



ARTICLES OF FAITH: ASSESSING ZIMBABWE’S “GPA” AS A MECHANISM FOR CHANGE – A LEGAL PERSPECTIVE

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EXECUTIVE SUMMARY

Introduction

Zimbabwe's current Inclusive Government, more commonly referred to as a Government of National Unity (GNU), was established pursuant to an Interparty Political Agreement, itself more commonly referred to as the Global Political Agreement (GPA). This Agreement was signed by the "Principals" of the three main extant political parties: the Zimbabwe African National Union - Patriotic Front (ZANU-PF) and two Movement for Democratic Change (MDC) formations.

Rather than simply containing clauses which are subject to legal interpretation and enforcement, the larger part of the agreement comprises rhetoric and ideological bombast designed to facilitate political posturing and little else. The ideological bombast is symptomatic of the lack of any real consensus between the parties, and the GPA thus reflected a continuation of this discord rather than its resolution.

In fact, only Article XX of the GPA has, and was intended to have, any real legal traction. The Articles of the GPA may be regarded as falling into one of three categories – Articles which are *mere bombast*, Articles which are of *political relevance only*, and Articles which have *legal traction*. Even those Articles intended to have legal traction are problematic. An agreement can only bind those who are party to it. Accordingly, the GPA can only bind the signatory political parties in their relationship with each other as political parties, and no one else. Yet the three political parties purported to oblige the both Government of Zimbabwe and its President, Robert Mugabe, to undertake certain acts. The Government of Zimbabwe is not party to the Agreement. Mugabe signed the agreement *qua* leader of ZANU PF and not as President of the country. Even if he had signed in the latter capacity, it is not possible for the President to limit his powers provided for in the Constitution by contract. The Articles which purported to do so only became legally enforceable once incorporated in the Constitution itself.

The Articles

a) *Bombast.*

The Agreement commences with a Preamble, Definition Section and "Declaration of Commitment" all of which are lofty statements of little practical importance. The same may be said of several other Articles. In Article III, the parties agree to give priority to "*the restoration of economic stability and growth*", but the agreement is largely meaningless without consensus as to the cause of Zimbabwe's economic collapse and the manner in which stability and growth might be restored. Article IV concerned "sanctions and measures" imposed by western powers who thus alone have the power to remove them and who have repeatedly stated the conditions necessary to this end – conditions which would be met if democratic reforms mentioned in the GPA were implemented. The phrasing of the Article does not explicitly link sanctions with these conditions and simply facilitates political posturing by ZANU PF around this issue. Article VIII

addresses the need to “*observe Zimbabwe’s national institutions, symbols, national programmes and events*”. Given ZANU PF’s control over these events and its conflation of patriotism with support for ZANU PF, the Article seeks to require the MDC to collude with such conflation and is mere political cant. The following Article, Article IX rejects foreign interference in Zimbabwe designed to facilitate regime change and has clearly been inserted solely to support ZANU PF’s contention that the west is conspiring to overthrow Mugabe’s government. It is political posturing and no more. By way of Article XI, the parties agree to abide by the rule of law in Zimbabwe, something already required in terms of Zimbabwe’s legislative structure, and the GPA does not add to or strengthen this existing obligation. Similarly, Article XIV enjoins the Traditional Leaders to carry out their duties impartially - something already required by the Traditional Leaders Act.

b) Political Relevance only

i) The insincere and subjective

Article X and Article XII provide that free political activity and freedom of assembly and association will be allowed “*within the ambit of the law*”. ZANU PF thus signaled its intention to retain the power to continue to distort and misinterpret draconian legislation in order to suppress these freedoms rather than allow them, as the events of 2011 have amply demonstrated. Humanitarian Aid and Assistance, by virtue of Article XVI, is also to be supplied impartially “*within the confines of Zimbabwean law*” a reference to ZANU PF inspired government directives designed to do the opposite - control the distribution of aid in favour of ZANU PF supporters. Article XIII requires that the police and military carry out their duties ethically and professionally, and then proposes that training programmes be instituted to facilitate this, cynically suggesting that past abuses arise out of ignorance and are not deliberate and premeditated. In Article XV the parties agree on the desirability of the National Youth Training Programme to instill patriotism in the youth. It has already been noted that ZANU PF conflates patriotism with ZANU PF ideology. The Article this allows the continuation of a programme whose graduates have been implicated in a large proportion of documented political violence. ZANU PF retains control over this programme.

ii) Clear Political Undertakings

In Article V the parties made a clear commitment to conduct a comprehensive, transparent and non-partisan land audit, during the tenure of the current Parliament. Without control of the relevant Ministries, the MDC has been unable to compel the implementation of this Article.

While the agreement to undertake a constitution-making process under Article VI has been fulfilled in part to date, the unaltered constitutional requirement that the new constitution be approved by a two-thirds majority in Parliament means that inter-party support will be required for the amending Bill. Such support will not be forthcoming from ZANU PF if the new constitution has the potential to open democratic space.

The parties agreed in Article VII to give consideration to establishing a body to advise on what measures should be taken to achieve “national healing”. An “organ” on national healing was

established as required. However, it should be noted that its mandate is merely to advise on what should be done, and not, as is sometimes claimed, to actually implement a process of national healing.

Partial policing and the impunity of perpetrators of violence is one of the main blights on Zimbabwe's polity. Article XVIII requires that the laws of the country be applied fully and impartially in bringing all perpetrators of politically motivated violence to book. Recent reports by several human rights organisations indicate that the converse prevails. In order to address this problem the institutions responsible for this problem needed to be wrested from the control of ZANU PF and the securocrats. Statutory control of the police and the military rests with the President. Accordingly, in order to ensure compliance with this Article, legislative amendments giving impartial civilian control over the personnel and institutions concerned was required and should have been specifically stipulated in the GPA and enshrined in the subsequent constitutional amendment. The consequences of the failure to do so have been starkly manifested in the early part of 2011 - reflected in the references to the breaches of this Article in the SADC Communiqué of 01.04.11.

c) Articles with Legal Traction.

The first of these is Article X, touched upon above and relating to political activity. This Article was given some legal muscle through the inclusion of a new section in the Constitution (through Constitutional Amendment 19), section 23A, which provides that every Zimbabwean citizen shall have the right to free, fair, and regular elections. The wording is drawn from the South African Constitution and has been interpreted there as requiring that South Africans outside the country be afforded the right to vote. The section can thus be used to try to gain the vote for Zimbabweans in the Diaspora, currently excluded from voting by provisions of the Electoral Act. It is also an illustration as to how vaguely drawn and ineffectual provisions of the GPA could have been given teeth by incorporation into Constitutional Amendment 19, as the GPA itself required (see below).

The importance of control over the relevant Ministries and other bodies with the power to ensure the implementation of the GPA is reflected in other Articles such as Article XIX concerning freedom of expression and communication. Some advances have been made in regard to the print media due to the fact that the Zimbabwe Media Commission has been reconstituted pursuant to legislative amendments introduced in 2007 (not the GPA), and several new daily papers are now available. The electronic media remains ZANU PF's exclusive domain and control lies partly with the Minister of Information and partly with the Broadcasting Authority of Zimbabwe (BAZ). BAZ has not been reconstituted as required by law, though it continues to purport to exercise authority. Legal action is viable and appropriate to compel its proper composition. The MDC has shown little interest in exerting pressure in this vitally important sector.

By way of Article XXIV the parties agreed that a constitutional amendment would be passed to incorporate "appropriate" sections of the agreement into the Constitution to give effect to the agreement. Only section 23A (noted above); a clause on citizenship; a clause placing the Commissions and composition of the Parliamentary Committee on Standing Rules and Orders into the Constitution; and Article XX were in fact part of the subsequent Constitutional

Amendment. Article XX was incorporated without amendment as Schedule 8 to the Constitution and sets out the structure of the new Government. This Article supposedly comprises the provisions which establish “*power sharing*” in the “*unity*” government. In fact, Article XX left Mugabe’s vast Presidential powers virtually intact, and Tsvangirai’s position as Prime Minister held no power other than the symbolic. The only real constraint placed upon Presidential power is, firstly, to limit the number of Ministers the President may appoint to 31 and to require that 16 of these appointees be nominees from the combined MDC and, secondly, that all Presidential appointments in terms of the Constitution or any Act of Parliament must be made after or in consultation with the Prime Minister.

In legal parlance, the requirement to “consult” does not require that the person so consulting is obliged to act on any recommendations that might be made. This requirement thus did not constitute any real restriction on the President’s powers. Mugabe ignored even this small procedural impediment by appointing the Attorney-General and Governor of the Reserve Bank, without consulting Tsvangirai as the GPA required.

However, Constitutional Amendment 19 significantly strengthened the provision on consultation by providing that wherever the phrase “in consultation” is used (as opposed to “after consultation”) the phrase shall be given the special meaning of “after securing the agreement or consent of”. Accordingly, after constitutional amendment 19 became law, all appointments made by Mugabe under the Constitution or any Act of Parliament required Tsvangirai’s consent. Tsvangirai did not immediately utilize this power, allowing Mugabe a free hand to appoint whatever ZANU PF Ministers he wished, even though these were appointments in terms of the Constitution and thus required Tsvangirai’s consent. The need for agreement between Mugabe and Tsvangirai on the appointment of Ministers was made painfully clear when Mugabe refused to agreed to the appointment of the MDC’s nominee for Deputy Minister of Agriculture, Roy Bennett.

Mugabe subsequently took advantage of Tsvangirai’s failure to assert his power in this regard by ignoring the constitutional requirement to secure the agreement of the Prime Minister when making numerous other appointments – those of permanent secretaries, ambassadors, judges and provincial governors, and the vice presidents. Agreement was only reached in relation to the appointment of Constitutional Commissioners. Mugabe also ignored the constitutional limit on the number of Ministers he could appoint, and, in order to balance the various caucuses within his party, appointed 41 Ministers and 19 Deputy Ministers, ten and five more than the constitutionally prescribed limits respectively. This violation of the GPA and Constitution was given Tsvangirai’s imprimatur. More important than the flouting of the constitutional quotas, this concession, made at the very inauguration of the new government, indicated to Mugabe that Tsvangirai did not intend their relationship to be governed by the letter of the GPA and Constitution, but by *realpolitik*. Mugabe undoubtedly had the upper hand in this realm.

Furthermore, the MDC, most remarkably, had entered into the GPA without any agreement on the allocation of Ministerial portfolios, and had left Mugabe with plenary power to do so in terms of the Constitution. Mugabe used this power to allocate Ministries in such a way that all real power over the implementation of the GPA fell to ZANU PF Ministers. With the exception of the powerful Ministry of Finance, the MDC was confined to Ministries concerned with service

delivery or “empty” portfolios” where the relevant Minister had no Acts to administer and the nature of his or her mandate was obscure. Despite the MDC’s objection to the manner in which Ministerial portfolios had been allocated, they were directed to accept the allocation by SADC. Accordingly, MDC had no executive power to ensure the implementation of the GPA in any of the areas of governance which could open democratic space. Although SADC had directed that the allocation of Ministerial portfolios be reviewed after six months, this directive was forgotten the moment it was made. As a result, ZANU PF control over these key Ministries has meant that none of the reforms essential to ensure democratic conditions for a free and fair election have been effected.

Although the combined MDC’s have a parliamentary majority, the legislature comprises Parliament *and* the President, who must give his assent to any Bill passed by Parliament. The refusal to give such assent can only be overridden by a two-thirds vote in the House of Assembly. As a result, interparty agreement is required to implement reform by way of legislative enactments. No such legislation has been forthcoming.

The MDC could have used the changes introduced in 2007 as to the manner in which the Constitutional Commissions are appointed to ensure that it comprised predominantly persons with a robust commitment to democratic values. Most of the Commissioners are appointed from lists submitted by the Parliamentary Committee on Standing Rules and Orders a Committee in which the combined MDCs have a majority. Apparently “in the interest of unity”, the MDCs allowed an almost equal number of ZANU PF aligned Commissioners to be appointed, none of whom have any notable democratic credentials. None of the Committees are chaired by person likely to push a democratic agenda with any dynamism and many of the MDC aligned appointees lack the necessary drive to challenge the ZANU PF aligned caucuses within the Commissions and ensure the implementation of necessary reforms. The change to the composition of the Commissions, an improvement on the position where *all* Commissioners were aligned to ZANU PF, has not been accompanied by structural changes which would facilitate democratic reform.

Conclusion

No one should be surprised by the failure of the GPA to open democratic space. The chain of command over the instruments of state repression was unaltered. The GPA contained no method by which Articles relating to democratic reforms could be enforced. The structure of the GPA and the power left in the hands of Mugabe and ZANU PF meant reforms were entirely dependent on the political will of Mugabe and ZANU PF, both of whom had clearly shown an aversion to allowing democratic freedoms in Zimbabwe. Their survival depends upon the closure of democratic space. The MDC lost the opportunity to give the Articles relating to democratic space some teeth by making their implementation a constitutional imperative through constitutional amendment 19 and failed to vigorously assert the right to approve key executive appointments when this requirement was ignored by Mugabe. SADC has not only allowed Mugabe to flout this crucial provision with impunity, they have exacerbated the problem by giving approval to Mugabe’s allocation of Ministries in such a way that control over the implementation of reforms lies with ZANU PF.

Although the GPA was fundamentally flawed, something maybe salvaged from the wreckage.

Much can be achieved by revisiting the issue of executive appointments. There is no need to have meetings and continued negotiations, for example, over Mugabe's refusal to comply with the requirement to obtain Tsvangirai's agreement in making executive appointments, particularly in relation to Provincial Governors who wield enormous power in rural constituencies. The provision and the breach are clear. SADC should simply demand adherence. Similarly, SADC directed that the appointment of Ministerial portfolios should be revisited by July, 2009. This has not been done. The GPA provides for a yearly review mechanism. SADC should identify the issue of appointments as a key reason for the failure of the GPA and demand that this form subject of the review process and that its directive in reconsidering the allocation of Ministerial appointments be applied.

Introduction

Zimbabwe's current Inclusive Government,¹ more commonly referred to as a Government of National Unity (GNU), was established pursuant to an Interparty Political Agreement,² itself more commonly referred to as the Global Political Agreement (GPA). This Agreement was signed by the "Principals" of the three main extant political parties: the Zimbabwe African National Union - Patriotic Front (ZANU-PF) and two Movement for Democratic Change (MDC) formations.³

The Agreement was at once legally anomalous for several reasons. An agreement can only bind those who are party to it. Accordingly the GPA can only bind the signatory political parties in their relationship with each other as political parties, and no one else. Yet the three political parties purported to oblige the both Government of Zimbabwe and its President, Robert Mugabe, to undertake certain acts. The Government of Zimbabwe is not party to the Agreement. Mugabe signed the agreement *qua* leader of ZANU PF and not as President of the country. Even if he had signed in the latter capacity, it is not possible for the President to limit his powers provided for in the Constitution by contract.⁴ The Articles which purported to do so only became legally enforceable once incorporated in the Constitution itself.

When an agreement is committed to paper and solemnly signed,⁵ it is assumed to have legal ramifications in regard to its interpretation, obligations and enforcement. However, due to the anomalous legal nature of the agreement, enforcement through juridical channels was always going to be problematic. Furthermore, rather than simply containing clauses which are subject to legal interpretation and enforcement, the larger part of the agreement comprises rhetoric and ideological bombast designed to facilitate political posturing and little else. In fact only Article XX has, and was intended to have, any real legal traction. The Articles analysed in what follows may be regarded as falling into one of three categories – Articles which are mere bombast, Articles which are merely of political relevance and Articles which have legal traction.

The Agreement is remarkable in the way that the political positions of each party appear in the document parallel to each other. The patois of ZANU PF's discourse of "patriotic history" appears throughout and sits uncomfortably alongside (rather than incorporated with) the MDC's liberal democratic claims for human rights and governance. This is nowhere more apparent in the bombast of the Preamble to the Agreement as the following extract illustrates:

CONSIDERING our shared determination to uphold, defend and sustain Zimbabwe's sovereignty, independence, territorial integrity and national unity, as a respected member of the international community, a nation where all citizens

¹ This is the correct term for the current dispensation (see Article XX of the Interparty Political Agreement) but the more common term GNU will be used throughout.

² This is the correct term – see Schedule 8 to Zimbabwe's Constitution.

³ The terms "MDC-T" and "MDC-M" generally used to distinguish the MDCs led by Morgan Tsvangirai and Arthur Mutambara (now Welshman Ncube) respectively, were avoided in the Agreement and both leaders anomalously signed the Agreement as "President, MDC" reflecting an unresolved dispute over the claim to the title of MDC.

⁴ *Waterfalls TMB v. Minister of Housing* 1957(1) SA 336 (SR).

⁵ On 15th September, 2008 before an international audience and dignitaries.

respect and, therefore, enjoy equal protection of the law and have equal opportunity to compete and prosper in all spheres of life.

ACKNOWLEDGING the sacrifices made by thousands of Zimbabwe's gallant sons and daughters in the fight against colonialism and racial discrimination and determined to accept, cherish and recognise the significance of the Liberation Struggle as the foundation of our sovereign independence, freedoms and human rights.

The Agreement thus reflects the continuation of competing and incompatible claims by the parties rather than a consensus on the modalities of a cooperative effort. This lack of consensus, lack of any real agreement between the parties and lack of shared perspective, whether ideological or teleological, has informed the “implementation” of the accord.

The different motivations for entering the accord were apparent at the outset and have remained unchanged. The ostensible and stated objective of the MDC was that the Agreement be a vehicle through which the democratic conditions for a free and fair election could be established. ZANU PF's concerns were primarily the retention of plenary power and to legitimate the Presidency of Robert Mugabe, appointed following a June 2008 run-off election internationally regarded as flawed and vitiated by violence. These objectives are incommensurate. ZANU PF cannot, as their loss in the March 2008 election had demonstrated, retain power under the democratic conditions demanded by the MDCs. SADC's primary concern then, as now, was simply that of stability. SADC did not see such stability arising without accession to the concerns of ZANU PF at the expense of the democratic reforms demanded by the MDCs. Yet without such reforms, SADC's objective of stability could only be achieved in the very short term.

