender grounds. Only equality between men and women can create the proper conditions to transform Zimbabwean society, and any future constitution-making process ought to pay particular attention to this.

The South African constitution was subject to judicial certification before presentation to parliament. The constitutional court was responsible for examining the text and deciding whether it conformed to the agreed constitutional principles.<sup>141</sup> No precedent exists elsewhere in the world for certification of a constitutional text by a court. This approach, though attractive, would not have worked in Zimbabwe, where the judiciary is not perceived as independent. South Africa was fortunate in that the constitutional court was new, having only been established in 1994. All its judges were selected and appointed through a process adopted after the end of apartheid.

After the elaboration of a draft constitution, the next important issue is how to adopt the constitution and ensure maximum legitimacy. The supreme law of the land should not be adopted using procedures that apply to ordinary legislation. Two methods of adopting constitutions are common: adoption through a two-thirds majority in parliament or through a constituent assembly or national referendum. A constituent assembly could take a variety of paths. In Namibia and South Africa, the constituent assemblies were elected; in Uganda, it was a collection of all stakeholders defined as inclusively as possible. With respect to parliament adopting the constitution, the important issue is not so much whether parliament has power to adopt and enact a constitution; rather, it is how to ensure that the sovereign will of the people on which the edifice of democracy rests is expressed in producing a legitimate,

credible, and enduring constitution. If anything, the process of consulting the people strengthens parliament, as it implies parliament's unequivocal acceptance that its powers are delegated to it by the people. The relationship between parliament and the people can endure only if this is recognized. Thus, in matters of great national importance, such as adopting a new constitution, parliament must consult and defer to the wishes of the people. Adopting a constitution through a referendum is one of the most transparent ways to further the culture of consultation. Popular democracy demands the institutionalization of a culture of consultation, reciprocal control in lawmaking, and the use of power and privilege. It should be entrenched in a constitution as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to amendments. The two-thirds majority requirement is often within reach of the largest party in parliament, making it little different in practice from the simple majority required for ordinary lawmaking. To safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party in parliament. Approving a constitution through a national referendum encourages the full participation of the people, who can give it their formal seal of approval. The process can also generate wide publicity and engender full public debate and education of the people on the substantive issues that the constitution covers. It increases the chances of the document receiving the sort of critical and objective consideration that it deserves. Finally, a referendum can counterbalance a president- or government-inspired document being approved by a complaint parliament.

However, the February 2000 referendum on the draft constitution in Zimbabwe illustrates some of the pitfalls associated with the process. The referendum was merely a consultative exercise, as the president was under

no obligation to abide by its result. Government manipulation of the process quickly became apparent, as in the weeks leading up to the referendum, the state-controlled media launched an intensive publicity campaign in support of the constitution and was seemingly less prepared to allow airtime to those campaigning against it. Referendums inevitably have their own drawbacks. In particular, the actual wording of the questions may greatly influence the result; they are expensive and time-consuming and could be considered to be too formal and static. The success of the NGO's campaign against adopting the constitution amply demonstrates that NGOs can be key to ensuring that the wishes of the president and government remain subordinate to those of the people. The Zimbabwean process also demonstrated the crucial role of NGOs and other civil-society groups in bringing the issue of a just constitution to the fore and helping to defeat a bad product. If not for their mobilization, the referendum on the flawed draft constitution in 2000 would have passed, given the government's unparalleled use of state media to campaign for it.

## Conclusions

There are two root causes of the so-called cultural problem of constitutionalism in Africa: the colonial experience overlaid with the postcolonial imposition of a one- or dominant-party system. The legacy of colonialism is offered frequently as an explanation for Africa's current failures in governance. Western criticism of bad governance, as in the case of Zimbabwe, is often branded as neocolonialist. Undoubtedly, colonial governments were not conducive to developing a culture of the rule of law in a Diceyan sense, notwithstanding hasty and belated attempts to create a framework for constitutional government in the last years of colonial rule. Indeed, for most of its history, colonial government was by



nature authoritarian, and its legacy provided a temptation for similar conduct by successive rulers of the new states. The time has come, however, for Africans to take responsibility for transforming their own societies. Zimbabweans must realize that economic recovery and political stability begin by recovering those values that are acknowledged to be the true foundation of every human society. These values are, in turn, the foundation of social creativity and democratic governance. Zimbabwe must establish a stable political order that promotes development and aids the eradication of poverty, hunger, disease, and ignorance while guaranteeing citizens the rule of law, as opposed to rule by law, and equal protection under the law regardless of a citizen's gender, sexual orientation, age, religion, color, or ethnic origin.