In the event, the Agreement met the concerns of SADC and those of ZANU PF.

The Agreement

PART I

The Preamble.

As indicated, the Preamble encapsulates the jockeying by the parties to claim space for their differing ideological positions and is an inauspicious prelude to a document which is supposed to reflect consensus. It in fact presages the manifest lack thereof rather than anything else and in itself should remove any element of surprise from the subsequent failure of the Agreement to achieve the objective claimed by the MDCs. The Preamble therefore has no value as an interpretive guide for the body of the agreement.

Article I - Definitions

In accordance with the general drafting style of the Agreement as a whole, this Article is a meretricious, pseudo-legal “definition section” outlining the meaning to be accorded to three terms. The first two are “the parties” and “the New Government” both entirely unnecessary definitions of what is obvious in the Agreement. However, the inclusion of a definition section,

and thus the adoption of a legal template for the Agreement, proclaims the intention that the Agreement ought primarily to be subject to juristic rather than political hermeneutics. The intention is not, however, borne out by the text which follows.

The third definition provides that the “Agreement” shall mean “this written Agreement” (what else could it be?) and the inclusion of this definition is further rendered unnecessary as the phrase “the Agreement” does not appear in the document at all, “this Agreement” being used throughout. The definition, however, goes on to provide that the Agreement is:

in fulfillment of the material mandate handed down by the SADC Extraordinary Summit on 29th March 2007 and endorsed by SADC in Lusaka, Zambia and adopted by the African Union Summit in Sharm El-Sheikh, Egypt.

This disingenuously suggests that the Agreement is merely the end of a process of SADC mandated negotiations between ZANU PF and the MDC’s, expedited after March 2007. More accurately, the Agreement is the resolution of the more immediate crisis caused by the illegitimate appointment of Mugabe as President of Zimbabwe pursuant to an election regarded as fundamentally flawed.

Article II – Declaration of Commitment

This Article is a “declaration of commitment” of the parties to work together “*to resolving once and for all the current political and economic situations*” (sic). Without any agreement on what these “situations” are, how they came about and what the resolution should look like, this pious statement is essentially just that and no more.

Article III – Restoration of Economic Stability and Growth

In this Article, the parties agree to give priority to “*the restoration of economic stability and growth*”. The “how” of this restoration is not, and could not be, addressed in this Article due to the diametrically opposed views held by the parties on the cause of Zimbabwe’s economic collapse. ZANU PF continued and continues to insist that the collapse is due to “illegal western sanctions”, while the MDC views the collapse as caused by the destruction of commercial agriculture, the resultant failure to service debts to the Bretton Woods institutions, an economic policy subjugated to ZANU PF’s party political survival, elite projects of accumulation, rampant corruption and poor governance. In the absence of diagnostic consensus no effective remedial steps could be agreed. Through Indigenisation Regulations, proposing that 51% of all “foreign” businesses be owned by “indigenous Zimbabweans”, the sort of policy which MDC believes is responsible for Zimbabwe’s economic collapse in the first place has continued.⁶ ZANU PF claims that these policies will economically empower Zimbabweans. The failure to attend to the cause of Zimbabwe’s collapse in the Agreement meant that there has been little change of course. If the MDCs and ZANU PF believed that the very fact of being able to enter an Agreement together would secure balance of payments support and debt relief from western

⁶ The Indigenisation and Economic Empowerment (General) Regulations 21 of 2010, Gazetted on the 29.01.10 had an immediate negative impact on investor confidence see for example - *Foreigners Flee ZSE, Trade Dips: RBZ* <http://www.zimonline.co.za/> 31.07.10.

powers, despite the absence of any reduction in the democratic deficit in Zimbabwe, the belief was naïve. It should be noted that ZANU PF's ability to have these Regulations introduced was made possible by the passage of enabling legislation which became effective in 2008⁷ and Mugabe's continued control over the allocation of Ministerial portfolios, discussed below.

Article IV – Sanctions and Measures

In this Article the parties agree that *“all forms of measures and sanctions against Zimbabwe be lifted in order to facilitate a sustainable solution to the challenges that are currently facing Zimbabwe”* and *“commit themselves to working together in re-engaging the international community with a view to bringing to an end the country's international isolation.”*

This Article deserves close attention as it has been the leitmotif of ZANU PF's political rhetoric and has informed and informs ZANU PF's political tactics. Commenting on a recently launched⁸ campaign to garner two million signatures calling for the lifting of “sanctions”, Jonathan Moyo, responsible for formulating much of ZANU PF's spin, stated:

*This campaign is coming two years after the signing of the GPA in which parties in the inclusive Government committed themselves to the removal of the illegal sanctions. The clause on the removal of sanctions is the most important pillar of the GPA and two years after the signing of that agreement sanctions are still fully in place. Everyone was relying on MDC-T to unequivocally call for the removal of the sanctions since they are the ones who invited them. Therefore now there is need for us to take extraordinary measures beyond the GPA to deal with the sanctions.”*⁹

Article IV falls firmly into the category of the political rather than legal. While the parties agree that “sanctions be lifted”, as the MDC-T has repeatedly pointed out,¹⁰ not having imposed the “sanctions” it has no power to lift them. It could not therefore be sued to do so or be regarded as being in breach of the agreement for not so doing.¹¹ The MDCs' obligation in this regard is to work with ZANU PF *“in re-engaging the international community with a view to bringing to an end the country's international isolation”*. Furthermore, this obligation, placed on **all** parties, needs to be read in the context of the Article itself and the Agreement as a whole. Paragraph 4.2 provides:

The Parties note the present economic and political isolation of Zimbabwe by the United Kingdom, European Union, United States of America and other sections of the International Community over and around issues of disputed elections, governance and differences over the land reform programme.

⁷ The Indigenisation and Economic Empowerment Act Chapter 14:33.

⁸ At Harare Showgrounds on 02.03.11.

⁹ *Zimbabweans Back Anti-Sanctions Lobby Herald* 01.03.11.

¹⁰ *Mugabe Reneges on GPA Implementation SWRadio* 20.08.10.

¹¹ In this context ZANU PF was able to make considerable capital out of Secretary of State David Miliband's comment that the British Government would *“be guided by what the MDC says to us about the conditions under which it is working and leading the country”* in regard to a “calibrated” lifting of sanctions – see *Zuma Playing a Careful Hand – Miliband* <http://www.thezimbabweanetimes.com/?p=26707> 20.01.10.

This wording suggests a concession by ZANU PF that “measures and sanctions” were imposed as a result of concerns by western powers and sections of the international community over disputed elections, governance and the land reform programme.¹² The Agreement (at least from the MDCs’ point of view) is specifically designed to address these concerns through the adoption of a more democratic constitution, general democratic reforms, and an audit of the land “reform programme” (see below). Hence, from the standpoint of the MDC, working together to bring an end to Zimbabwe’s political and economic isolation, quite logically, ought to mean working together to address the concerns which gave rise to the imposition of what the Article calls sanctions. After all, ZANU PF appears to have accepted that these concerns caused the imposition of the measures in the first place. That in turn means working together to implement the democratic reforms which western countries have repeatedly stated are a necessary precondition for the lifting of the travel bans on listed ZANU PF officials and supporters and freeing of frozen assets.¹³

However, the MDC-T also made several important and injudicious concessions in the drafting of this Article which marked a retreat from its previously stated position and greatly facilitated ZANU PF’s rhetoric in this regard. Firstly (contrary to its previously stated position that there are no sanctions on Zimbabwe, but rather travel bans placed on targeted ZANU PF officials and supporters, together with the freezing of their off-shore assets) by way of paragraph 4.3 the MDCs agreed that “*the imposition of targeted travel bans against current Government and some business leaders*” can be defined as sanctions or measures against **Zimbabwe**.¹⁴ In the same vein, by way of this Article the MDC appear to have accepted ZANU PF’s position that Zimbabwe is under a regime of sanctions, despite the fact that the restrictive measures are a far cry from how the term sanctions is generally understood – an international embargo of trade with a country in the manner imposed on Rhodesia or Iraq for example.¹⁵ Trade with western powers has in fact increased since signing of the GPA.¹⁶

Secondly, the MDCs accepted that the “*suspension of Zimbabwe’s voting and related rights, suspension of balance of payment support, declaration of ineligibility to borrow Fund resources and suspension of technical assistance to Zimbabwe by the International Monetary Fund*” and that “*the enactment of the Zimbabwe Democracy and Economic Recovery Act [ZIDERA] by the United States of America Congress which outlaws Zimbabwe’s right to access credit from International Financial Institutions in which the United States Government is represented or has a stake*” constitute sanctions against Zimbabwe. Zimbabwe’s inability to access support from the IMF and related International Financial Institutions arises from Zimbabwe’s debt arrears and not

¹² ZANU PF has repeatedly asserted that “illegal western sanctions” were imposed by the West in retaliation for the seizure of land from “kith and kin” in Zimbabwe –see *Zim: Key World Player* The Herald 07.03.11.

¹³ See for example - *Sanctions To Go Only After ‘Real And Tangible’ Reforms* The Zimbabwe Independent 20.08.10.

¹⁴ The MDC-T generally, and Morgan Tsvangirai in particular, refer to “restrictive measures” when referring to the travel bans but then also often adopt the parlance of ZANU PF and the GPA and refer to the measures as “sanctions” - *Tsvangirai’s Sanctions Comment Fuels State Media Propaganda* The Media Monitoring Project Zimbabwe Weekly Media Review 22.02.10. This is in stark contrast to ZANU PF’s mantra like and relentless repetition of the measures as “illegal sanctions”.

¹⁵ *When Do Sanctions Become Restrictions?* <http://www.thezimbabwean.co.uk> 22.03.10.

¹⁶ *Sanctions Still Needed For Zimbabwe Reforms* <http://www1.voanews.com/> 05.03.10.

from any restriction imposed by western powers, and, importantly, pre-date so-called “land reform”, fraudulent elections, and all the concerns that have emerged since 2000. Zimbabwe would need western powers to pay off these arrears as a grant and their refusal to make such a donation can hardly be classified as sanctions. The restrictions placed on assistance by ZIDERA have thus been academic.

Thirdly, the MDCs, by way of paragraph 4.6 implicitly accepted ZANU PF’s stance that the removal of these restrictive measures would help arrest the decline in living standards of Zimbabweans generally, thus buying into ZANU PF’s rhetoric that “sanctions” are responsible for Zimbabwe’s economic collapse.

Furthermore, in the implementation of this article the MDC unwisely appears to have accepted the erroneous interpretation that the GPA obliges it to lobby for the lifting of “sanctions” even in the absence of any democratic reform.¹⁷¹⁸ The furthest the GPA goes in this regard appears in Article XXII which provides that the parties *shall seek the support and assistance of SADC and the AU in mobilizing the international community to support the new Government's economic recovery plans and programmes together with the lifting of sanctions taken against Zimbabwe and some of its leaders.*

Mugabe has also sought to reverse the sequencing implied by this Article and the Agreement as a whole, stating that there will be no more “concessions”¹⁹ - by which is meant no democratic reforms – until sanctions are lifted, despite the fact that the lifting of sanctions is dependent on such democratic reforms. There is nothing in the Agreement which allows Mugabe to suspend the implementation of the GPA pending the lifting of sanctions. Furthermore, the implementation of some provisions is now a constitutional imperative. Mugabe’s demand that sanctions, as defined by ZANU PF, be lifted has been supported consistently and uncritically by SADC which regularly includes this demand in SADC Communiqués, often ignoring the demands of the MDC formations.²⁰

This Article is probably the most graphic example of the danger of mixing statements which are merely political with provisions that have legal traction in the same agreement. Since western

¹⁷ This the MDC has done on several occasions which have either been ignored or denigrated by ZANU PF and the ZANU PF controlled media – see for example *Tsvangirai Comes Out Against More Sanctions - Mugabe 'Delighted'* <http://www.thezimbabweindependent.com/> 20.11.08; *MDC Campaigning For Targeted Sanctions Removal* <http://www.swradioafrica.com> 21.12.09; *Davos 2010: Zimbabwe 'Needs Reward For Progress'* <http://news.bbc.co.uk/29.01.10> and fn immediately below. Tsvangirai has not been consistent or unequivocal in this regard – see *Sanctions: MDC-T MPs Take Tsvangirai To Task* <http://www.theindependent.co.zw> 05.03.09. However, very recently, and possibly for the first time, Tsvangirai stated that the MDC’s was merely obliged to work with ZANU PF to end Zimbabwe’s international isolation and that this should be done through reforms in governance – see Tsvangirai’s *Key Note Address to the Euro Money Investment Conference March 8-9 2011*.

¹⁸ Before a multi-party visit to Brussels to persuade the EU to lift the restrictive measures in 2010, the leader of the MDC delegation claimed somewhat farcically that rather than relying on (non-existent) reforms to persuade western powers to remove the measures, it would rely upon friendly “body language” between the MDC and ZANU PF delegates *Govt Delegation Set To Meet EU Over Sanctions* The Zimbabwe Independent 15.04.10.

¹⁹ *Mugabe Refuses Compromise Until Western Sanctions Lifted* <http://news.yahoo.com/AFP> 20.08.10.

²⁰ See for example *Communiqué Summit of Heads of State and Government of the Southern African Development Community (SADC)* held in Windhoek, Republic of Namibia from August 16 - 17, 2010; *SADC Want 'Sanctions' Against Mugabe and Cronies Lifted* <http://www.swradioafrica.com/> 09.09.09.

governments have repeatedly stated what is required for the restrictive measures to be lifted, the inclusion of this Article has done little other than to provide a platform for grandstanding and has allowed Mugabe and ZANU PF the opportunity to attempt to use the provisions of an Article which are merely political, to trump the implementation provisions elsewhere which are legally enforceable.²¹

Article V – Land Question

This Article concerns “the land question,” an issue which may be said to reverberate throughout Zimbabwe’s polity, regardless of whether one regards the epicentre as lying in a colonial legacy or in an economically disastrous land grab which commenced in February 2000. The Article contains elements of the purely political as well as the quasi-legal. The Article contains its own mini pre-amble of little legal relevance. Hence there are eight paragraphs of the “recognizing” “noting” “accepting” ilk such as the following:

Noting that in addition to the primary objective of the liberation struggle to win one man one vote democracy and justice, the land question, namely the need for the re-distribution of land to the majority indigenous people of Zimbabwe was at the core of the liberation struggle.

Such paragraphs do nothing to advance the objectives of the Agreement. If the parties had wished to draw a document setting out their respective or agreed ideological positions this should have been contained in a separate document and not merged with legally enforceable provisions relating to the structure of government and processes and institutions to be established and followed by the inclusive government.

The undertakings of the parties in this Article are likewise a blend of the political and the legal. The political undertakings are to call upon the United Kingdom to accept responsibility to compensate dispossessed landowners; to work together to secure international support for the “land reform” programme; and to work together to restore productivity on the land.

The quasi-legal undertakings include an undertaking during the course of the next parliament to conduct a land audit to eliminate multiple farm ownership and “establish accountability”; to ensure security of tenure; and to ensure that the allocation of land is effected in a non-discriminatory fashion. The Article is thus one of several which purport to bind the Government²² which is not party to the Agreement, and, although the Article appears to specify acts which must be fulfilled, from a legal perspective it is impossible to see who would sue and who could be sued if the undertakings in this Article are not fulfilled. Furthermore, the

²¹ For an extensive discussion on the issue of “sanctions” see *Are Targeted Sanctions Smart Enough? On The Efficacy of International Restrictive Measures* Institute of Security Studies Situation Report Zimbabwe 04.06.10.

²² It may be argued in this regard that in drafting the Agreement in this manner the MDCs unwittingly collude with the frequent conflation of the State and ZANU PF by the latter – a recent and relevant example being advertisements for the “two million signature” campaign against sanctions bearing the Republic of Zimbabwe letterhead, but indicating that the placement of the advertisements was by ZANU PF.

undertakings are clearly impractical. A comprehensive land audit is a massive undertaking which will require substantial funding. How this is to be raised is ignored in the Article.

Similarly, security of tenure implies that the extent of each person's land holding is defined, requiring a comprehensive and time consuming land survey exercise at considerable cost. However, under the current system many farmers, particularly A2 farmers,²³ hold property on the basis of lease agreements which may be terminated at anytime by ZANU PF affiliated government officials. At the very least, security of tenure should have been improved by removing this broad discretion which renders those allocated land beholden to ZANU PF affiliated officials and ZANU PF held Ministries. Both the audit and a land survey would require the necessary political will, and those willing to see the process through would require control of the relevant Ministries, such as those of Local Government, Agriculture or Land. All remain in the hands of ZANU PF appointees.

Land is believed to be a primary method by which ZANU PF dispenses patronage, secures support, and commands loyalty. This Article does nothing to address this problem, and indeed could be said to entrench it. ZANU PF clearly has no intention of relinquishing this source of largesse or having it exposed as such. ZANU PF has stated that no land audit will be allowed until "sanctions" are lifted.²⁴ Nothing in the Agreement allows the imposition of this conditionality.

Article VI - Constitution

This Article concerns the making of a new constitution for Zimbabwe. The Article sets out the procedures for the making of a new constitution which includes "stakeholders" conferences, an outreach exercise to the public, the drafting of the new constitution (ostensibly using public input from the outreach exercise), a referendum to vote on the adoption or rejection of the document, and the tabling of the document before parliament so that it might be passed into law. Oddly, the Article does not specifically state that a constitution making exercise will be undertaken. This must be inferred from the general tenor of the provisions. Apart from various other anomalous facets of this Article, discussed below, the inadequacy of this Article as a vehicle for change is readily apparent.

a) The Kariba Draft

The Article repeats the Preamble to the Agreement that the parties "acknowledge" that a draft constitution was negotiated and agreed by the parties in Kariba in September 2007. This "Kariba Draft" was a concession made in 2007 by the MDCs, which formed part of a package of measures subscribed to by the parties, and included important legislative changes to the Electoral Act²⁵ and Access to Information and Protection of Privacy Act²⁶ among others. The MDCs had agreed to the Kariba Draft constitution only on the condition that it would be in place for the

²³ The category of large commercial farming operations, as opposed to smallholding A1 farmers.

²⁴ *Zimbabwe's ZANU-PF Vows to Block Land Audit Until Western Sanctions Are Lifted* <http://www1.voanews.com> 06.01.10.

²⁵ Chapter 2:13.

²⁶ Chapter 10:27.

elections of 2008 (to be called on a mutually acceptable date) together with the other legislative reforms.²⁷ In the event, Mugabe unilaterally called elections in March 2008 without these conditions having been met. The wisdom of “acknowledging” the Kariba draft while ignoring the context in which it was agreed, and ignoring the fact that the concessions therein were part of a *quid pro quo*, is dubious. It serves no purpose other than to provide a political platform from which to launch support for this draft constitution.²⁸ The acknowledgement has been deliberately misinterpreted to facilitate a false claim that the Agreement provides that this Kariba Draft will form the basis for any new constitution.²⁹

b) “People Driven”

The assertion in the preamble to this clause that:

Aware that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic.

contains the assumption that a constitution “owned and driven” by the people will be inclusive and democratic. The constitution making exercise drew attention to the fact that “the people” are capable of democratically voting for a dictatorship. The assertion thus contains an assumption that a “people driven” constitution will result in the enshrinement of certain democratic prerequisites which is not necessarily the case. The false assumption is repeated:

Determined to create conditions for our people to write a constitution for themselves; and Mindful of the need to ensure that the new Constitution deepens our democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship and equality of women.

It is impossible to determine with any precision what is meant by a “people driven” constitution. It is obviously not possible that the “people” draft the constitution.³⁰ In practice, an outreach programme to determine the people’s views could never be more than democratic window-dressing. The best that might be hoped for is that certain general principles might be democratically determined³¹, such as, for example, whether the state will be secular or theocratic.

In the event, an outreach programme was undertaken with *pro forma* questions addressing sections of the proposed constitution put to the public.³² Rather than issues of general principle, the questionnaires addressed specific details which do not sit comfortably with constitution

²⁷ ZANU PF, MDC Agree On New Constitution The Independent 28.09.07.

²⁸ Though it is usefully referred to in Article XXIV as some of its provisions were to be incorporated into Zimbabwe’s Constitution.

²⁹ This claim has been made by Mugabe, and the draft circulated in the state controlled press – *Base Constitution on the Kariba Draft* The Herald 26.06.09.

³⁰ The process had some value in educating people on the role of a constitution in a democracy which was clearly needed judging from the input on some occasions. For example, one suggestion from a member of the public was that the Constitution require that a cookery programme which had been dropped from the airwaves be re-introduced see *Constitution Outreach Provides Comic Relief* <http://www.thestandard.co.zw> 11.08.10.

³¹ This already assumes that a democratic methodology of decision making is the one to be adopted

³² For this and the current (March 2011) state of the process see Veritas *Constitution Watch* No 1 2011.

making. A small, but significant, cameo which illustrates the point is that instead of suggesting that unfair discrimination be prohibited, the public were asked whether protection under such a clause should be afforded to sexual minorities. One cannot protect particular minority rights by putting the issue to majority vote. The principle of non-discrimination only can be agreed. Each member of the majority may simultaneously be a member of a particular minority and might thus agree to the principle of non-discrimination generally to protect their own individual minority status. Allowing a majority to determine specific minority rights was never going to result in a liberal democratic constitution which protects minority rights. The very posing of the question assumed that an unfettered majoritarianism was an acceptable constitutional principle.

The outreach programme was beset by intimidation, predominantly by ZANU PF supporters, and the coaching of individuals to support the ZANU PF party political position and, in some cases, individuals reading from scripts that had been prepared for them. The MDCs did little to counter this and to try to insure that the process was not determined by the ideological positions of particular parties. The process cannot be said to have successfully canvassed the views of the people. It was used by ZANU PF as a test of its ability to cow the population, and may well have given certain sections of Zimbabwe's security sector the confidence to call for elections, claiming that the GNU "expired" in February, 2011, two years after its formation. The continued influence of the security sector in Zimbabwe's politics was highlighted once more by this exercise.

c) The Constitution Making Timetable

A timetable established for the various stages in the process was incorporated in a Bill passed by Parliament as Constitutional Amendment 19 in January 2010, the amendment intended to give legal effect to the GPA.³³ However, the section and Schedule in the Bill relating to the Constitution making process was omitted from the published version of the Act.³⁴ The timetable proposed a 20 month process, ending in the tabling of a draft new constitution as a Bill before Parliament - provided that the draft had been approved in a referendum. A central part of the MDC-T's initial political rhetoric around the GPA was that the resultant GNU was a transitional arrangement, pending the adoption of a new constitution, which would lead to free and fair elections thereafter. Accordingly, in this scheme of things, the transitional government would last approximately two years.³⁵ For this reason it came to be assumed that the GNU had a two year life span, and Mugabe stated in October 2010 and January 2011, that the GNU could not be

³³ See below.

³⁴ This renders the entire legal status of Constitutional Amendment 19 suspect. The President must sign into law the Bill that was passed by Parliament and not some other version thereof. The subsequent MDC-T Minister of Constitutional Affairs later sought to claim that the MPs were aware that the Schedule relating to the constitution making process was "for information purposes" only. A reading of Hansard [Vol. 35 no 17 05.02.2009 column 1012], and indeed the Amending Act [No 1 of 2009] (which still refers to the non-existent Schedule) proves otherwise – see section 114 which refers to the insertion of sections, but only one follows. The sections which appeared in the Bill, 116 -118, and the Schedules to which they referred, were simply omitted from the published Act. Section 117 required that Article VI of the GPA (Schedule 10) would "guide" the Constitution making process.

³⁵ *MDC Dismiss 5 Year Extension to Unity Government* <http://nzcw.wordpress.com/2009/08/26/mdc-dismiss-5-year-extension-to-unity-government/>

extended beyond a few months.³⁶ In February 2011, the press reported that all parties were considering a six month “extension”.³⁷ In fact, the GPA provides a start date – the day of signature – and no end date. The existence of the GNU and GPA are coterminous. Thus the GNU likewise has no specified end date.³⁸ It is not stated in the GPA that the GNU is to be a transitional arrangement terminating after the creation of democratic conditions leading to free and elections. There is thus no legal imperative that it should come to an end on account of elections, though certain provisions are incompatible with a poll, such as the requirement that Mugabe shall “continue” as President.³⁹ If the inference is made that it is implied that the GNU will come to an end with elections, there is no clarity as to whether the GNU would end once a new election is called or once a new government is formed.⁴⁰ Schedule 8 to the Constitution refers to the provisions establishing the GNU as “transitional” but the end point of the “transition” is not indicated.

d) The Adoption of a New Constitution

The MDC’s stated strategy in agreeing to the GPA was that it was a temporary arrangement during which there would be democratic reforms leading to elections with two years.⁴¹ The central pillar of these democratic reforms was regarded as being constitutional reform which would curb the presidential powers believed to distort the electoral terrain, and which was required before a free and fair election could be held. This strategy was, and is, inherently flawed.

Firstly, the vast and remarkable amount of power vested in the President is dispersed through numerous Acts of Parliament, and is not derived solely from the Constitution, though a constitutional amendment could certainly attenuate these powers, for, by example, requiring that they be exercised in conjunction with some other person or body.

But secondly and crucially, this Article contained no requirement that the parties agree to pass the Bill put before Parliament following the constitutional referendum. The omission is even more glaring when it is noted that the parties *did* agree to pass into law the constitutional amendment necessary to give constitutional legitimacy to the Inclusive Government.⁴² Since the

³⁶ *No GPA or Inclusive Government Extension: President Mugabe* The Zimbabwe Guardian 15.10.10 *Politburo To Discuss GNU Lifespan* Zimbabwe Independent 21.01.11

³⁷ *Elections in August?* Financial Gazette 10.02.11.

³⁸ It is possible that the omission was deliberate with both political parties wishing to keep their options open in this regard. However, ZANU PF has since alleged that the MDC had sought a two year time frame during negotiations and that ZANU PF had wanted five year time frame – see *Mugabe in GNU Tight Corner* The Zimbabwe Independent 11.02.11.

³⁹ See below.

⁴⁰ While Parliament is dissolved once an election is called the executive remains in place until the entry into office of a new President – Section 31E(c) of the Constitution. This is important as it will determine who has the powers and advantages of incumbency during the electoral period.

⁴¹ “*The signing of the Global Political Agreement on 15 September 2008, signified the soft landing of the Zimbabwe crisis and the commencement of a process that is irreversible and will lead to a new constitution and free and fair elections.*” Morgan Tsvangirai, opening of the Seventh Parliament 04.03.09.

⁴² It is difficult to stretch the requirement in Article 22.8 that the Parties agree that they shall cause Parliament to amend any legislation to the extent necessary to bring the agreement into full force to encompass this as the adoption of a new constitution cannot be held to be an amendment.

passage of a new constitution requires a two-thirds majority in Parliament, which no party can muster, ZANU PF retains the power to ensure that no new constitution is introduced which does not meet its requirements. Mugabe had previously expressed his satisfaction with the present much amended “Lancaster House” constitution, claiming that it is “home grown and sacrosanct”.⁴³ The failure to adopt a new constitution would mean that the current constitution, with an extremely powerful executive president, will continue – to Mugabe’s advantage. Because of its veto power, it has always been obvious that any new constitution will have to be acceptable to ZANU PF. Under the GPA, the MDC has been faced with the choice of either negotiating a draft new constitution which contains sufficient compromises (particularly in relation to presidential powers and the non-applicability of term limits to Mugabe) to satisfy ZANU PF, or continuing under the current constitution. Neither of these options has ever contained the possibility of opening the door to democratic reform. Yet the MDC’s entire strategy appears to be predicated on this very possibility.⁴⁴

Article VII – Promotion of Equality, National Healing, Cohesion and Unity

This Article addresses the “promotion of equality, national healing, cohesion and unity”. Most of the provisions in this Article are clearly mere political cant for example:

The parties will strive to create an environment of tolerance and respect among Zimbabweans and that all citizens are treated with dignity and decency irrespective of age, gender, race, ethnicity, place of origin or political affiliation.

The promotion of equality already forms part of Zimbabwe’s Constitution and there was no need to repeat it in this Article. The only provision of any significance in the Article is that pertaining to “national healing”. The actual provisions of the GPA relating to national healing have been ignored by all parties. The MDC and civil society saw the Article as opening up the possibility for a proper process of transitional justice with all that such a process entails - reparative or retributive justice, truth telling, memorialisation, and reconciliation.⁴⁵ ZANU PF, on the other hand, felt that national healing required a “forgive-and-forget” approach to the violence of 2008⁴⁶ and a blanket amnesty for those involved.⁴⁷ Ironically, these opposing views on healing and reconciliation resulted in inter-party violence at a meeting to discuss the issue.⁴⁸ The exclusion of the word “justice” from this Article is telling. However, the Article had even less traction than this elision suggests. The provision which was latched upon as opening the door to a form of transitional justice stated no more than that the parties:

shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing,

⁴³ *Mugabe Under Fire for Rejecting New Constitution* The Zimbabwe Independent 03.11.06.

⁴⁴ *No Polls Without a New Constitution – MDC-T* Financial Gazette 26.01.11.

⁴⁵ See *Statement by Cluster on National Healing Regarding the Planned National Dedication Ceremony* Zimbabwe Human Rights NGO Forum 23.07.09.

⁴⁶ Which is clearly at variance with Article XVIII – see below.

⁴⁷ See for example *Outrage At Mugabe's Amnesty Call* <http://news.radiovop.com/09.08.10>.

⁴⁸ *Violent Clashes Break Up Government Youth Summit* <http://www.swradioafrica.com> 09.04.09.

cohesion and unity in respect of victims of pre and post independence political conflicts.

Accordingly, the parties agreed to do no more than “give consideration” to the setting up of a body engaged with “national healing”. This was done and a tripartite Organ on National Healing was established. However, as the extract above indicates, the mandate of this Organ was merely to advise on what measures might be necessary to achieve national healing, and not to put such measures into place, as is often suggested. In practice, the Organ has done little to attend to even this limited mandate.⁴⁹ The fact that perpetrators of violence have effectively received immunity for their actions has a profound impact on Zimbabwe’s polity and current electoral environment. Many of the perpetrators still live side by side with people they brutalised or relatives of those they killed, and thus continue to effectively intimidate villagers.

Article VIII – Respect for National Institutions and Events

In this Article the parties agreed:

on the necessity of all Zimbabweans regardless of race, ethnicity, gender, political affiliation and religion to respect and observe Zimbabwe's national institutions, symbols, national programmes and events.

Needless to say, this is once again mere political blather, designed to facilitate grandstanding using the political tropes of “patriotic history” advanced by ZANU PF. Events which should be national, such as the declaration of national heroes and burials at heroes acre, remain under the control of ZANU PF.⁵⁰ Since they are turned into occasions to espouse and celebrate ZANU PF ideology, the Article seeks to imply that repudiation of such occasions would be an unpatriotic act by the MDC, and that support for ZANU PF equates with patriotism.

Article IX – External Interference

This Article concerns “external interference” and the parties agreed:

- (a) that the responsibility of effecting change of government in Zimbabwe vests exclusively on and is the sole prerogative of the people of Zimbabwe through peaceful, democratic and constitutional means;*
- (b) to reject any unlawful, violent, undemocratic and unconstitutional means of changing governments; and*

⁴⁹ Zimbabwe: 'National Healing an Exercise in Futility' <http://www.ictj.org/en/news/coverage/article/3567.html> 2603.10.

⁵⁰ *Heroes Acre for Zanu PF Members Only* The Independent 30.09.10 and *Build Your Own Heroes Acres: Mugabe* <http://africa.world247.net/zimbabwe-news/build-your-own-heroes-acres-mugabe/> 26.03.11

(c) that no outsiders have a right to call or campaign for regime change in Zimbabwe.

The provision serves little purpose other than to feed ZANU PF's rhetoric around sovereignty, that the MDC-T is planning "illegal regime change", and reinforces ZANU PF's interpretation of this phrase – i.e. that regime change is *ipso facto* illegal, rather than the illegality referring to undemocratic means to accomplish it, and obscures the fact that "regime change" is implied in every election that ever takes place. It also makes no reference to a refusal to accept a change of government pursuant to democratic elections. The need to include such a clause (if provisions of this nature were to be included in the GPA) should have been readily apparent after the events following the elections of 2008.

Article X – Free Political Activity

This article concerns free political activity. Legislation relating to "free and fair elections", freedom of expression, and the right to form and belong to political parties is already provided for in Zimbabwe's Electoral Act⁵¹ and Constitution⁵² respectively, but the existence of this legislation has done nothing to prevent repression of free political activity by successive ZANU PF governments. By providing that free political activity would be allowed "*within the ambit of the law*", ZANU PF signaled its intention to retain the power to continue to distort and misinterpret draconian legislation relating to freedom of expression and assembly as a repressive tool. While such repression abated markedly in the first few months after the formation of the GNU, at the time of writing it has resurfaced, with a blanket ban being imposed on MDC meetings and numerous human rights and MDC activists arrested.⁵³ No amendments have been effected to this repressive legislation (see below).

However, this Article resulted in the inclusion of Section 23A in the Constitution as part of Constitutional Amendment 19. This section provides that every Zimbabwean citizen shall have the right to free, fair and regular elections to local government, the legislature, and presidency. The wording is drawn from the South African Constitution and has been interpreted there as requiring that South Africans outside the country be afforded the right to vote.⁵⁴ The section thus has important implications for Zimbabweans in the Diaspora, currently excluded from voting by provisions⁵⁵ of the Electoral Act. These provisions may be declared unconstitutional on the basis of Section 23A. The Section does not form part of the "transitional provisions" inserted temporarily into the Constitution by Constitutional Amendment 19, and thus will remain notwithstanding the collapse of the GNU – though this clause may not necessarily be included in any new constitution for Zimbabwe. For the moment, it arguably stands alone as the sole improvement in democratic space which has resulted from the GPA.

Article XI – Rule of Law, Respect for the Constitution and Other Laws

⁵¹ Chapter 2:13. Provided for in the Act as a whole, which despite its several flaws, if followed would in fact allow for free and fair elections – see Part XV in particular.

⁵² Section 21.

⁵³ *MDC Banned From Holding Office, Home Or Public Meetings* SWRadio 07.03.11.

⁵⁴ *Richter v Minister of Home Affairs & Ors* 2009 (3) SA 615 (CC).

⁵⁵ Sections 23(3) and 71(1).

This Article concerns respect for the rule of law. The legislative structure of Zimbabwe already demands that this principle be applied. The repetition of this requirement wrongly suggests that in the absence of this Article in the GPA, compliance is not mandatory. In the face of clear violations of this principle over the last 10 years, ZANU PF spokesmen have always proclaimed adherence to the rule of law.⁵⁶ The provision is thus a vacuous repetition of these assertions. Both parties in the GNU have shown willingness to set this principle aside when expedient to do so, manifested most obviously in the failure to call by-elections for vacant parliamentary seats, and the swearing in of 10 more Ministers than allowed by the Constitution (see below).