Such a stable political order can only be achieved by establishing a constitutional order that is legitimate, credible, enduring, and accessible to the people, without compromising the integrity and effectiveness of the process of governance. The stark lessons learned from Zimbabwe's failure in its 1999 constitutional process are that the process of adopting the constitution is as important as its substance, and that the process must be legitimate if all stakeholders are to accept it. In turn, for the process to be legitimate, it must be inclusive. No party, including the government, should control it. A constitution should be the product of the integration of ideas from all stakeholders in a country, including political parties both within and outside parliament, organized civil society, and individuals in society. The question of developing a durable constitution for Zimbabwe remains a matter of priority. There is an urgent need for the nation to be engaged constructively in finding positive approaches to nation building for a just and sustainable society in Zimbabwe. As the Zimbabwe Council of Churches (ZCC) stated in a pastoral letter, the rejection of the

constitution in 1999 clearly did not imply the continued acceptance of the amended Lancaster House Constitution. Producing a homegrown constitution remains a national priority.<sup>142</sup> A new constitution for Zimbabwe could be the common platform through which Zimbabweans promote national reconciliation, build a national identity, promote national reconstruction, and engage in nation building.

## Notes

1. See, generally, Patrick McAuslan, "Good Governance and Aid in Africa," *Journal of African Law*, vol. 40, no. 2 (1996), p. 168.

2. C. Palley, *The Constitutional History and Law of Southern Rhodesia, 1888–1965 with Special Reference to Imperial Control* (Oxford: Clarendon Press, 1966); see also Colin Leys, *European Politics in Southern Rhodesia* (Oxford: Oxford University Press, 1959).

3. Royal Charter of Incorporation of the British South Africa Company, October 29, 1889. Cecil Rhodes approached the British government with a request for a royal charter. His reasons were set out in the royal warrant and were mainly that, first, the existence of a powerful British company would be advantageous to the commercial and other interests of the United Kingdom and her colonies; second, the company would carry into effect diverse concessions and agreements that had been made by chiefs in the region and such other concessions and treaties as the petitioners should obtain; and third, that if the concessions obtained could be carried out, the conditions of the natives could be improved and their civilization advanced.

4. Royal Charter of Incorporation, 1889.

5. Hugh Marshall Hole, *The Making of Rhodesia* (London: Macmillan, 1926).

6. In 1918 the African chiefs mounted a legal challenge to the BSA Company claims of land ownership. See *In re Southern Rhodesia*, 1919, A.C. 211.

7. By the early 1920s, BSA Company officials had become convinced that Rhodesia was too costly to administer, and the Crown in turn was satisfied that company administration could be improved upon. The Crown assumed responsibility for administration of Rhodesia. Southern Rhodesia Order in Council, 1924.

8. *Report of the Constitutional Commission 1968* (Harare: Government Printer, 1968). See chap. 16, p. 143, on land tenure and economic development.

9. Claire Palley, *The Constitutional History and Law of Southern Rhodesia, 1888–1965 with Special Reference to Imperial Control* (Oxford: Clarendon Press, 1966), p. 265.

10. Constitution of Zimbabwe, 1979, art. 52 (4).

11. Constitution of Rhodesia, 1961.

12. Leo Baron discusses the impact of the 1961 constitution in detail in “The Rhodesian Saga,” *Zambia Law Journal*, vol. 1, no.1 (1969), p. 43.

13. Baron, “The Rhodesian Saga.”

14. Constitution of Southern Rhodesia, 1961, art. 70. See also Baron, “The Rhodesian Saga,” p. 44.

15. *Ibid.*, p. 45.

16. *Racial Discrimination and Repression in Southern Rhodesia*, International Commission of Jurists (ICJ) report (undated). See also Reg. Austin, *The Character of the Rhodesian Front since UDI*, Africa Bureau, 1968. See also Law and Order (Maintenance) Amendment Act 50 of 1967.

17. Law and Order (Maintenance) Amendment Act 50 of 1967.

18. There are several good accounts of Rhodesia’s Unilateral Declaration of Independence, such as Douglas Anglin, *Zambian Crisis Behavior: Confronting Rhodesia’s Unilateral Declaration of Independence, 1965–1966* (Montreal: McGill-Queen’s University Press, 1994).

19. Southern Rhodesia Order 1965 no. 1952, (S.I. 1965/1952). Article 2 (1) states: “It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorized by Act of Parliament is void and of no effect. . . . (2) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.”

20. Southern Rhodesia Order 1965 no. 1952.

21. *Madzimbamuto v. Ladner–Burke and Baron v. Ayre N.O. and Others*, GD/Civ/23/66 and AD 1/68.

22. (1969) AC 645.

23. Sanctions were imposed, but were largely ineffectual. General Assembly Resolution 2012 (XX) 12 October 1965; General Assembly Resolution 2151 (XXI) 17 November 1965; Security

Council Resolution 216, 12 November 1965, and Security Council Resolution 217, 20 November 1965. For a critical analysis of the international response, see Baron, “The Rhodesian Saga,” p. 37.

24. The Constitution of Rhodesia, 1969, Act no. 54. The adoption of the constitution followed a referendum held on June 20, 1969, which approved a Republican status. The 1969 constitution continued to entrench the prevailing land ownership. Article 8 (1) (b) stated: “any provision of the law relating to tenure of land, including Tribal Trust Land, which is specified in that law to be a specially entrenched provision for the purposes of this section shall, subject to the provisions of sub section (4) be subject to the same procedure in all respects as if it were a constitutional Bill to amend a specially entrenched provision of this constitution specified in the Third Schedule.”

25. Constitution of Rhodesia, 1969, Act no. 54, art. 92 (schedule 2) provided for a bill of rights. Article 84 excluded the courts jurisdiction from hearing any allegations of the violation of the rights.

26. Constitution of Rhodesia, 1969. Article 10 provides that “(1) Every person is entitled to the enjoyment of the rights and freedoms set forth in this schedule without unjust discrimination on the grounds of race, tribe, political opinion, color or creed; (2) For the purposes of subparagraph (1) of this paragraph, a law shall not be construed to discriminate unjustly to the extent that it permits different treatment of persons or communities if such treatment is fair and will promote harmonious relations between such persons or communities by making due allowance for economic, social or cultural differences between them; (3) No law shall be construed to be inconsistent with any of the following provisions, that is to say, paragraphs 2, 5, 6, 7 (other than subparagraphs (a) and (b) of subparagraph (3) thereof), 8 and 9 of this schedule to the extent that the law in question provides for: (a) the application in the case of Africans of African customary law; or (b) the exercise by tribal courts of their jurisdiction; or (c) restrictions on the ownership, occupation or use of land.”

27. The injustices and suffering caused during the ninety years of colonial rule that began in 1899, in particular during the last fifteen years of colonialism (the UDI period), have been well documented, especially the abuses of the 1970s. The Catholic Commission for Justice and Peace (CCJP) in the country was an important part of the documentation process. CCJP facilitated the international

publication of several reports, including *The Man in the Middle* (1975), *Civil War in Rhodesia* (1976), and *Rhodesia, the Propaganda War* (1977). See also *Racial Discrimination and Repression in Southern Rhodesia*.

28. A.J. Hanna, *The Story of the Rhodesias and Nyasaland* (London: Faber and Faber, 1960), and Thomas Franck, *Race and Nationalism: The Struggle for Power in Rhodesia-Nyasaland* (Santa Barbara, CA: Greenwood Press, 1960).

29. Terence Ranger, *Peasant Consciousness and Guerrilla War in Zimbabwe: A Comparative Study* (London: James Currey, 1985).