Article XII – Freedom of Assembly and Association

This Article concerns freedom of association which once again is to be allowed “in accordance with the law” and the comments made in regard to Article X are apposite here. However, cognisant of the problems outlined in relation to Article X, the provision includes an agreement that the police attend training programmes aimed at engendering an appreciation of “*the proper interpretation, understanding and application of the provisions of security legislation*”. (The clause should more correctly refer to “public order” legislation). The implication that in the misapplication of laws pertaining to public meetings etc the police “know not what they do” is simply naïve.⁵⁷ Without any mechanism to restrain those ordering police officers to disrupt the freedom of association, provisions such as this serve no purpose – other than to create the false impression that the actions of the police hitherto in this regard have been misguided rather than cynical.⁵⁸

Article XIII – State Organs and Institutions

This Article concerns the conduct of State institutions and requires that such bodies:

perform their duties ethically and professionally in conformity with the principles and requirements of a multi-party democratic system in which all parties are treated equally.

The additional provision:

that there be inclusion in the training curriculum of members of the uniformed forces of the subjects on human rights, international humanitarian law and statute law so that there is greater understanding and full appreciation of their roles and duties in a multi-party democratic system

⁵⁶ See for example Obert Mpofu cited in Zanu PF Youth Leader Orders 'Green Bombers' to Raid Homes For Basics The Standard 23.09.07.

⁵⁷ Two Reports issued by the Zimbabwe Republic Police in this regard are singularly revealing - see Opposition Politics in Zimbabwe: A Trail of Violence (the first report) and Opposition Forces in Zimbabwe: The Naked Truth, Volume 2. (the second report). The reports should be read together with a riposte to written by the Human Rights NGO Forum At Best a Falsehood, At Worst a Lie? Shooting Oneself in the Foot? Comments on the Zimbabwe Republic Police Report “Opposition Politics in Zimbabwe. A Trail of Violence” June 2007.

⁵⁸ Who Guards the Guards? Violations by Law Enforcement Agencies in Zimbabwe, 2000 to 2006 Zimbabwe Human Rights NGO Forum (2007).

makes it clear that the Article is largely directed at the partisan policing, the involvement of the military in political violence, and the violation of the human rights of those perceived to support the opposition that has characterised law enforcement in Zimbabwe.

i) *The Police*

The conduct of Zimbabwe's police as been commented upon by the International Bar Association:

*Instead of conducting itself as a national security force charged by the Constitution and statute with ensuring public order and security in the country, the ZRP has abandoned its constitutional mandate in favour of an approach to policing which is blatantly partisan. The police repeatedly characterise government opponents and critics and their lawyers as 'agents of the West' or 'enemies of the state' and routinely violate the rights of these persons during policing operations.*⁵⁹

In a similar vein to the comments in relation to Article X and XII, the last cited extract from the Article is predicated on the idea that partisan policing and the violation of rights stems from ignorance and a lack of training. In fact, junior officers following orders in this regard are fully aware of the unprofessional nature of partisanship, but are subjected to reprisals should they attempt to do their work professionally.⁶⁰

The Law and Order Section of the Police appears to take instructions directly from state security agents in the President's Office rather than the legislated chain of command and regularly engages in acts of torture. Those perpetrating such torture do not require training to know that such actions are wrong. The Police Internal Security and Intelligence Unit and "Riot Squad" appear to have been given specific directions to carry out repressive measures on a partisan basis. Police spokespersons have regularly simply denied accusations of partisan policing, no matter how convincing the evidence to the contrary. Police Commissioner-General Augustine Chihuri has recently claimed before a Parliamentary Committee inquiring into the issue that MDC activists are frequently arrested and few if any from ZANU PF face charges, because the MDC activists are guilty of crimes while those from ZANU PF are not.⁶¹

This partisanship results in wrongful arrests, malicious prosecutions, and the impunity of perpetrators. All require the co-operation of the Attorney-General, Johannes Tomana, which has been willingly provided. Tomana has declined to institute prosecutions against ZANU PF supporters despite being presented with compelling evidence in this regard.⁶² Yet the prosecution of MDC supporters on petty or dubious charges is pursued with vigour. Arrest without warrant, when other methods of bringing an accused to court, such as summonses, are appropriate, is

⁵⁹ *Partisan policing: An Obstacle to Human Rights and Democracy in Zimbabwe* International Bar Association 10.07.

⁶⁰ *Chihuri Sacks Cops for Probing Zanu (PF) Atrocities* <http://www.thezimbabwean.co.uk/> 22.07.09.

⁶¹ *Chihuri Blames Makone, Khupe for Violence* The Zimbabwean 04.03.11.

⁶² *Tomana Dismisses MDC-T's Claims Document* <http://www.theindependent.co.zw/> 26.08.10.

invariably deployed and the grant of bail to MDC activists often is followed by an appeal against such grant, not, as the law requires, because the prosecution believes that the judgment is wrong, and the accused might abscond, but in order to ensure that the accused remain incarcerated for a further seven days while the appeal is determined.⁶³

ii) *The Military*

The involvement of the military in political violence is well documented.⁶⁴ Mugabe is the Commander-in-Chief of the Defence Forces, appoints the Commanders of each branch of the Defence Forces⁶⁵, and appoints and promotes officers within these branches⁶⁶, giving him considerable influence over the manner in which they carry out their duties. The Head of the Army, Head of the Defence Forces, the Head of the CIO, Head of Prisons and Minister of Defence are part of the shadowy Joint Operations Command (JOC) which is regarded as the body which makes crucial decisions concerning security, not of the state, but of ZANU PF's control on power. It is believed to co-ordinate much of the political violence in Zimbabwe. Cognisant of this, the MDC took tentative steps to try to reign in JOC during the negotiation of the GPA, proposing that JOC be disbanded and replaced by a National Security Council – to which reference is made in the GPA, although no such body existed at the time.⁶⁷ A National Security Council Act was, however, passed by Parliament.⁶⁸ Although the body must convene monthly, it has met infrequently. While it provides an outlet for the Prime Minister to voice concerns about violations perpetrated by the uniformed forces to the defence and security chiefs who sit on the council *ex officio*, it does not provide civilian control. The JOC has continued to meet and has not changed its behaviour.

The kinds of abuse with which this Article is concerned cannot be addressed in this manner. Impartial civilian oversight of policing and the appointment of impartial individuals in key positions relating to law enforcement and the military are essential. Impunity for ZANU PF supporters is a key mechanism of control of the electorate and means by which democratic space is closed.

Article XIV – Traditional Leaders

This Article concerns traditional leaders and the requirement that they be non-discriminatory and politically neutral in carrying out their duties. This requirement already exists in the Traditional Leaders Act.⁶⁹ The vast powers of traditional leaders, removed at independence but restored in 2000,⁷⁰ allow for oppressive control of rural villagers through these unelected officials. The

⁶³ *Zimbabwe Attorney General Admits Abuse of Section 121* <http://www.sokwanele.com/thisiszimbabwe/archives/5425>.

⁶⁴ See, for example, CSVR (2009), *Subliminal Terror? Human Rights Violations and Torture in Zimbabwe During 2008*. A. P. Reeler. 06. 2009. : CSVR

⁶⁵ Section 96(4) of the Constitution.

⁶⁶ Section 15 of the Defence Act, Chapter 11:02

⁶⁷ Article 20.1.3(h) providing that Mugabe will be the chair of this body.

⁶⁸ Act 2 of 2009.

⁶⁹ Section 46(1) of the Traditional Leaders Act, Chapter 29:17.

⁷⁰ By way of the Traditional Leaders Act, passed in 1998 but becoming effective in 2000.

traditional leaders form part of an overbearing structure⁷¹, headed by the extremely powerful Minister of Local Government which ensures that those in the rural areas remain “subjects” rather than “citizens.”⁷² The entire system of authoritarian control afforded by local government legislation requires radical reform. The single pious statement in this Article appears almost ridiculous when set against the size of the problem. It is remarkable, given that the MDC won a clear majority of votes in local authorities (the combined urban and rural vote) in the elections of March 2008, that the MDC did not insist on the allocation of this Ministerial portfolio to its nominee to balance the power held by the ZANU PF aligned security sector. Instead, it concentrated on the weak portfolio of the Minister of Home Affairs, presumably in the misapprehension that this portfolio would give it some control over the police and the Registrar-General of Voters (see below).

Article XV – National Youth Training Programme

This Article concerns the National Youth Training Programme, the graduates of which are infamously known as “green bombers” who are implicated in numerous human rights reports as responsible for a large percentage of political violence in Zimbabwe⁷³. There have thus been repeated calls from civil society for this programme to be abandoned. Cogent circumstantial evidence of the role played by the graduates of this programme in violence and the ZANU PF government’s complicity in this violence is evidenced by a recent audit of the civil service which revealed that 6 861 probable graduates of this programme were unprocedurally added to the payroll, shortly before⁷⁴ the violence prior to the June 2008 poll began, by the Minister in charge of the programme, Saviour Kasukuwere.⁷⁵ Yet in this Article the MDC recognises:

the desirability of a national youth training programme which inculcates the values of patriotism, discipline, tolerance, non-violence, openness, democracy, equality, justice and respect.

The parties agree that the programme should not include *political material advancing the cause of any political party* but there is no mechanism to enforce this requirement. The programme remains under ZANU PF control. The “patriotism” which the MDC recognizes as desirable has long been conflated by ZANU PF as support for its dogma. Those graduates of the programme placed on the government payroll before the June 2008 violence continue to intimidate rural villagers and commit acts of violence with impunity.

Article XVI – Humanitarian Aid and Assistance

This Article concerns food and humanitarian aid which both parties have frequently accused each other of distributing on a partisan basis. The parties agree that such aid should be supplied

⁷¹ For an analysis of this see *Formal Structures of Power In Rural Zimbabwe* D. Matyszak available at <http://www.kubatana.net/html/archive/demgg/101116rau.asp?sector=DEMGG>

⁷² The distinction is drawn from Mahmood Mamdani’s *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* PUP 1996.

⁷³ *National Youth Service Training – “Shaping Youths in a Truly Zimbabwean Manner”. An Overview of Youth Militia Training and Activities in Zimbabwe, October 2000 – August 2003.* Solidarity Peace Trust (2003)

⁷⁴ On 26.05.08.

⁷⁵ *Ghost Workers Helped Mugabe Defeat Tsvangirai In 2008 Polls: Report* <http://www.radiovop.com/13/02/11>.

on a non-partisan basis “within the confines of the laws of Zimbabwe”. These *laws* are, in fact, merely governmental directives designed to ensure that the structures of local government, over which ZANU PF exercises control, manage food distribution. Compliant local authorities,⁷⁶ youth militia, compliant police, the District Administrators, and Provincial Governors, using ZANU PF’s control over structures of rural governance indicated above, are able to ensure partisan distribution of food aid and to compel displays of fealty to ZANU PF. ZANU PF has recently signaled its intention to retain tight control in this regard.⁷⁷

Article XVII – Legislative Agenda Priorities

This Article concerns the legislative agenda and priorities. The parties agree that “*the legislative agenda will be prioritized in order to reflect the letter and spirit of this agreement*” and that the Government agree on further legislative measures with a “*view to entrenching democratic values and practices*”. The “letter and spirit” of the agreement, as should be apparent from the preceding comments, is open to interpretation along party lines, as is the phrase “*democratic values and practices*”. In practice, no legislation has been prioritised and the Seventh Parliament, the first in which ZANU PF has not held a majority, has been characterised by desuetude.⁷⁸ Parliament sat only 17 times in 2009, with some sessions lasting for as little as 10 minutes. By July 2010, it had sat only 13 times with similarly brief sessions.⁷⁹ The legislature in Zimbabwe consists of Parliament *and* the President and Presidential assent is required before the enactment of any Bill.⁸⁰ Hence no legislation can be passed without inter-party agreement (see below). The fact that no legislation implementing the terms of GPA, other than Constitutional Amendment 19, has been enacted reflects the continued lack of consensus between the parties.

The only Bill relating to legislative reform has had to come by way of a private members Bill, introduced by a MDC MP concerning amendments to the Public Order and Security Act.⁸¹ Introduced in November 2009, it has yet to be introduced in the Senate and then returned to the House of Assembly for passage.⁸²

Article XVIII – Security of Persons and Prevention of Violence

This Article concerns security of persons and the prevention of violence. It commences with the parties noting “*the easy resort to violence by political parties*”. The inclusion of this note is a concession by the MDC as it suggests an equal culpability in the perpetration of violence, a culpability that is not supported by the facts. Data collated by civil society reveals that the vast majority of political violence is perpetrated by ZANU PF supporters and activists. The series of pious statements which follow referring to non-partisan policing and bringing perpetrators to

⁷⁶ Rural District Councils which played a central role in food distribution have been sidelined in favour of chiefs and District Administrators where the Council is no longer under ZANU PF control. Several reports have been received of International Aid Organisations operations in rural areas effectively being run by ZANU PF cadres.

⁷⁷ *UN Agencies Barred from Food Assessment for 'Political Reasons'* <http://www.irinnews.org> 16.03.11.

⁷⁸ *Parliament Resumes Sitting as MP's Slam Slow Pace of Reforms* <http://www.swradioafrica.com> 16.06.09.

⁷⁹ Veritas Bill Watch 30/2010.

⁸⁰ Section 32 of the Constitution.

⁸¹ Chapter 11:17.

⁸² The 16 month delay has been occasioned not only by the lack of parliamentary sittings but also by procedural problems arising from the fact that private members Bills are a rarity.

book do nothing to address the problem, rooted in the ability of those in charge of law enforcement to ensure impunity for ZANU PF. The only provision of any interest in this Article is the provision that:

the prosecuting authorities will expedite the determination as to whether or not there is sufficient evidence to warrant the prosecution or keeping on remand of all persons accused of politically related offences arising out of or connected with the March and June 2008 elections.

This provision contradicts ZANU PF's declaration that the requirements of national healing demand a "forgive and forget approach" to the violence preceding the June 2008 poll (see above) and Mugabe's clear statements that no one will be prosecuted for the pre June 2008 violence.⁸³ In August 2010, the MDC submitted dossiers to the Attorney-General with details of 197 murders which took place during the pre-June 2008 poll period, including the names of perpetrators. Despite this provision in the GPA, Tomana has refused to take any action.⁸⁴ Without any control over the arms of government responsible for implementing this provision, the MDC is unable to bring partisan policing to an end.

Article XIX – Freedom of Expression and Communication

This Article concerns freedom of expression and communication. In this Article, the parties claim that they are *desirous of ensuring the opening up of the air waves and ensuring the operation of as many media houses as possible*. To this end, they agreed that the government should ensure the immediate processing of all applications for registration by media houses and broadcasters by the Broadcasting Authority of Zimbabwe and the Zimbabwe Media Commission (ZMC). The parties further agreed that foreign governments be called upon to cease hosting foreign radio stations; that those working for these stations "be encouraged" to return to Zimbabwe; that balanced and fair coverage be afforded to political parties; and that all media *refrain from using abusive language that may incite hostility, political intolerance and ethnic hatred or that unfairly undermines political parties and other organisations*. The parties agreed that *the inclusive government shall ensure that appropriate measures are taken to achieve this objective*.

There is no legal mechanism by which these undertakings may be enforced and implementation is contingent upon those willing to see the agreement fulfilled.⁸⁵ The bodies which apply legislation which requires broadcasters and publishers to be licensed determine the plurality of voices in the media. Since the MDC has influence in only one of the body's wielding power in this regard, the ZMC, this is the only part of the agreement adhered to in any respect.

⁸³ *No One is Going to be Arrested for Political Violence – Mugabe* <http://www.zimeye.org/?p=20592> 09.09.10.

⁸⁴ *Tomana Dismisses MDC-T's Claims Document* The Zimbabwe Independent 26.08.10.

⁸⁵ Theoretically the draconian provisions of AIPPA could be used to insure that publishing houses "refrain from using abusive language that may incite hostility, political intolerance and ethnic hatred or that unfairly undermines political parties and other organisations." However, the Media Council, to whom complaints in this regard are to be made, has not been re-constituted and the co-operation of the police would be required to enforce regulations against transgressors such as the Herald.

There had been no independent daily newspaper in Zimbabwe since the closure of the Daily News in 2003.⁸⁶ In May 2010, the newly constituted ZMC finally granted licences to publish to four media houses,⁸⁷ and an independent daily, NewsDay,⁸⁸ began circulation in June 2010; a further four licences followed in July 2010.

The new ZMC which granted these licences did not come into existence by virtue of the GPA or Constitutional Amendment No. 19 as is sometimes erroneously assumed. A form of the ZMC appeared as the Media and Information Commission (MIC) in the Access to Information and Protection of Privacy Act (AIPPA).⁸⁹ Constitutional Amendment 19 merely inserted the Commission into the Constitution by way of a duplicate establishment provision.⁹⁰ It was the reforms of 2007, mentioned above, which made some democratic changes to AIPPA and the establishment provision.⁹¹ Some of the changes were superficial. While the name of the Commission was changed from the MIC to the ZMC, the new ZMC was to have the same function as the defunct MIC.⁹² ⁹³ However, important changes were made to the method of appointment of Commissioners, which was previously under the control of the President.

Whereas the MIC had comprised no more than five persons appointed by the minister after consultation with or on the instruction of the President,⁹⁴ the new ZMC must comprise a chairperson and eight other members appointed by the President from a list of not fewer than twelve nominees submitted by the parliamentary Committee on Standing Rules and Orders (CSRO). As a result, the possibility arose for a list of nominees who were all sympathetic to ensuring the freedom of the press (or at least very few opposed to such a notion) to be submitted to the President, leaving Mugabe with little choice other than to appoint a more benign body than the previous MIC.

Having delayed the establishment of CSRO which was to submit the list of nominees to the ZMC to the President, Parliament began its selection process only in August 2009, by interviewing proposed candidates. A scorecard marked against pre-agreed criteria was used in the interview of 27 candidates. However, this method of selecting nominees did not determine the list sent to the

⁸⁶ The Daily News was one of the many victims of the Access to Information and Protection of Privacy Act [Chapter: 10:27], introduced to tighten control over the media.