30. For an excellent account of the liberation war in Zimbabwe, see Ranger, *Peasant Consciousness*.

31. *Ibid.*

32. Constitution of Zimbabwe Rhodesia, 1979.

33. Southern Rhodesia Act, 1979, chap. 52. It provided for the bringing into effect a new constitution for Zimbabwe and the revocation of the 1961 constitution. See articles 1 (1), (2), (3). The constitution was brought into force by the Southern Rhodesia Constitution (Interim Provisions) Order 1979 (S.I.1979/1571). It provided that the constitution was to come into force on December 4, 1979. See art. 1 (1), (2), (3), (4), (5).

34. Constitution of Zimbabwe, 1979.

35. Constitution of Zimbabwe Amendment no. 4, 1979, art. 16 (1) provided: "No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—(a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition; (b) requires that the acquisition is reasonably necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilized, the settlement of land for agricultural purposes; (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition; (d) requires the acquiring authority, if the acquisition is contested, to apply to the General Division or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and (e) enables any claimant for compensation to apply to the General Division or some other court for the prompt return of the property if the court does not con-

firm the acquisition and for the determination of any question relating to compensation, and appeal to the Appellate Division."

36. Constitution of Zimbabwe, Act no. 4, 1979. Article 38 (1) provided that "the House of Assembly shall consist of one hundred members qualified in accordance with schedule 3 for election to the House of Assembly, of whom: (a) eighty shall be elected by voters registered on the common roll for eighty common roll constituencies; (b) twenty shall be elected by voters registered on the white roll for twenty white roll constituencies."

37. The Constitution of Zimbabwe Rhodesia, Act no. 12, 1979. Article 2 (b) provided that "Zimbabwe Rhodesia shall cease to be an independent state and shall become part of her Majesty's dominions."

38. The state of emergency gave power to legislate by regulation, rather than through parliament. Regulations included the Emergency Powers (Maintenance of Law and Order) Regulations, which gave sweeping powers of arrest and detention without trial, the right to control meetings, and so on.

39. Jason Beaubien, "Government Policies Lead to Collapse of Zimbabwe Economy," available at [www.npr.org/templates/story/story.php?storyId=5446596](http://www.npr.org/templates/story/story.php?storyId=5446596) (accessed May 26, 2009).

40. Constitution of Zimbabwe Amendment no. 7 Act no. 23, 1987.

41. Amnesty International, *Zimbabwe: Terror Tactics in the Run-up to the Parliamentary Elections, June 2000*, AFR 46/014/2000, available at [www.unhcr.org/refworld/docid/3b83b70ce.html](http://www.unhcr.org/refworld/docid/3b83b70ce.html) (accessed April 27, 2009).

42. Beaubien, "Government Policies Lead to Collapse."

43. Section 110 (3), Electoral Act, 2008.

44. "Mugabe Rival Quits Election Race," *BBC News*, June 22, 2008, <http://news.bbc.co.uk/2/hi/africa/7467990.stm> (accessed May 28, 2009).

45. Article 20.1.7 of the eighth schedule of the Global Political Agreement.

46. Southern African Development Communiqué, issued in Pretoria on January 27, 2009.

47. The Constitution of Zimbabwe Rhodesia Amendment no. 4 Act 1979. It was published as a schedule to the Zimbabwe Constitution Order, 1979 (SI 1979/1600), United Kingdom.

48. The Lancaster Talks were held at Lancaster House London in 1979 under the auspices of the British government. These negotiations led to a cease-fire in the guerrilla war that the black



liberation movements had been waging against the Unilateral Declaration of Independence regime. The movements were Zimbabwe African National Union (ZANU-PF) and the Zimbabwe African Peoples Union Party (ZAPU-PF). The armed wing of ZANU-PF was called Zimbabwe National Liberation Army (ZANLA) and that of ZAPU-PF was called Zimbabwe Peoples Liberation Army (ZIPLA).

49. Constitution of Zimbabwe, 1979, art. 52(4).

50. See Constitution of Zambia as amended by Act no. 18 of 1996, Article 35 (1): "Every president shall hold office for a period of five years; (2) notwithstanding anything to the contrary contained in this constitution or any other law no person who has twice been elected as President shall be eligible for re-election to that office."

51. See Constitution of Malawi, 1996, art. 83(2): "The President or Vice President may serve a maximum of two consecutive terms."

52. See South African Constitution, 1996, art. 88(2): "No person may hold the office as president for more than two terms, but when a person is elected to fill a vacancy in the office of the president, the period between that election and the next election of a president is not regarded as a term."

53. Universal Declaration of Human Rights, U.N. GAOR, 3rd sess., U.N. Doc. A/810 pmb. (1948), art. 21(3): "the will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections."

54. Universal Declaration of Human Rights, art. 20: "(1) everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."; American Declaration of the Rights of Man, May 2, 1948, art. XXV (right to peaceful assembly), XXI (right to associate) "to promote, exercise and protect... legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature," OEA/Ser.L. V/II/71, Doc. 6 rev. 1, 18 (1988).

55. See, e.g., Universal Declaration of Human Rights, art. 21(1): "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives," International Covenant on Civil and Political Rights, December 19, 1966, art. 25 (a), 999 U.N.T.S. 171, echoing art. 21 (1) of the Universal Declaration of Human Rights.

56. See, e.g., International Covenant on Civil and Political Rights, art. 25: "Every citizen shall

have the right and the opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country"; American Convention on Human Rights, July 18, 1978, art. 23, 1144 U.N.T.S. art. 123: "(1) Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country"; African Charter on Human and Peoples' Rights, art. 13: "(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of his country."

57. The International Covenant on Civil and Political Rights preamble states: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human being enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

58. See Universal Declaration of Human Rights, art. 2 (1); see also International Covenant on Economic, Social, and Cultural Rights, art. 2; International Covenant on Civil and Political Rights, art. 19 (right to freedom of thought, conscience and religion and art) and art. 20 (prohibiting war propaganda and incitements to discrimination); African Charter on Human and Peoples' Rights, art. 8.

59. See Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19; see also African Charter on Human and Peoples' Rights, art. 9.

60. See International Covenant on Civil and Political Rights, art. 20. See also African Charter on Human and Peoples' Rights, art. 9.



61. See Universal Declaration of Human Rights, arts. 20 (10) and 23 (4) (right to form and join trade unions); see also International Covenant on Civil and Political Rights, arts. 21, 22 (right of freedom of association including trade unions); African Charter on Human and Peoples' Rights, arts. 10, 11.

62. See Universal Declaration of Human Rights, arts. 6–11; see also International Covenant on Civil and Political Rights, art. 2(3), 14–16, and African Charter on Human and Peoples' Rights, art. 7.

63. See Universal Declaration of Human Rights, arts. 2, 23 (1); see also International Covenant on Civil and Political Rights, arts. 2, 26.

64. United Nations Human Rights Committee, art. 19, June 29, 1983, general comment 10.

65. United Nations Human Rights Committee, art. 19, general comment 10.

66. Thomas Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, vol. 86, no. 1 (1992), p. 46.

67. Constitution of Zimbabwe, 1979, chap. 111, arts. 11–26.

68. Constitution Amendment no. 7, 1987.

69. For example, one of the earlier changes was the removal (by the expiry date of the provision) of the twenty seats reserved for whites in parliament's Constitution Amendment Act no. 15 of 1987. Related changes were the substitution of a ceremonial presidency and premier for an executive president, as well as the abolition of the Senate to create a 150-member unicameral legislature, Act 23 of 1987.

70. Constitution of Zimbabwe Amendment Act no. 30, 1990. Article 15 (4) provided that "the execution of a person who has been sentenced to death by a competent court in respect of a criminal offence of which he has been convicted shall not be held to be in contravention of subsection (1) solely on the ground that the execution is carried out in the manner prescribed in section 315 (2) of the criminal Procedure and Evidence Act as that section existed on the 1st October, 1990." The amendment was passed as the Supreme Court was hearing the case *S. V. Chileya*. The appellants in the case argued that hanging was a cruel and unusual form of punishment. The Government did not wait for the case to be concluded.