⁸⁷ *New Dailies Get Licences*, New Zimbabwe, 26.05.10

<http://www.newzimbabwe.com/news/news.aspx?newsID=2515>.

⁸⁸ Published by Alpha Media.

⁸⁹ Chapter 10:27.

⁹⁰ Section 100N.

⁹¹ These changes received little positive comment at the time, as ZANU (PF) dominated the CSRO which determined the list of nominees to the post of Commissioners (see below) and was thus expected to submit lists acceptable to the ZANU PF leadership.

⁹² But has not sought to exercise its extensive undemocratic powers in relation to the many violations of AIPPA by The Herald and its journalists in the way the MIC did against the non-state controlled press.

⁹³ While the composition of the ZMC established by the Constitution is identical to that established by AIPPA, its functions are not. The Fourth Schedule to the Act also sets out conditions in relation to terms of office (which the Constitution does not) and prescribes conditions of appointment for Commissioners which differ from the constitutional body, creating considerable legislative confusion. However, it has been generally assumed that the two bodies are the same and that the ZMC established by the Constitution will carry out the functions provided for and given to a ZMC by AIPPA. These functions include the regulation by the ZMC of printed media, and the licensing and the accreditation of journalists - Sections 66 and 79 of AIPPA.

⁹⁴ Section 40 of the AIPPA.

President. ZANU PF was unhappy with the final list and the MDC inexplicably allowed the list to be altered. Several eminently suitable candidates were removed⁹⁵ and ZANU PF-aligned candidates added – some of whom had fared extremely badly in the interview process.⁹⁶ Parliamentarian Tongai Matutu claims that the list had been altered because ‘the politicians had their own list’ and compromise was necessary to avoid an ‘impasse’.⁹⁷ Yet if any impasse had resulted, the correct course of action would have been to demand that Mugabe and ZANU PF follow the legal provisions establishing the ZMC. The compromise thus seems to have been made through fear of Mugabe flouting constitutional requirements and refusing to appoint a commission at all. It took until December 2009 for ‘the politicians’ to reach a consensus on the list which ‘the CSRO’ would eventually submit. The lack of urgency in the process continued. The establishment of the ZMC was gazetted only on 19 February 2010, with the appointed Commissioners believed to be fairly evenly balanced between those perceived as sympathetic to ZANU PF and the MDC-T.⁹⁸ The Commission held its first meeting only in March 2010, eventually licensing its first publications in May 2010.

The plaudits which followed this ‘success’ in opening democratic space ought to be tempered by several important considerations. Firstly, the final choice of Commissioners was a significant concession by the MDC without noticeable reciprocity from ZANU PF. In addition, to the astonishment of journalists, the discredited chair of the former MIC, Tafataona Mahoso, re-emerged to head the secretariat.⁹⁹ The appointments were evidence of further political weakness and pliancy on the part of MDC which contributed towards a pattern of power dynamics within the ‘unity government’, with the MDC allowing itself to be dominated by ZANU PF in areas where it could have asserted authority. The result was an increase in ZANU PF arrogance and arrogation of power and an increase in the sense of resignation and powerlessness within the MDC.

Secondly, the basic demand of those journalists and others seeking to open democratic space in Zimbabwe is that the media should be self-regulating (as is common in democracies) and not subject to the control of the state.¹⁰⁰ The powers given to the ZMC under AIPPA are regarded as having a chilling effect on freedom of expression, and demands have been made for the repeal of

⁹⁵ Including Roger Stringer, a well-known and respected publisher who had scored highly in the interview process.

⁹⁶ For example Christopher Mutsvangwa, former Zimbabwean ambassador to China, whose suitability as a commissioner is highly questionable: see *Mutsvangwa Lashes Out At Journalists* Zimbabwe Times, 24.01.10, available at http://www.zimbabwesituation.com/jan25_2010.html.

⁹⁷ *Zanu PF Hijacks Selection of Media Commissioners* The Standard, 23.08.10 <http://www.thestandard.co.zw/local/21100-zanu-pf-hijacks-selection-of-media-commissioners.html>.

⁹⁸ See Veritas, Bill Watch, 12/2010 (28.03.10), available at http://www.kubatana.net/html/archive/legisl/100328veritas.asp?sector=LEGISL&year=0&range_start=1. The ZMC comprises Godfrey Majonga [chairperson], Nqobile Nyathi [deputy chairperson], Lawton Hikwa, Miriam Madziwa, Chris Mhike, Millicent Mombeshora, Henry Muradzikwa, Chris Mutsvangwa and Matthew Takaona.

⁹⁹ *Donors Shun Zimbabwe Media Commission* Radio VoP, 18 May 2010, available at http://www.zimbabwesituation.com/may19_2010.html. Both Zimbabwe’s High Court and Supreme Court held that the head of the MIC, Dr. Tafataona Mahoso, was biased against the publishing house ANZ, and had refused its application for a licence on this basis. A reconstituted MIC was directed to reconsider the application: *MIC Divided Over ANZ Fate* Financial Gazette, 09.03.06.

¹⁰⁰ *Media Hopes Dashed as Confusion Shrouds ZMC*, Zimbabwe Independent, 22 Jan. 2010, <http://www.theindependent.co.zw/local/25045-media-hopes-dashed-as-confusion-shrouds-zmc.html>.

AIPPA in its entirety.¹⁰¹ ZANU PF has shown no inclination for allowing the state's control over the printed media to be eased. While the MDC has proposed the replacement of AIPPA with less restrictive legislation through a Media Practitioners Act, the necessary bill is still at the drafting stage and is unlikely to be debated any time soon. In any event, the MDC bill retains the requirement of licensing and accreditation of journalists.

The composition of the current Commission has certainly led to a more liberal approach towards the press. Apart from the licensing of new publications, journalists report that they have been able to obtain accreditation without any obstacles being placed in their paths.¹⁰² However, this liberal attitude is dependent upon personalities and whim and is not due to structural reform. The space may thus be quickly closed on the basis of future political considerations.¹⁰³

Thirdly, the Herald newspaper continues to be controlled by ZANU PF¹⁰⁴ which appears to have issued instructions in the last few months that each day an article should appear which denigrates Morgan Tsvangirai – in violation of the GPA – in addition to its more usual and general vitriol against the MDC and others opposed to ZANU PF.

Fourthly, the increased flow of printed information will have little effect in the rural areas, where information is gained primarily through the electronic media. The electronic media is controlled through the Broadcasting Authority of Zimbabwe (BAZ).¹⁰⁵ ZANU PF is intent upon maintaining close control of the electronic media. Although there was nothing in the GPA requiring that the Board of BAZ be reconstituted, as with the ZMC, the establishment provision of the Act was amended as part of the 2007 reforms. It appears that a new Board was not, thereafter, immediately appointed in accordance with the new requirements. However, in October 2009, the ZANU PF Minister of Media, Information and Publicity, Webster Shamu, announced his (sic) appointment of a new Board. The Shamu-appointed board comprised ZANU PF loyalists, with Tafataona Mahoso as chair. However, the minister has the power only to **fill** vacancies on the Board¹⁰⁶, and not to **appoint** it. The twelve-member board is appointed by the President, nine 'after consultation' with the minister and the CSRO, and three from a list of six submitted by the CSRO.¹⁰⁷ As presidential appointments, the GPA and Constitution require Tsvangirai's consent to them (see below). The Board is thus not legally constituted, having been appointed neither by the President, nor with Tsvangirai's consent. No broadcasting licences have been issued by the Board to end the monopoly of the state in this regard.

¹⁰¹ *Media Institute of Zimbabwe, Amend AIPPA* – African Commission 28.08.09

¹⁰² In personal communications made by journalists on several occasions after the formation of the new ZMC.

¹⁰³ Alarm bells have already rung in this regard owing to attempts by the parliamentary body in charge of the constitution-making process (COPAC) to prevent NGOs from monitoring the process as a result of adverse reports filed by them.

¹⁰⁴ The legal status of Zimpapers (Pvt) Limited, the proprietor of the Herald, is mired in confusion. The Zimbabwe Mass Media Trust was established shortly after independence to break up foreign domination of local publishing houses. The Trust was to acquire shares in the publishing houses. The original board of seven were all government appointees. ZMMT owns 51% of Zimpapers, but the ZMMT was itself declared dissolved in September 2000.

¹⁰⁵ Established by Section 3 of the Broadcasting Services Act Chapter 12 :06.

¹⁰⁶ Paragraph 5 of the Third Schedule to the Act.

¹⁰⁷ Section 4(2) of the Broadcasting Services Act.

A more significant impediment to an immediate opening of the airwaves than control over the issuance of licences is the onerous Sixth Schedule relating to “local content”. In the case of a television broadcaster, the licensee must ensure that, during defined prime time periods, at least:

- a) *seventy per centum of its drama programming consists of Zimbabwean drama;*
- b) *eighty per centum of its current affairs programming consists of Zimbabwean current affairs;*
- c) *seventy per centum of its social documentary programming consists of Zimbabwean social documentary programming;*
- d) *seventy per centum of its informal knowledge-building programming consists of Zimbabwean informal knowledge-building programming;*
- e) *eighty per centum of its educational programming consists of Zimbabwean educational programming;*
- f) *eighty per centum of its children’s programming consists of Zimbabwean educational programming*

In the case of a radio broadcaster, the licensee must ensure that during prime time periods:

- 1. *seventy-five per centum of the music broadcast consists of Zimbabwean music;*
- 2. *ten per centum of the music broadcast consists of music from Africa.*

These conditions are so onerous that not even the State-controlled broadcasters ZBC and ZTV fully comply with them. Apart from the commercial viability of broadcasters controlled in this manner, there are insufficient production houses able to provide the material to meet these requirements and there are not likely to be for some time. The Board, not the Minister, may cancel any licence which does not comply with these conditions.

As the local content conditions form part of a Schedule to the Act, rather than regulations, they cannot be subject to amendment by the Minister of Information.

Notwithstanding its dubious legality, the extent to which Board intends to retain control over the electronic media space is reflected in the fact that it has sought to close information services (including one established by the Prime Minister’s office) delivered by cell phone whereby a caller can receive pre-recorded information. The Board has claimed that these services constitute broadcasting which require licensing by the Board.¹⁰⁸ Most recently, the Board has invited “applications for licences” for “diffusion services”¹⁰⁹ which it rather questionably claims includes electronic billboards and audio dissemination in trains and buses. There has been an attempt to provide independent information electronically by the distribution of tapes and CDs in mini buses, taxis etc. The Board has thus signalled an intention to extend the reach of its control and prevent the distribution of information electronically in this manner. Finally, legislation relating to criminal defamation and ‘undermining the authority of or insulting the

¹⁰⁸ *Presidential Administration [sic] Pressured Econet to Terminate MDC Audio Service*, Zimbabwe Reporter, 22.06.10 <http://zimbabwepreporter.com/politics/1210.html>.

¹⁰⁹ Broadcasting Authority of Zimbabwe [BAZ] Notice General Notice 21/2011, gazetted on 11.02.11.

President’¹¹⁰ can be unleashed at any time, restoring repressive conditions and fostering self-censorship. The appearance of an independent daily caused Zimbabwe to rise five points on Freedom House’s press freedom rankings, but it still remains the lowest in the region and is rated 181st of 196 countries.¹¹¹

Article XX – Framework for a New Government

This Article XX sets out the structure of the government and is the core of the GNU. It is dealt with separately in Part II below.

Article XXI – Electoral Vacancies

By way of this Article the parties agreed that for a period of 12 months from the date of signing of the Agreement, *should any electoral vacancy arise in respect of a local authority or parliamentary seat, for whatever reason, only the party holding that seat prior to the vacancy occurring shall be entitled to nominate and field a candidate to fill the seat.* This provision is not part of Constitutional Amendment 19 and thus does not bind any political parties who are not signatories to the GPA. The Article also cannot override the statutory requirement to hold by-elections.¹¹² The failure of the President to call by-elections to fill the current vacancies in Parliament¹¹³ is thus a violation of the Electoral Act. It is also a violation of the recently introduced Section 23A to the Constitution, discussed above, which requires regular free and fair elections to be held. Court action has been instituted against the President in this regard.¹¹⁴

Article XXII – Implementation Mechanisms

This Article establishes a Joint Monitoring and Implementation Committee (JOMIC) co-chaired by a representative from each of the three signatory parties. JOMIC was intended to be the principal body dealing with the issues of compliance and monitoring of the Agreement. All complaints and issues relating to compliance with the Agreement were to be channelled through JOMIC. JOMIC was also to assess and ensure the implementation of the “letter and spirit of the Agreement” and to recommend any steps which ought to be taken to this end.

However, JOMIC was accorded no power to issue directives or to act as a determining arbitrator in disputes between the parties. No arbitration body or dispute resolution mechanism was included at all. JOMIC was thus set to be merely the septic tank into which the sort of endless disputes of patriotic history versus liberal democracy and arguments of the “yes, you did” versus “no, I didn’t” variety, which have characterised Zimbabwe’s polity, were to flow.

¹¹⁰ Sections 96 and 33, respectively, of the Criminal Law (Codification and Reform) Act Chapter 9 : 23.

¹¹¹ *Zim Press Freedom Still Lowest in the Region* SW Radio Africa, 16.08.10 <http://www.swradioafrica.com/news160810_zimpress160810.htm>.

¹¹² Section 39 of the Electoral Act.

¹¹³ There are at least 8 by-elections pending in the House of assembly only, many of which have been due since August, 2008.

¹¹⁴ *Expelled MP Seeks By-election* <http://www.radiovop.com> 26.11.09.

The Article does however state that *the implementation of this agreement shall be guaranteed and underwritten by the Facilitator, SADC and the AU*. No precise meaning can be attributed to this undertaking. However, although the Agreement was formally signed on 15th September, 2008, the MDC, at least, did not consider the negotiation process complete as the vital issue of the division of ministerial portfolios had still to be agreed, and talks on this issue were to continue the day after signing (see below). Accordingly, the facilitator was not discharged from his duty and as disputes around implementation arose immediately they were inevitably placed before him to resolve rather than JOMIC, rendering this body largely redundant.

While the Agreement commences with a legalistic template by including “definitions” to be accorded to certain phrases, in concluding with an Article providing that implementation will be guaranteed by the Facilitator, SADC and the AU, the intention is clearly that the implementation would be primarily subject to political considerations. The Agreement would have remained in the realm of the quasi-legal if the provision had been, for example, that disputes would be referred to the SADC Tribunal for resolution and that all parties undertook to abide by its decisions.

With SADC effectively given the role of “guarantor”, the parties moved any issue around the implementation of the Agreement from the realm of the legal to that of the political. Yet, if SADC is to be characterised by any single attribute in regard to Zimbabwe, it is precisely its singular reluctance to place any political pressure on Mugabe. This attribute of SADC has not changed through the course of the Agreement. In the face of obvious violations of the Agreement by Mugabe, particularly in relation to the appointments of Provincial Governors, the Governor of the Reserve Bank, and Attorney-General (see below) the most SADC has been able to muster is to require Mugabe to address these issues at a time when Mugabe has declared that they are no longer open for discussion. South Africa, which continues to play the most active role in relation to the GPA, has suggested that these issues be “parked”, and that the parties move on. In so doing it is inferred that these disputes are simply a petty jockeying for positions. In fact, ensuring that positions such as these are occupied by persons prepared to uphold the rule of law is the very vehicle by which the democratic process in Zimbabwe is to progress. To advise that this vehicle must be parked, and the MDC must move on, is thus paradoxical.

Article XXIII – Periodic Review Mechanism

This article establishes a Period Review Mechanism comprising a Committee of two representatives from each party. Its mandate is to review, on an annual basis the implementation of the Agreement. It is difficult to see how its mandate differs from that of JOMIC in this regard.

Article XXIV – Interim Constitutional Amendments

By way of this Article, the Parties undertook to unconditionally support the passage of an appropriate constitutional amendment to incorporate appropriate sections into the Constitution to give effect to the Agreement. This presented an opportunity to transpose the loose and vaguely drafted language of the GPA into precise and legally enforceable provisions. The opportunity was squandered. Only the provisions relating to the structure of the new government in Article XX were placed in the constitution and these without alteration as a Schedule, Schedule 8. Its

provisions were to prevail against any contrary provisions elsewhere in the Constitution. Not only were the contradictions, inconsistencies and ambiguities of Article XX repeated and retained, but they were compounded by the necessity of reconciling them with the extant provisions of the Constitution, and determining whether they “were to the contrary to” or compatible with them. The result is a legal dog’s breakfast.

More importantly this Article required a constitutional amendment which would give effect to the Agreement as a whole, and not only Article XX as was done. This presented the opportunity of a constitutional amendment incorporating into the Constitution provisions of the Agreement (aside from those which were mere rhetoric) which had been redrawn in such a way as to have legal traction. The implementation of these provisions would not then have depended upon a cynical political undertaking but would have been a matter of constitutional imperative, and thus legally enforceable. It was thus expected that the negotiations over the content of Constitutional Amendment 19 would be protracted. They were not. By incorporating only Article XX into the Constitution the MDC lost an important opportunity to strengthen provisions to bring about democratic reform.

This Article also provided that certain provisions of the Kariba Draft would be added to the Constitution as part of the amendments to give effect to the GPA. These provisions were Chapters 4 and 13 and section 12 of the Kariba Draft. Chapter 4 relates to Zimbabwean citizenship. The provision continues the arrangement whereby an Act of Parliament may prohibit dual citizenship (an Act does so¹¹⁵), but changes in wording suggest that it is unlawful to remove a person’s right to Zimbabwean citizenship by birth by virtue of holding citizenship of another country.¹¹⁶ Chapter 13 introduces the Commissions into the Constitution (see above), while Section 121 enshrines in the Constitution the composition of the important Parliamentary Committee on Standing Rules and Orders previously set out in the Rules of that Committee itself, and thus subject to amendment by that Committee. The provision ensures that the composition of the Committee reflects the political and gender balance of Parliament.¹¹⁷ These provisions are not part of the “transitional” amendments to the Constitution, and thus will survive the end of the GNU, but may not necessarily be included in any new Constitution for the country. These all may be counted as minor steps in the opening of democratic space.