71. Constitutional Amendment no. 7, 1987.

72. Constitutional Amendment no. 7, 1987.

73. Constitutional Amendment no. 7, 1987.

74. This is the case even though the Zimbabwe constitution guarantees the independence of the judiciary and vests judicial authority in the courts (art. 79 [1]) and declares: "the constitution is the Supreme law of Zimbabwe and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void." See Zimbabwe Constitution, art. 3.

75. Constitution of Zimbabwe Amendment no. 12 Act of 1993, sec. 2, which amended section 16(1) (e) of the constitution.

76. Parliamentary debates, December 6, 1990. (Harare, Zimbabwe: Government Printer). The Supreme Court was progressive on the death penalty; in *Catholic Commission for Justice and Peace v. Attorney General* 1993, (1) ZLR 242, the Supreme Court passed an order to set aside and substitute the sentences of death with sentences of life imprisonment because of undue delays in executing four prisoners. The delay had been declared to be inhumane.

77. Bulletin of Zimbabwe Law no. 1, 1991, p. 19.

78. Constitution of Zimbabwe Amendment no. 11 Act of 1990, sec. 5.

79. 2000 (2) ZLR 243.

80. Supreme Court of Zimbabwe, 2000.

81. Amnesty International, *Zimbabwe: Rights under Siege*, AFR 46/012/2003, available at <http://www.unhcr.org/refworld/docid/3f12edab4.html> (accessed on April 27, 2009), p. 14.

82. 1994 (2) ZLR 54.

83. 1994 (2) ZLR 54.

84. 1994 (2) ZLR 54.

85. Constitution of Zimbabwe Amendment no. 14 Act of 1996. Paragraph (d) to section 22 (3) of the constitution was repealed.

86. In *Kohlhasas v. Chief Immigration Officer*, 1997 (2) ZLR 441, the court held that the amendment did not in any way impact upon, interfere with, or diminish the mobility rights of a citizen wife, in particular the right to have her alien husband reside with her permanently in Zimbabwe.

87. See National Constitutional Assembly, *AGENDA: Building a Peoples' Constitution*, vol. 2, no. 2 (October 1999). The National Constitutional Assembly was a voluntary and inclusive association of civil-society organizations and individuals, including civic groups, political parties, churches and other religious organizations, youth organizations, women's organizations, and pressure groups.

88. *Constitution Commission of Inquiry into the Establishment of a New Democratic Constitution* (Ha-

rare: Government Printer, 1999), a publication of the constitutional commission. The commission was established under Proclamation no. 6, 1999, issued under the Commission of Inquiry Act.

89. *Constitutional Commission of Inquiry*.

90. Lovemore Madhuku, "How Independent Is the Constitutional Commission?" *AGENDA: Building a People's Constitution*, vol. 2, no. 2 (October 1999).

91. Presidential Commissions of Inquiry Act.

92. Presidential Commissions of Inquiry Act, p. 10.

93. National Constitutional Assembly, *Why the NCA Says No to a Partisan Constitution-Making Process* (Harare: Government Printer, 1999), pp. 5, 6.

94. National Constitutional Assembly, *Why the NCA Says No*, p. 7. The commission had 13 women out of 500 commissioners.

95. *Constitution Commission of Inquiry*.

96. *Ibid.*

97. The coordinating committee developed a comprehensive roster of key individual opinion leaders in Zimbabwe from all walks of life, notably politics, business, education, religion, media, and civil society.

98. Justice G. Chidyausiku, constitutional commission chairperson, speech delivered at the International Conference, November 17, 1999 (on file with the author).

99. On April 28, 1999, Mugabe set up a commission of inquiry under the Commission of Inquiry Act (chap. 10:07) in terms of Proclamation no. 6 of 1999 (SI 138/99).

100. Inter-Parliamentary Union (IPU), Parline database: Zimbabwe, Last Elections, available at [www.ipu.org/parline/reports/2383\\_e.htm](http://www.ipu.org/parline/reports/2383_e.htm) (accessed May 27, 2009).

101. Inter-Parliamentary Union (IPU) Parline database: Zimbabwe, Last Elections.

102. Inter-Parliamentary Union (IPU), Parline database: Zimbabwe, Last Elections.

103. Tichaona Sibanda, "Zimbabwe: Who Should Write Country's Constitution?" AllAfrica.com, available at <http://allafrica.com/stories/printable/200904290850.htm1> (accessed July 18, 2009).

104. Sibanda, "Zimbabwe: Who Should Write Country's Constitution?"

105. See John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance: An Eastern and Southern African Per-*

*spective* (New York: Cambridge University Press, 2004), p. 32.

106. Hatchard, Ndulo, and Slinn, *Comparative Constitutionalism*.

107. Contrary to expectations, the final draft did not permit the state to acquire land from white farmers without compensation.

108. The reasons advanced by the government in the government gazette were as follows: "It is common knowledge that any draft is by definition subject to improvement by way of grammatical and factual corrections as well as linguistic clarifications in order to avoid any doubt about the meaning of what is in the draft. The corrections and clarifications below were done based on the records of the Commission as contained in the commission's Committee minutes and published in the Commission's 1,437 page report. It is all there for the asking and there is nothing new because the record is public and therefore speaks for itself. Only people with literacy problems or hidden political agendas will find it difficult to tell the otherwise clear difference between corrections and clarifications on the one hand and amendments on the other. Don't be misled." See Hatchard, Ndulo, and Slinn, *Comparative Constitutionalism*, p. 33.

109. *Mushayakarara v. Chidyausiku* no. 2000 (1) ZLR 248, p. 252.

110. E.g., the Harare Commonwealth Declaration, signed October 20, 1991, by heads of government of the member countries of the Commonwealth, which reaffirms member countries' commitment to the primacy of equal rights under law and includes a specific pledge by member countries to concentrate, with renewed vigor, on established national systems based on the rule of law and independence of the judiciary; see The Harare Declaration, 1991. Zimbabwe withdrew from the Commonwealth in 2003.

111. Human Rights Watch, "Fast Track Land Reform in Zimbabwe," March 2002, vol. 14, no. 1 (A); Amnesty International, *Zimbabwe: Rights under Siege*. See also International Bar Association, "International Human Rights Day," December 10, 2004; the association marked the day by publishing a collection of personal accounts, opinions, and images about human rights in Zimbabwe. See Human Rights Institute, "International Human Rights Day," December 10, 2004, London.

112. See previous note.

113. Commonwealth Observer Group to the Zimbabwe Presidential Elections, Preliminary Report of the Commonwealth Observer Group to

the Zimbabwe Presidential Elections March 9–10, 2002, (Harare, Zimbabwe) March 14, 2002, concluded that although the actual polling and counting process were peaceful and secrecy of the ballot was assured, the conditions in Zimbabwe did not adequately allow for a free expression of will by the electors. See also SADC Parliamentary Forum (SADCPF) Observer Mission, Report on Zimbabwe Elections, March 13, 2002, Harare, Zimbabwe, which concluded that the election process could not be said to adequately comply with the norm and standards for elections in the SADC region (on file with the author).

**114.** Human Rights Watch, *Under the Shadow: Civil and Political Rights in Zimbabwe*, Human Rights Briefing Paper, June 6, 2003, New York.

**115.** Human Rights Defenders Report, "Evaluation Mission 2003: Systematic Repression of Human Rights Defenders in Zimbabwe," February 18, 2004, Paris.

**116.** Joseph Winter, "What Is Behind the Zimbabwe Demolitions?" *BBC News*, July 26, 2005.

**117.** Winter, "What Is Behind the Zimbabwe Demolitions?"

**118.** Inter-Parliamentary Union, Parline database: Zimbabwe, Last Elections.

**119.** UN Human Rights Committee, Initial Report on Zimbabwe (CCPR/C/SR.1664) para. 4.

**120.** African Commission on Human and Peoples' Rights, Resolution on the Rights to Freedom of Association, Gambia, December 2002.

**121.** International Labor Organization, "Latest Report of ILO Committee on Freedom of Association Cites Belarus, Colombia, Zimbabwe, Others," November 21, 2002 (ILO/02/51).

**122.** See Human Rights NGO Forum, "Complying with the Abuja Agreement: Two Months Report," Harare, December 2001, p. 4.