Article XXV - Commencement

This is the last Article in the Agreement and simply provides that the Agreement commences on the signature of the parties – not entirely unimportant as ZANU PF has occasionally suggested that their obligations only began with the commencement of the Inclusive Government. If the Agreement were to have a cut off date, this would have been the Article in which to place it. No

¹¹⁵ Section 9 of the Citizenship of Zimbabwe Act Chapter 4:01.

¹¹⁶ Section 9(c) of the Constitution now provides that an Act of parliament may provide for the loss of citizenship by descent or registration only. The provision is important as many Zimbabweans, particularly those of Malawian or Mozambican origin have been stripped of their Zimbabwean citizenship, and thus the right to vote.

¹¹⁷ The actual number on the Committee is left to the discretion of Parliament. In view of the presence in the Senate of 18 Chiefs, 10 Mugabe appointed Provincial Governors, and five other appointees, the interpretation of this section may prove difficult.

such cut off date is given. The closest one comes to a termination provision is set in Article XXIII relating to the Peer Review mechanism:

This Agreement and the relationship agreed to hereunder will be reviewed at the conclusion of the constitution-making process.

Since it is part of the Article relating to the Peer Review Mechanism one might infer that the review is to be done by the Committee, though this is not explicitly stated.

Conclusions

Many of the Articles in the GPA merely set out the ideological position of a particular party in relation to a certain issue, and provide little other than an opportunity for rhetoric and political grandstanding. Other provisions relating to democratic conditions, such as the rule of law, freedom of assembly, impartial policing etc were already governed by Zimbabwean legislation, and merely allowed any complaint relating to the breach thereof to be contextualised around the GPA. There was no reason to assume that ZANU PF's past denials of violations of the rule of law etc would not continue. Similarly, the implementation of these provisions and others, such as the agreement that there be a land audit, required that those who held the power in these areas of governance had the necessary political will. This meant that appointments to key executive posts would be of vital importance. Yet the Agreement left most of Mugabe's power in this regard intact. Where there was any restriction on this power, Mugabe responded by simply ignoring the constraint (see below). In the absence of any real mechanism for enforcement, the MDC was forced to rely upon making political capital from breaches of the GPA by ZANU PF. ZANU PF and Mugabe have responded, in part, by denying that breaches, such as political violence by its supporters and partial policing, have taken place, and, more weakly, by truculently claiming that it will not comply with the GPA, for example, in relation to the land audit and executive appointments, until "sanctions" are removed. The provision describing SADC as a "guarantor" of the Agreement could be interpreted as requiring SADC to respond robustly to such unabashed truancy by ZANU PF. If this is how SADC itself understands the provision, it has not acted accordingly.

The weakness of relying on SADC as a guarantor underlines the how important it was for Constitutional Amendment 19 to give legal traction to the Articles in the Agreement. Only Article XX was so transformed and thus forms the core of the GPA and lies at the heart of the GNU. This Article is examined in what follows.

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PART II

Article XX – Framework for a New Government

The discussion of Article XX was deferred as it requires a separate section of its own. Having been incorporated into the Constitution as Schedule 8, by way of Constitutional Amendment 19, the provisions of Article XX have legal traction and are generally legally enforceable. They

became law on 11th February, 2009. The Agreement does not suggest that this Article's provisions in relation to the structure and modalities of governance are to replace all current constitutional provisions in that regard, and such an interpretation cannot be placed upon it. Essential provisions would be omitted if that were so. It must thus be assumed, that, unless specifically indicated as requiring amendment, current constitutional provisions will apply and indeed ZANU PF has acted as if this is the case without objection from the MDC.

An examination of this Article reveals that although the Agreement is referred to as a power sharing arrangement, such sharing appears only in one aspect of governance, that of statutory and constitutional appointments.

Presidential Power

The GPA and subsequently Article 20.1.6.1 of Schedule 8 to the constitution provide:

There shall be a President, which Office shall continue to be occupied by President Robert Gabriel Mugabe.

The use of the word “continue suggests” that Mugabe’s claim to legitimacy as President derives from the June 2008 election and not the GPA. Although the June election had been condemned as flawed by almost all observers,¹¹⁸ and, despite the fact that in 2007 the MDC had successfully negotiated amendments to the Electoral Act precisely to expedite such electoral petitions¹¹⁹, Tsvangirai decided not to launch a legal challenge to Mugabe’s election. With clear evidence that the election results did not reflect the will of the people, even the Chidyausiku led Supreme Court¹²⁰ would have had some difficulty in finding otherwise. At the very least, the petition would have been a high chip to put on the negotiating table.¹²¹

Article 20.1.1 declares that:

The Executive Authority of the Inclusive Government shall vest in, and be shared among the President, the Prime Minister and the Cabinet.

However, having made this declaration, the subsequent paragraphs in this Article do not in fact invest any executive authority in the Prime Minister (see below).

¹¹⁸ Only the Joseph Chinotimba led Zimbabwe Federations of Trade Unions claimed that the election had been conducted in a peaceful environment.

¹¹⁹ One significant change was to require that the Electoral Court determine such petitions to avoid the past position where such petitions were not determined before the next electoral cycle.

¹²⁰ The Chief Justice is regarded by many as engaging in jurisprudential gymnastics in order to find in favour of ZANU PF wherever possible, a reputation not helped by the fact that he too is a beneficiary of the distribution of land by ZANU PF functionaries. He recently invalidated the election of the MDC’s Lovemore Moyo as Speaker of Parliament (see *J.Moyo and Ors v Austin Zvoma & Anor S.C. 28/10*) on questionable grounds leading to Tsvangirai to make impolitic statements about the court as an appendage of the judiciary and opening Tsvangirai to charges of contempt.

¹²¹ Mugabe detests challenges to his legitimacy – see Court challenge to Mugabe election win <http://www.mg.co.za/article/2003-11-02-court-challenge-to-mugabe-election-win> 0211.03. It is likely that Tsvangirai yielded to Mbeki in this regard and the threat that negotiations would collapse if such a petition were brought.

a) Ministerial Appointments

i) The Full Ministers.

Mugabe's executive authority over Ministers and the Cabinet derives from his powers to hire and fire. In terms of section 31D of the Constitution:

The President shall appoint Ministers and may assign functions to such Ministers, including the administration of any Act of Parliament or of any Ministry or department....

The GPA curtails Mugabe's power in this regard quantitatively but only to a limited extent, qualitatively. The number of Ministers he may appoint is set at 31. Of these 16 must not only be drawn from the MDC, but must also be MDC nominees. In other words, the MDC formations select their 16 Ministers, not Mugabe. They do not, however, have any power to determine the portfolios.

The establishment of the Ministries appears in Article 20.1.6 of Schedule 8:

(5) There shall be thirty-one (31) Ministers, with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC-T and three (3) by MDC-M.

(6) There shall be fifteen (15) Deputy Ministers, with (eight) 8 nominated by ZANU PF, six (6) by MDC-T and one (1) by MDC-M.

On the 13th February, 2009 President Mugabe purported to swear into office 35 Ministers and, on the 19th February, 2009, a further six Ministers bringing the total to 41, ten more than are permitted by the Constitution and agreed in the GPA. As such, the appointment of these ten additional Ministers is unconstitutional, unlawful, and void.¹²² Which Ministers are unconstitutionally in office depends upon the order in of the swearing-in. Once the quota of 15 ZANU PF nominees was reached, the purported assumption of office by any ZANU PF nominee thereafter was unconstitutional. The same considerations applied once the quota of 13 MDC-T and 3 MDC-M Ministers had been reached. Ministers are required to both take and subscribe to oaths of loyalty and of office. While they all took the verbal oaths simultaneously on the date of their swearing in, the process was not completed until they had subscribed in writing to these oaths. The ten that did so after the quotas had been reached are not constitutionally appointed as Ministers. Of the ten, three were MDC-T nominees, one an MDC-M nominee and six ZANU PF nominees. The Ministers in question are as follows:

MDC-T

1. Henry Madzorera [Elected Senator] Health and Child Welfare.
2. Giles Mutsekwa [MP Manicaland] Home Affairs
3. Sekai Holland [no parliamentary seat] National Healing.

¹²² The additional appointments have been challenged by a grouping lobbying for democracy in Zimbabwe, The Voice For Democracy, with a High Court hearing in this regard set for 22.03.11.

MDC-M

1. Gibson Sibanda (who has since lost his Ministerial post as he has no parliamentary seat) Minister of State in Deputy Prime Minister Mutambara's office.

ZANU PF

1. John Nkomo [Appointed Senator] Minister of State in President's Office .
2. Flora Bhuka [MP Midlands] Minister of State in Vice-President Msika's office.
3. Sylvester Nguni [MP Mashonaland West] Minister of State in Vice-President Mujuru's office.
4. Saviour Kasukuwere [MP Mashonaland Central] Youth Development, Indigenisation and Empowerment.
5. Joseph Made [Appointed Senator] Agriculture, Mechanisation and Irrigation Development.
6. Walter Mzembi [MP Masvingo Province] Tourism and Hospitality Industry.¹²³

It is not open to ZANU PF and the MDC formations to argue that they had an agreement amongst themselves to amend the GPA to provide for the increased number of Ministers. As part of the law of Zimbabwe, the number of Ministers is set by Schedule 8 to the Constitution and not by the GPA. Any alteration to the Schedule requires a constitutional amendment. It would be unprecedented that a country's constitution could be amended simply at the whim of (some of) the country's political parties.¹²⁴

The unconstitutional swearing in of additional ministers is arguably one of the most significant events in the implementation of the GPA. Even if it was politically expedient for Tsvangirai to agree to the increase in ministries, at the very least, Tsvangirai should have insisted that proper legal instruments were put in place to achieve this, in line with the rule of law. In failing to do so, and collaborating with this unconstitutional act, Tsvangirai signalled to Mugabe that a non-legalistic approach would be adopted towards the implementation of the only Article which had constitutional force and legal traction, Article XX. The power relations between the two were thus not to be governed by the strict letter of the law and what was set out in the GPA and Constitution, but by political considerations and machinations. And with Mugabe holding the weight of political power, Tsvangirai would inevitably emerge the loser - as subsequent events have demonstrated.

In ignoring the constitutional provisions, the very entry into government by the MDC, a party that campaigns on the platform of the rule of law, violated the constitution of Zimbabwe. And the extra Ministers, with unparalleled irony, violated the Constitution in the very process of swearing an oath to uphold it. In a further irony, a pro-democracy group has launched court proceedings to have this unconstitutional appointments set aside. As a person required to agree to these appointments, Tsvangirai has been cited as the Second Respondent in the case with Mugabe as the First. Tsvangirai has allowed the Attorney-General, Johannes Tomana, to represent him in defending the court application and to depose an opposing affidavit on his

¹²³ This has been determined by viewing video footage of the ceremony.

¹²⁴ Nothing was committed to writing to reflect this alleged amendment of the GPA, suggesting that the structure of Zimbabwe's executive exists only in the minds of the three political parties and is only known with any certainty by them.

behalf. The irony arises not from the remarkable assertions made on Tsvangirai's behalf (such as the averment that "Mugabe has the power to appoint as many ministers as he likes") but that Tsvangirai has repeatedly stated that the appointment of Tomana, his representative in the case, is itself invalid.

It was simply assumed that those appointed as Ministers would automatically become members of the Cabinet. This is not the case. The Constitution provides, in section 31G(1), that the Cabinet consists of such Ministers as the President may from time to time appoint. The GPA and Constitutional Amendment 19 leave this power unaffected. Mugabe in fact appointed all Ministers to Cabinet except those who are "Ministers of State".

ii) The Appointment of Deputy Ministers

On the 19th February, 2009 19 Deputy Ministers were purportedly sworn in, four more than the constitutional establishment of 15. They comprised 10 ZANU PF nominees (two above the permitted eight) and eight MDC-T nominees (two above the permitted six). The same considerations outlined above in relation to the purported appointments of additional Ministers apply to the four Deputy Ministers purportedly sworn in above the constitutionally prescribed quotas. The order of the subscription to the oaths of loyalty and office by the Deputy Ministers has not been determined.

Roy Bennett is the MDC-T's nominee for a post of Deputy Minister which the MDC wishes to be within the Ministry of Agriculture, Mechanisation and Irrigation Development. President Mugabe refused to swear Bennett into office, initially ostensibly on account of charges he faces relating to the possession or supply of weapons of war contrary to Zimbabwe's laws.¹²⁵ When Bennett was acquitted, the State launched an appeal which, given the paucity of the evidence against him, not even the most blatantly partisan court could uphold without being subject to derision. Although the appeal was futile, Bennett is alleged to have made several disparaging comments about the judge in the court *a quo*, and is now being sought in relation to a charge of criminal defamation following a complaint filed by the judge.¹²⁶ Rather than spend any more¹²⁷ time in jail, which arrest on the basis of this charge would entail, Bennett did not return from a trip outside the country.

¹²⁵ While the swearing-in ceremony of deputy ministers was taking place, Deputy Minister designate Roy Bennett was arrested on charges of "banditry". These charges had unsuccessfully been levelled two years previously against the Home Affairs Minister designate, Giles Mutsekwa, who had been indicted as Bennett's co-accused. Mutsekwa judiciously decided to miss his swearing-in and be out of the country "on business" on the day of the ceremony and Bennett's arrest - see *Zimbabwe Government in Crisis as Roy Bennett Charged with Treason* The Times 13/02/09 <http://www.timesonline.co.uk>.

¹²⁶ Bennett has denied making the comments attributed to him. Ironically, the complaint by the Justice Bhunu itself tends to support an allegation of partisanship as the additional charge conveniently meant that Mugabe could again avoid the issue of swearing in Bennett. The fact that the Judge commended the prosecution in doing its best in the face of the paucity of evidence, rather than querying as he ought, why the prosecution was brought when the state was aware of the absence of evidence to sustain it, likewise suggests at the very least a pro-state leaning by the Judge. The integrity of the judiciary will always be tainted until addresses the fact that most judges (including Justice Bhunu) are beneficiaries of land distributed by, and retained at the whim of, ZANU PF officials.

¹²⁷ Bennett previously spent nearly a year in prison after being jailed for contempt by the ZANU PF dominated Sixth Parliament.

It is unclear how the provisions relating to Mugabe's power "to formally appoint" ministers ought to be interpreted. They could imply that once a candidate has been nominated from a particular party, and the Prime Minister's agreement or consent obtained,¹²⁸ Mugabe must appoint the nominee to the post. On this interpretation, the President's agreement to the appointment is not required, and the appointment is a formality only. This interpretation would give the Prime Minister a veto power over the appointment of ZANU PF and MDC-M nominees, without any reciprocal veto power by the President over MDC-T nominees. Alternatively, it could be argued that by giving the President the power to make such appointments, his agreement to the appointment must also be secured.

Constitutional Amendment 19 provides that the phrase "in consultation with" is given a peculiar meaning, which is specifically distinguished from the phrase "after consultation with".¹²⁹ Where something is done by the President "in consultation with" the Prime Minister this is defined to mean "after securing the agreement or consent of" the Prime Minister. Section 20.1.3(p) of Schedule 8 to the Constitution provides:

*The President **in consultation** with the Prime Minister makes key appointments the President is required to make under and in terms of the Constitution or any Act of Parliament.*¹³⁰

Accordingly, all appointments by the President in terms of the Constitution or any Act of Parliament, must, in terms of this section must be made "after securing the agreement or consent of" Morgan Tsvangirai. The implication, therefore, is that while Mugabe formally appoints nominees to the portfolios, the nominees must be mutually acceptable. Tsvangirai made no attempt to exercise this power in relation to the appointment of Ministers and Deputy Ministers, allowing Mugabe a free reign in relation to ZANU PF appointees – despite the fact that the past record of some made them manifestly unsuitable for their positions.¹³¹ Mugabe did not extend a similar courtesy to Tsvangirai. Mugabe clearly has not agreed to the appointment of Bennett. There is no mechanism under the amended Constitution as to what is to happen if no such agreement can be reached. The resolution of such a deadlock would thus need to be political rather than legal.

However, the above points have no currency at present. The MDC-T quota of Deputy Ministers has already been exceeded. The appointment of Bennett would thus be unconstitutional.

iii) The Allocation of Ministerial Portfolios

In any governmental power sharing arrangement, the allocation of Ministerial portfolios will be a key determinant of the actual distribution of executive power. The issue formed part of the negotiations around the GPA¹³², with Mugabe frequently threatening to appoint Ministers before

¹²⁸ As required by paragraph 20.1.3(p) of Schedule 8 to the constitution discussed above.

¹²⁹ Section 115 of the current Constitution.

¹³⁰ Schedule 8 to the Constitution, article 20.1.3 (p).

¹³¹ Mugabe himself had described the crop of Ministers he reappointed as his "worst cabinet ever". *Mugabe Appoints a War Cabinet, Excludes Youth*. See www.kubatana.net.

¹³² *MDC Seeks Control of Zim's Economy* Reuters (IOL) 13.09.08.

the conclusion of the talks.¹³³ The MDC inexplicably signed the GPA without this issue having been resolved, with negotiations on the issue scheduled to continue on the 16th September, 2008 the day after the formal signing of the GPA. This did not happen.

The ZANU PF controlled Herald newspaper announced on the 20th September, 2008 that Mugabe had plenary power to make ministerial appointments as he wished. However, two further meetings took place on the issue in the first week of October, 2008¹³⁴, and, with the parties appearing deadlocked, Mbeki¹³⁵ prepared to travel to Harare to attempt to resolve the issue. Shortly before his arrival¹³⁶, a government gazette of 10th October, 2008 was published indicating that Mugabe had proceeded to unilaterally allocate Ministries, leaving only the Ministry of Finance politely unassigned, so that Mbeki did not arrive to a *fait accompli*. Mugabe then agreed to allow an MDC nominee to occupy the Ministry of Finance, and, by 13th October, only the Ministry of Home Affairs appeared to be in contention. The dispute over this portfolio was acrimonious with the MDC threatening to pull out of the GPA if it was not resolved. On 8th November, 2008 SADC endorsed Mugabe's allocation of Ministries and adopted the proposal that the Ministry of Home Affairs be shared. The MDC declared this unacceptable. The 8th National Council of the MDC in December, 2008 reiterated the MDC's position that it "*would not be part of a government of national unity unless and until there is an amicable settlement on the outstanding issues of a equitability and fairness in the allocation of ministerial portfolios...*"¹³⁷ among other demands.¹³⁸

However, a 27th January, 2009 Resolution¹³⁹ of SADC "decided" that the swearing in of Ministers in accordance with its November endorsement should take place on the 13th February, 2009. This allocation of portfolios was to be reviewed within six months - a directive which was promptly forgotten. In the face of the stance by SADC, the MDC capitulated and agreed to enter the inclusive government, with this distribution of portfolios, on 29th January, 2009. Unsurprisingly,¹⁴⁰ once the MDC joined the government Mugabe had no incentive to resolve this issue.¹⁴¹ The unequal allocation of ministries had further tilted executive power heavily in favour of ZANU PF and left ZANU PF functionaries with the power over the implementation of most of the key Articles of the GPA aimed at restoring democracy and the rule of law.

¹³³ This would have been a violation of Clause 9 the July 2008 MOU between the parties which required that a government would not be formed before the conclusion of the negotiations.

¹³⁴ On the 4th and 7th.

¹³⁵ Although Mbeki had been removed as President of South Africa a few days after the GPA was signed, he continued in his role as facilitator between the parties.

¹³⁶ On 13.10.08.

¹³⁷ Paragraph 5a of the Council Resolution.

¹³⁸ These demands included the return of MDC and civil society activists who had been abducted by state security agents, the refusal of Mbeki as a facilitator and that appointments in breach of the MOU and GPA are reversed. Mugabe's unilateral appointment of Provincial Governors in August 2008 in violation of the MOU, the appointment of Gideon Gono as Governor of the Reserve Bank and Johannes Tomana as Attorney-General in violation of the GPA have bedevilled relations between the political parties through the course of the government.

¹³⁹ Communiqué of the Extraordinary Summit of the SADC Heads of State and Government issued from the Presidential Guest house in Pretoria, Republic of South Africa, on January 26-27, 2009.

¹⁴⁰ *None of MDC's Demands Will Ever Be Met* <http://www.thezimbabwezeitung.com/?28.01.09>.

¹⁴¹ *Mugabe's Party Blames Sanctions for Zimbabwe's Woes* <http://www.businessday.co.za> Sapa-AFP 27/08/09

The MDC had signed a GPA which left Mugabe's power to allocate ministries intact. Section 31D(1) of the Constitution appears largely unaffected by the GPA and Constitutional Amendment 19. This provides that the President:

(a) shall appoint Ministers and may assign functions to such Ministers, including the administration of any Act of Parliament or of any Ministry or department

Article 20.1.3(l) provides that the President:

after consultation with the Vice Presidents, the Prime Minister and the Deputy Prime Ministers, allocates Ministerial portfolios in accordance with this Agreement.

Since the word "after" rather than "in" is used here, the President is merely required to consult in relation to the allocation of portfolios.¹⁴² His discretion to assign duties and the administration of Acts remains unfettered. Mugabe had used his powers to allocate the 16 MDC ministerial seats to "empty" portfolios, junior portfolios or portfolios related to infrastructure or service delivery – all of which were in a parlous state.¹⁴³

Each Minister's power is derived from the executive authority provided for in legislative Acts they administer. The allocation of the administration of Acts by the President is usually done shortly after ministerial portfolios are renamed or new portfolios introduced. For the first time this was not been done, leaving the administration of Acts as it was before the formation of the inclusive government until March 2010.¹⁴⁴ This effectively means that several of the MDC Ministers have no Acts to administer. They thus have no real executive authority and the nature of their duties and ambit of their portfolios is obscure.

Ministries and departments relating to defence and state security remain firmly in ZANU PF hands. The Police Act¹⁴⁵ is currently administered by the Ministers of Home Affairs. The MDC placed undue emphasis on gaining this portfolio. Undue, because the belief that control of this Ministry would reign in police excesses and lead to a non-partisan force, is incorrect.¹⁴⁶

The Commissioner-General of Police is appointed by Mugabe.¹⁴⁷ Mugabe also determines appointments and promotions to all Commissioned ranks in the police force, while the Commissioner-General controls the appointments and promotions of non-commissioned officers.

¹⁴² See the discussion on "consultation" above.

¹⁴³ Which was graphically illustrated by a cholera epidemic which was to infect over 100 000 people and claim the lives of over 4 200 see *Zimbabwe: Beyond Cholera—Beyond the Crisis?* Report by Doctors Without Borders 18/08/09.

¹⁴⁴ Some 33 Statutory Instruments were gazetted to this effect S.I. 33 – 67 of 2010. The MDC complained that they had not been consulted and that the Ministerial powers of some had been trimmed - see *Zimbabwe President Mugabe Rearranges Ministerial Portfolios to MDC Disadvantage* <http://www1.voanews.com/05.03.10>.

¹⁴⁵ Chapter 11:10.

¹⁴⁶ See Zimbabwe Human Rights NGO Forum (2003), *Torture by State Agents in Zimbabwe: January 2001 to August 2002* Zimbabwe Human Rights NGO Forum (2006), *Who Guards the Guards?* Fn 54 *At Best a Falsehood, At Worst a Lie?* fn 53.

¹⁴⁷ Section 93(2) of the Constitution.

¹⁴⁸ Regulations made by the Ministers of Home Affairs relating to the pay of police officers and the organisation of the force must be approved by the Commissioner-General.¹⁴⁹ It is the Attorney-General who may direct the Commissioner-General to investigate criminal offences, and who has authority over any prosecutions.¹⁵⁰ The Attorney-General is once again a Mugabe appointee.¹⁵¹

Mugabe and the Commissioner-General dominate the manner in which the Police perform their duties, regardless of which party holds this portfolio. If this had proved not to be the case, Mugabe could have simply used his power, indicated earlier, to reassign the administration of the Police Act. The opening of democratic space by reforming policing depended entirely upon Mugabe's goodwill.

There was also an assumption that the Minister of Home Affairs controls the office of the Registrar-General. This is deemed important as the current incumbent, Tobaiwa Mudede, is perceived as biased towards ZANU PF, and has used his powers to manipulate the voters roll, voter registration, and the electoral process generally. The Minister of Home Affairs administers some 35 Acts, including the Births and Deaths Registration Act,¹⁵² the Citizenship of Zimbabwe Act¹⁵³ and the National Registration Act¹⁵⁴ (The Electoral Act¹⁵⁵ is administered by the Minister of Justice, Legal and Parliamentary Affairs). However, there is no general post of Registrar-General, but each Act creates a post of Registrar-General for each function. Thus, the Birth and Deaths Registration Act creates the post of Registrar-General of Births and Deaths, the Citizenship of Zimbabwe Act creates a Registrar-General of Citizenship, and the Electoral Act a Registrar-General of Elections. These posts are part of the Public Service and appointments are thus made by the Public Service Commission - a body itself appointed by the President under section 74(1) of the Constitution. Currently Mr. Mudede has been appointed Registrar-General for all these Acts, including the Electoral Act. However, amendments to the Electoral Act and the composition of the Zimbabwe Electoral Commission (ZEC) in 2007 discussed above have had a significant impact on the manner in which the Registrar-General of Elections carries out his duties. Responsibility for the custody and maintenance of the voters roll has been moved from the office of the Registrar-General of Elections to ZEC.¹⁵⁶ Furthermore, in terms of section 18(2) "in the exercise of his or her functions, the Registrar-General of Voters shall be subject to the direction and control of the Commission". These are powers which ZEC declined to exercise in the election of March 29th 2008.¹⁵⁷

Mugabe had every intention of minimising the power of the MDC ministers as much as possible through the allocation of portfolios and assignment of Acts. When Mugabe realised that control of the Information and Communications Technology portfolio would give an MDC-T Minister

¹⁴⁸ Sections 14, 15 and 16 of the Police Act.

¹⁴⁹ Section 72 of the Police Act.

¹⁵⁰ Under section 76(4) and 76(4a) of the Constitution.

¹⁵¹ Section 76(2) of the Constitution.

¹⁵² Chapter 5:02.

¹⁵³ Chapter 4:01.

¹⁵⁴ Chapter 4:02.

¹⁵⁵ Chapter 2:13.

¹⁵⁶ Section 20 of the Electoral Act.

¹⁵⁷ See Matyszak, D. M *Law, Politics and Zimbabwe "Unity" Government* KAS and RAU 2010 p183 et seq.

power over the state's surveillance infrastructure, he moved quickly to reassign this part of the Minister's duties to the ZANU PF Minister of Transport.¹⁵⁸ The MDC's claim that the reduction of the duties of the MDC Minister of Information Communication Technology is a violation of the GPA is incorrect.

Mugabe also retains the power to "re-shuffle" his entire Cabinet should he so wish.

Mugabe did allow the MDC-T one Ministry with some real power – the Ministry of Finance, presumably on the understanding that little international aid would be forthcoming without this concession. The Ministry of Finance is a powerful portfolio, with the Minister responsible for the Administration of some 50 Acts of Parliament (including the Banking Act¹⁵⁹, the Customs and Excise Act,¹⁶⁰ the Exchange Control Act¹⁶¹ and the Income Tax Act¹⁶²). The Minister of Finance has some power to affect the activities of the Reserve Bank. Prior to the dollarisation of Zimbabwe's economy in February 2009, the Reserve Bank used its ability to print money to distribute resources to ZANU PF and the judiciary¹⁶³ and to engage in business ventures as "quasi" fiscal activities. It was an important component in ZANU PF's survival and was responsible for record breaking hyperinflation until the Zimbabwe dollar became completely valueless and the black market in United States dollars held sway.

The Governor of the Reserve Bank, Deputy Governors and Board of Directors are all direct appointees of Mugabe¹⁶⁴ and may be dismissed by Mugabe after "consultation with the Minister".¹⁶⁵ The Minister does have some powers over the Board, however. In addition to the usual and regular audit of the Reserve Bank's accounts, the Minister of Finance has the power under section 36(3) of the Reserve Bank Act to require auditors "to provide such other reports, statements or explanations in connection with the Bank's activities, funds or property as the Minister considers expedient." Given the apparent distribution of largesse to Judges, and admitted improprieties by the Governor, such as the use of funds belonging to donor agencies and NGOs without their authority¹⁶⁶ (which, if done by an ordinary citizen, or more analogously a lawyer holding monies in trust, would have resulted in charges of theft by conversion) it is apposite that the Minister exercise these powers.

iv) The Dismissal of Ministers

The removal of a Minister is provided for in Article 20.1.6(7) of Schedule 8 to the Constitution.

¹⁵⁸ See below.

¹⁵⁹ Chapter 24:20.

¹⁶⁰ Chapter 23:02.

¹⁶¹ Chapter 22:05.

¹⁶² Chapter 23:06.

¹⁶³ In early September, 2008 the Governor of the Reserve Bank arranged a delivery of generators, satellite dishes and receivers and large LCD television sets to all judges – despite the constitutional requirement that the remuneration of judges be set by Parliament and drawn from the Consolidated Revenue Fund (section 88 of the Constitution). Such largesse naturally compromises the judiciary's impartiality in the eyes of the public.

¹⁶⁴ Under section 14 of the Reserve Bank Act.

¹⁶⁵ In terms of Section 17 of the Act.

¹⁶⁶ *Zim: Central Bank Raids Foreign Accounts* <http://www.africanews.com> 09/04/09.

Ministers and Deputy Ministers may be relieved of their duties only after consultation among the leaders of all the political parties participating in the Inclusive Government.

The use of the passive voice obscures agency, but it must be assumed that dismissals are effected by the President under section 31E(1)(a) of the Constitution. Since this is done “after consultation” he is not bound by the results of the consultation. However, any replacement must be a nominee of the party to which the dismissed Minister belonged.¹⁶⁷

Arthur Mutambara, who signed the GPA as representative of MDC-M and was subsequently appointed as Deputy Prime Minister, has since been removed by the party as leader.¹⁶⁸ As such, he is no longer a “principal” to the agreement and should not be involved in discussions around the implementation thereof in this capacity. For so long as Mutambara remains a member of the MDC-M, his dismissal as Deputy Prime Minister is at the discretion of the President. Once he ceases to be a member of the MDC-M he must be dismissed and replaced by a nominee of MDC-M.¹⁶⁹

b) Other appointments

As discussed above, the GPA provided that all “key appointments” in terms of the Constitution and all appointments in terms of any Act of Parliament can only be made after securing the consent of the Prime Minister. Since this provision has been incorporated into the Constitution any appointment made without following this requirement is constitutionally invalid and may be challenged as such.¹⁷⁰

This provision constitutes the only significant limitation on Mugabe’s power which resulted from the GPA and Constitutional Amendment 19.¹⁷¹ It is also the only provision which places any real executive power into the hands of the Prime Minister (see further below).

Mugabe has responded to this limitation on his authority by simply ignoring it.

i) The Appointment of Provincial Governors

Mugabe had signalled his attitude to such limitation on his power even before the signing of the GPA. In July 2008 the parties agreed to an MOU which was to guide the negotiations. In terms of section 9 it was accepted that:

¹⁶⁷ In terms of Article 20.1.10.

¹⁶⁸ *Ncube Elected New MDC-M Leader* <http://www.radiovop.com> 08.01.11.

¹⁶⁹ 20.1.6(4) of Schedule 8 to the Constitution.

¹⁷⁰ Though who might have the *locus standi* to do so is legally complex.

¹⁷¹ It was only in the drafting of Constitutional Amendment 19 that the phrase “in consultation with” was defined to mean “after securing the agreement or consent of.” Without this definition the word “consultation” in the GPA and subsequently the Constitution would have been accorded its usual meaning – that Mugabe was bound to consult as stipulated but was not bound by any recommendations or discussions arising.

The Parties shall not, during the subsistence of the Dialogue, take any decisions or measures that have a bearing on the agenda of the Dialogue, save by consensus. Such decisions or measures include, but are not limited to the convening of Parliament or the formation of a new government.

Notwithstanding this agreement, in August 2008, Mugabe proceeded with the appointment of all ten Provincial Governors.¹⁷² As appointments which related to the formation of the new government, these were appointments to be made with the consensus of all the parties. The failure to do so constituted a clear breach of the political arrangement agreed by the parties under the MOU and was an act of bad faith by Mugabe. However, at this time, the breach was only of the MOU and not the Constitution. Mugabe made various excuses around this issue, undertaking to address the matter once the Governors had completed a year in office. There were suggestions at this time that the parties had agreed that there would be a new appointment of Governors at the end of August 2009 on the basis of a 5:4:1 distribution between MDC, ZANU PF and MDC-M respectively. The anniversary came and went and Mugabe then sought to rely on the fact that Governors are appointed for two year terms. When this two year term of office expired in August 2010, Constitutional Amendment 19 had been passed into law and Article 20.1.3(p) of the GPA had been incorporated into the Constitution as part of Schedule 8. It is repeated here;

*The President **in consultation** with the Prime Minister makes key appointments the President is required to make under and in **terms of the Constitution** or any **Act of Parliament**.*

Since in consultation with means “after securing the agreement or consent of” Tsvangirai, Mugabe’s unilateral reappointment of all 10 Provincial Governors once their two term limits had expired was a flagrant and unambiguous violation of this constitutional requirement. The Prime Minister has responded by instituting court proceedings to have the appointments set aside, fortunately eschewing the services of the Attorney-General on this occasion.¹⁷³ The result has been that this political hot potato has been moved from the political to the judicial realm.

ii) The Appointment of the Governor of the Reserve Bank

The Governor of the Reserve Bank was appointed in November 2008, that is, after the signing of the GPA but before the passage of Constitutional Amendment 19.

The appointment of the Governor of the Reserve Bank is provided for by an Act of Parliament - the Reserve Bank of Zimbabwe Act.¹⁷⁴ Accordingly, the President of Zimbabwe was obliged under 20.1.3(p) to consult with the Prime Minister before making this appointment. His failure to do so was a breach of the GPA, but not of the Constitution. At this time, “consultation” with the Prime Minister only was required and not his agreement or consent.

¹⁷² Made by the President in terms of section 4 of the Provincial Councils and Administration Act Chapter 29:11.

¹⁷³ Again, it is legally complex as to whether a Prime Minister may sue a President. The matter is further complicated by a possibly obsolete and inapplicable rule of court requiring that prior leave be obtained from the court before proceedings may be instituted against the President. The President has sought to defend the issue on this basis.

¹⁷⁴ Chapter 22:15 section 14.

ZANU PF sought to excuse the failure to consult the Prime Minister in relation to this appointment by pointing out that the formality of consulting the Prime Minister under 20.1.3(p) could not be met as, at the time of the appointment, the Prime Minister himself was yet to be appointed.