**123.** Human Rights Watch, *Under the Shadow*, p. 40.

**124.** Meeting in Abuja, Nigeria, the Commonwealth heads of state and government voted to renew Zimbabwe's suspension, which was in place in March 2002 following the country's flawed presidential election. Zimbabwe called the Commonwealth decision unacceptable and announced that Zimbabwe would withdraw from the organization immediately. See Human Rights First Media Alert, "Zimbabwe Suspended Indefinitely from Commonwealth," available at [www.humanrightsfirst.org/](http://www.humanrightsfirst.org/)

media/2003\_alerts/1208.htm (accessed on April 27, 2009).

**125.** Hatchard, Ndulo, and Slinn, *Comparative Constitutionalism*, p. 33.

**126.** The author was one of the experts who participated in the conference. He did so as an Institute for Democracy and Electoral Assistance (IDEA) consultant.

**127.** In his welcome remarks at the International Conference on the Making of Zimbabwe's New Democratic Constitution, November 17, 1999, G. Chidyausiku stated: "A homegrown constitution can and needs to be enriched by drawing on the experiences of other countries. Indeed there is no country in the modern world including Zimbabwe that can escape the imperative of a global society."

**128.** One of the justifications for the seizure of land from the white population has been on the grounds that it was being transferred to Zimbabweans.

**129.** See Katherine Savage, "Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiating Process," p. 1,664, in Penelope Andrews and Stephen Ellman, eds., *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Athens, OH: Ohio University Press, 2001).

**130.** Freedom Charter, 1954. See Anthony Sampson, *Mandela: The Authorized Biography* (New York: Vintage, 1999), pp. 93–95.

**131.** Andrews and Ellman, *The Post-Apartheid Constitutions*.

**132.** The commission was appointed on May 21, 1999. It was directed to complete its work by November 30, 1999.

**133.** See NCA, *Why We Say No*.

**134.** Constitution of Zimbabwe Amendment Act of 1981; Constitution of Zimbabwe Amendment no. 2 Act of 1981; Constitution of Zimbabwe Amendment no. 3 Act of 1983; Constitution of Zimbabwe Amendment no. 4 Act of 1984; Constitution of Zimbabwe Amendment no. 5 Act of 1985; Constitution of Zimbabwe Amendment no. 6 Act of 1987; Constitution of Zimbabwe Amendment no. 7 Act of 1987; Constitution Amendment no. 8 Act of 1989; Constitution Amendment no. 9 Act of 1989; Constitution Amendment no. 10 Act of 1990; Constitution Amendment no. 11 Act of 1990; Constitution Amendment no. 12 Act of 1990; Constitution Amendment no. 13 Act of 1993.

**135.** *Report of the Constitutional Commission* 1968.

**136.** Other constitutional issues not sufficiently attended to included administrative structures and issues of decentralization, rights of farm workers, the relationship between church and state, and minority rights.

**137.** Women and Land Lobby Group, *Report on WLLG Workshop on Women's Land Rights, Held 27–28 November, 2000* (Harare: WLLG, 2001). Many men are migrant workers in the cities or in other areas away from their homes.

**138.** The Zimbabwe Constitution, sec. 33: “No law or public officer shall discriminate against any person on the grounds of that person’s tribe, race, and place of origin, political views, color, religion or sex. It shall be lawful to discriminate on any of the above grounds in the areas of family law (including marriage, divorce and inheritance), customary law,

rights/privileges relating to communal lands, qualifications for serving under the civil service or the armed forces, or the spending of public funds.”

**139.** Supreme Court of Zimbabwe, 1999.

**140.** Supreme Court of Zimbabwe, 1999.

**141.** Savage, “Negotiating South Africa’s New Constitution,” p. 184. The constitutional court in September 1996 refused to certify the first draft submitted to the court on the grounds that a number of provisions of the constitutional text were not in compliance with the relevant constitutional principles. Finally, in December 1996, the constitutional court certified the new constitution. See *In re: Certification of the Constitution of the Republic of South Africa Act May 1996*, CCT 23/96.

**142.** Zimbabwe Christian Council Pastoral letter, Victoria Falls, August 2001.