However, the GPA specifically provided¹⁷⁵ that the Prime Minister would be appointed by the President of Zimbabwe *prior* to the enactment of Constitutional Amendment No 19, thus anticipating that the Article would have operation before the formation of the Inclusive Government. It was thus implicit that, if the President intended to make an appointment under the Constitution or any Act of Parliament, he was required to appoint the Prime Minister first so that he was available to be consulted. The ability to do so prior to the enactment of Constitutional Amendment 19 was probably included for precisely this reason.¹⁷⁶

The appointment of Gideon Gono was not only a violation of the GPA, but may have violated the Reserve Bank Act. This is so for two reasons. Firstly, before appointing the Governor of the Reserve Bank the President was obliged, in terms of Section 14 of the Act, to consult with the Minister of Finance. At the time of the appointment of the Governor, the new Ministers had yet to be appointed.¹⁷⁷ Accordingly, the President was obliged to wait until a new Minister of Finance was appointed in order to comply with the requirement of consultation with the Minister under the Act. His failure to do so meant that the appointment was not in compliance with the Act. The intention of the Act may be to ensure that the person who occupies the post of Governor is someone who will enjoy a good working relationship with the Minister, as their respective duties are closely tied. By not following the provisions of the Act, incompatible persons occupy these positions to the detriment of good governance.

Secondly, it may be that Gideon Gono was not qualified to hold the post of Governor, as persons holding shares in any banking institution are excluded from holding the post.¹⁷⁸ It is believed that Gono still holds shares in a commercial bank, CBZ.

iii) The Appointment of the Attorney-General

¹⁷⁵ See below.

¹⁷⁶ It is perhaps worth noting that government adopted a similar argument to justify its failure to hold by-elections in terms of the Electoral Act (section 39) as required maintaining a reconstituted Zimbabwe Electoral Commission must first be appointed. Constitutional Amendment 19 altered the manner in which this body is to be constituted. However, although the body has since been constituted no by-elections have been held as legally required.

¹⁷⁷ The Constitution provides that the term of office of Ministers ends upon the assumption of office of a new President [31E(1)(c)]. The Supreme Court has ruled that where the same person is re-elected as President, that person is not a new President for the purposes of section 31E(1)(c) - *Quinnell v Minister of Lands Agriculture and Rural Resettlement* SC 47/04. Therefore, people who were Ministers under the outgoing government continued as such by virtue of the fact that no new president assumed office. However, 31E(2) of the Constitution also provides that no person shall hold office as Minister for longer than three months without being a member of Parliament. This three month period is suspended if Parliament is dissolved. The former Minister of Finance, Samuel Mumbengegwi lost his seat in the 2008 elections. Although he was entitled to remain as Minister for longer than three months while Parliament was dissolved, the moment Parliament sat on the 26.08.08 he ceased to be Minister of Finance.

¹⁷⁸ Section 16(a) of the Reserve Bank Act.

As with the appointment of Gideon Gono, this appointment was made prior to the passage of Constitutional Amendment 19, but during the course of the GPA – that is in December 2008. The Attorney-General is appointed by the President in terms of section 76(2) of the Constitution in consultation with the Judicial Service Commission. As such, it is an appointment in terms of the Constitution and thus falls squarely within the ambit of article 20.1.3(p) of the GPA. The GPA required that the President of Zimbabwe consult with the Prime Minister before appointing the Attorney-General. He did not do so. The appointment was thus a clear breach of the GPA.¹⁷⁹ Tomana has openly proclaimed his allegiance to ZANU PF¹⁸⁰ and his appointment was clearly based on political considerations. Due to his ability to order or prevent the prosecution of perpetrators of violence, this appointment lies at the root of the non-implementation of several other Articles of the GPA. The ability of ZANU PF perpetrators to carry out acts of violence without fear of arrest or prosecution inhibits the return to democracy in Zimbabwe more than any other factor.

iv) The Appointment of Permanent Secretaries

On 24th February, 2009 Mugabe unilaterally appointed all permanent secretaries. The appointments were unconstitutional as a result. Not only was Article 20.1.3(p) contravened but so too was a similar and slightly contradictory provision of the Constitution and GPA:¹⁸¹

*Senior Government appointments: The Parties agree that with respect to occupants of senior Government positions, such as **Permanent Secretaries** and Ambassadors, the leadership in Government, comprising the President, the Vice-Presidents, the Prime Minister and Deputy Prime Ministers, **will consult and agree on such prior** to their appointment.*

Despite initially announcing these appointments as being “null and void” a few weeks later, in a MDC-T press statement released on 21st May, 2009, Tsvangirai disingenuously declared:

I am pleased to announce that we have reached agreement on these appointments. We went through each one of the persons proposed and satisfied ourselves that they were suitable in terms of experience and qualifications. We do not believe that civil servants should be appointed on a partisan basis, so there will be no civil servant from the MDC or ZANU-PF.

The suggestion that ZANU PF stalwarts such George Charamba, permanent secretary in the Ministry of Information and an orchestrator of ZANU PF’s propaganda campaign¹⁸² against the

¹⁷⁹ The Attorney-General does not hold office simply at the pleasure of the President. The provision is badly drafted, but section 110 of the Constitution indicates that the Attorney-General may only be removed from office on specified grounds such as misconduct and the inability to discharge the functions of his office - and even then possibly only after a tribunal established for this purpose has recommended such removal from office. Accordingly, even if Mugabe had the political will to remove Tomana as Attorney-General, there would have to be compliance with the requirements of section 110 of the Constitution. The removal of Tomana on political grounds would violate those sections of the Constitution which ostensibly shield the office of the Attorney-General from political interference. Such an act would not be in accordance with the objective of the GPA of restoring the rule of law.

¹⁸⁰ *New AG Openly Declares Support for Zanu-PF* The Zimbabwe Times 13/01/09.

¹⁸¹ Schedule 8 to the constitution article 20.1.7.

MDC and Tsvangirai in the state media, is a non-political appointment, was not believed by anyone. Tsvangirai was obviously torn between confronting Mugabe over these illegalities and violations and revealing himself to be helpless to do anything about them or pretending that they were not an issue.

The permanent secretaries in all Ministries are thus almost all ZANU PF loyalists, causing no little difficulty for the MDC Ministers. The position within the Ministry of Education is instructive. In an attempt to get teachers back to work, the Minister directed that teachers who had unlawfully left their posts (usually on account of the inability of the government to pay any meaningful wage, but also because of political intimidation and violence) would be allowed back without reprisal. In fact, those teachers who have returned to rural schools have faced harassment from ZANU PF militia¹⁸³ and many have not been re-entered on the government pay roll by the permanent secretary for education.¹⁸⁴

v) *The Appointment of a Second Vice-President.*

Section 31C(1) of the Constitution simply provided that there be “no more than” two Vice-Presidents, giving the President the discretion as to whether to appoint more than one Vice-President. He had in fact appointed two - Joice Mujuru and Joseph Msika as Vice-Presidents in October 2008. However, Article 20.1.6 of Schedule 8 to the Constitution¹⁸⁵ now makes it a requirement that there be two Vice-Presidents. President Mugabe was thus required to appoint a second vice-president following the death of Vice-President Msika in early August 2009. The filling of vacancies in the executive is provided for by article 20.1.10 of Schedule 8.

In the event of any vacancy arising in respect of posts referred to in clauses 20.1.6 and 20.1.9 above, such vacancy shall be filled by a nominee of the Party which held that position prior to the vacancy arising.

As a constitutional appointment, Tsvangirai’s consent ought to be obtained, and withholding consent to the appointment to the subsequently selected¹⁸⁶ John Nkomo, would have afforded the MDC a powerful bargaining chip, as the positions of Vice-President are extremely important in ZANU PF’s politics of succession. Yet the MDC chose to interpret this clause as meaning that once a party has nominated its candidate, that is the end of the matter and the nominee must be appointed. This is not an interpretation which sits well with the refusal to appoint Roy Bennett, an MDC nominee, but a proposed appointment with which Mugabe does not agree.

vi) *The Appointment of Ambassadors*

¹⁸² *Tsvangirai Media-Onslaught Intensifies* <http://www.radiovop.com> 06/09/09.

¹⁸³ *New Terror for Returning Rural Teachers* <http://www.thezimbabwestandard.com/> 07/03/09.

¹⁸⁴ While the Minister concerned has defended his permanent secretary claiming that bureaucratic hurdles emanating from the Public Service Commissioners are to blame (SWRadio interview with David Coltart 21/08/09) the situation accords with anecdotal evidence of obstructionism by the permanent secretaries and the Minister’s defence of the permanent secretary needs to be interpreted in light of the general MDC strategy of non-confrontation at the time.

¹⁸⁵ This Schedule specifically overrides any other constitutional provision to the contrary – paragraph 1.

¹⁸⁶ He was appointed on the 13.12.09.

Mugabe appoints ambassadors in terms of the Constitution.¹⁸⁷ Once again this power must be read with the Articles in the 8th Schedule to the Constitution requiring consultation. Initially, Mugabe refused to appoint any MDC officials as ambassadors claiming that they needed to first undergo the necessary diplomatic training. Five such appointments were finally made in October 2009.¹⁸⁸ However, the issue became even more controversial in July 2010 when Mugabe reassigned various ambassadorial postings, including replacing the ambassador in the important posting of South Africa, which the MDC wanted filled by one of its officials. Once again, Mugabe acted unilaterally. Six of Zimbabwe's ambassadors were transferred and reassigned as ambassadors to the United Nations, European Union, Italy, Sweden, South Africa and Switzerland. ZANU PF apologists argued that this was not a breach of the GPA and Constitution as they were not appointments but merely reassignments. In so doing they ignored Section 113(5) of the Constitution:

In this Constitution, unless the context otherwise requires, a reference to the power to appoint a person to any public office shall be construed as including a reference to the like power—

(a) to reappoint him to that office;

*(b) to appoint him on promotion **or transfer** to that office;*

(c) to appoint him to act in that office;

(d) to fix and vary his conditions of service in that office, including his remuneration and the period of his appointment and any benefits to him in respect of the termination of his appointment

vii) The Appointment of Judges

The power to appoint judges is again vested in the President by the Constitution. As such the consultative provisions requiring Tsvangirai's consent have application. In May 2010, the President of Zimbabwe purported to appoint three people as judges to the High Court of Zimbabwe¹⁸⁹, and purported to appoint Justice George Chiweshe as Judge President of the High Court and Justice Rita Makarau as a Judge of the Supreme Court of Zimbabwe. All these appointments were made without the consultation and consent of the Prime Minister necessary to render them valid and constitutional.

Mugabe has thus acted as if the extensive powers accorded to him under the Constitution have not been fettered in any way by Constitutional Amendment 19. Notwithstanding these breaches of the Constitution and unilateralism by Mugabe, Tsvangirai has continued to insist that he shares power equally with Mugabe. The following statement is fairly typical:

There is nothing he [Mugabe] does that I don't agree and nothing I do that he does not agree.¹⁹⁰

¹⁸⁷ Section 78 of the Constitution.

¹⁸⁸ The appointments were to Australia, Germany, Nigeria, Senegal and Sudan.

¹⁸⁹ Garainesu Mawadze, Nicholas Mathonsi, and Andrew Mutema.

¹⁹⁰ *Tsvangirai Now GNU's Public Relations Officer* Zimbabwe Times 4/05/09.

The helplessness of Tsvangirai in the face of Mugabe's overweening power and statements such as this, brimming in pathos, do nothing to enhance Tsvangirai's stature as a leader.

Powers of the Prime Minister

In addition to a Cabinet, chaired by Mugabe, which sets government policy, a Council of Ministers is established by the GPA and Schedule 8 to the Constitution. Ostensibly its powers are to assess the implementation of Cabinet decisions, receive briefings from Cabinet Committees, and report to Cabinet on such briefings. The Council comprises all Cabinet Ministers. As such, it was difficult to see how it would consider issues or exercise any functions not undertaken by Cabinet and would quickly become redundant. It is unclear whether this Council has in fact met regularly and whether ZANU PF ministers have bothered to attend when it has met. This Council's function is, oddly, to ensure that the person who chairs it, the Prime Minister (Tsvangirai), "*properly discharges his responsibility to oversee the implementation of the work of government*". The Prime Minister thus seems subject to the Council of Ministers, rather than the converse as one might expect.

The Prime Minister is to be the Leader of Government Business in Parliament and shall be a member of the National Security Council (see below). Article 20.1.4 outlines the Prime Minister's other powers. The Prime Minister "shall oversee the formulation of government policies by the Cabinet" and "shall ensure that the policies so formulated are implemented by the entirety of government". He shall ensure that the Ministers develop appropriate implementation plans to give effect to the policies decided by Cabinet and the Ministers will report to the Prime Minister on all issues relating to the implementation of such policies and plans. These Articles lack necessary precision and he is given no authority to execute them or ensure that they are enforced, so what they mean and how the Prime Minister interprets them is largely irrelevant. The Prime Minister is powerless in the face of a recalcitrant Minister, lacking the formal power held by Mugabe through the threat of dismissal, removal from Cabinet reassignment to a more junior portfolio, removal of the power to administer particular Acts or, a directive to investigate a particular minister for corruption.

As a result, attempts by Tsvangirai to exercise power have been met with derision by ZANU PF Ministers. An issue relating to the accreditation of journalists to cover a June 2009 COMESA¹⁹¹ summit is telling. Prior to the establishment of ZMC (discussed above) there was no statutory body with which journalists could register as required by the Act and the requirement had thus to be regarded as suspended. Nonetheless, the former head of the MIC and Zimbabwe's Information Ministry continued to act as if the statutory body were still in existence.¹⁹² The Ministry of Information thus insisted that journalists intending to cover the COMESA summit be accredited by the (legally defunct) MIC. In response, Tsvangirai issued a directive to the Ministry to the contrary. The Minister of Information, Webster Shamu, ignored this directive, subsequently stating that he does not take instructions from the Prime Minister, and claiming that only the President has the power to issue such directions. He went on to elaborate that the Prime Minister was ignorant of the security concerns that arise from the presence of journalists at

¹⁹¹ A Regional Customs Union – the Common Market for Eastern and Southern Africa.

¹⁹² *Zanu-PF Defies Tsvangirai*, iafrica.com, 24.05.09 <http://news.iafrica.com/worldnews/1696850.htm>.

international summits. The issue of accreditation, he said, had been cleared with the President and, despite the legislation repealing the MIC, ‘functional vacuums’ could not be allowed to exist. In contravention of a court order,¹⁹³ the unaccredited journalists were barred from covering the summit. The lack of executive authority and powerlessness of Tsvangirai was thus starkly exposed. After this incident Tsvangirai avoided publically issuing directives to ZANU PF Ministers.

In case the point had not been made clearly enough, shortly after this debacle the Permanent Secretary in the Ministry of Information and presidential spokesperson, George Charamba, issued a directive to the state media that, whenever President Mugabe was mentioned, the phrase ‘Head of State and Government and Commander-in-Chief of the Zimbabwe Defence Forces’ must be inserted parenthetically immediately thereafter – a directive which has been followed without remiss.¹⁹⁴

Tsvangirai's position in government under the Agreement is little more than window dressing.

Legislative Power

Legislative authority vests in Parliament *and* the President under section 32 of the Constitution. (The ZANU PF dominated upper House of Parliament, the Senate, has the power only to suggest amendments to legislation to the House of Assembly and delay the passage of legislation for 90 days¹⁹⁵). Accordingly, the MDC cannot use its majority in the House of Assembly to pass and amend legislation as such legislation does not become law without Presidential assent.¹⁹⁶ Where the President withholds his assent, it can only be overridden by a two-thirds majority in the House of Assembly, which the MDC cannot muster without ZANU PF support. Section 31H(5) of the Constitution obliges the President, in the exercise of his functions, to “act on the advice of Cabinet”, and not merely to consult Cabinet. This presumably applies to the decision whether to withhold assent to legislation. However, section 31H(5) must be read together with section 31K(2) of the Constitution:

Where the President is required or permitted by this Constitution or any other law to act on the advice or recommendation of or after consultation with any person or authority, a court shall not, in any case, inquire into either of the following questions or matters—

- (a) the nature of any advice or recommendation tendered to the President;*
- or*
- (b) the manner in which the President has exercised his discretion.*

If Mugabe ignores the advice of Cabinet, there is thus no remedy available other than impeachment, which itself requires a two thirds majority (section 29(3) of the Constitution).

¹⁹³ *Journalists Win Landmark Case Against Government* SW Radio Africa 04.06.09 <http://www.swradioafrica.com/news050609/journalists050609.htm>.

¹⁹⁴ See, for example *Tsvangirai Media-Onslaught Intensifies* fn 177 above.

¹⁹⁵ Schedule 4 of the Constitution.

¹⁹⁶ Section 51(2) of the Constitution.

The President also has legislative powers in terms of the Presidential Powers (Temporary Measures) Act.¹⁹⁷ Although this power should only be utilised in cases of urgency where it is inexpedient to await the passage of a Bill through Parliament,¹⁹⁸ Mugabe has repeatedly used the legislation to rule by decree.¹⁹⁹ However, such legislation must be presented to Parliament for approval within eight days of Parliament's next sitting and will lapse without such approval. With the majority in Parliament held by the combined MDC formations, such legislation will not be simply rubber stamped as previously. If Parliament is in recess, the legislation continues in force until the eight day provision can apply. The President may not, however, enact legislation relating to budgetary finance and withdrawals from the Consolidated Revenue Fund in this manner.

The effect of the current balance between Parliamentary and Presidential legislative power is that the President cannot (while Parliament is sitting) legislate without Parliament and Parliament cannot legislate without the President. The MDC's ability to ensure that the legislative reform required by the GPA is implemented is hampered by the need for Mugabe's consent. ***A simple constitutional amendment included in Amendment 19 to place full legislative authority where it belongs, with Parliament, would have dealt with this problem.***

The Constitutional Commissions

The issue of these Commissions has been touched upon briefly in relation to the Zimbabwe Media Commission and Article XIX of the GPA. There it was pointed out that the reconstitution of these Commissions was pursuant to reforms introduced in 2007 and not by virtue of the GPA or Constitutional Amendment 19. However, Article XXIV of the GPA provided that certain parts of the Kariba Draft would be included in the amendments to be made to the Constitution. One such part was Chapter 13 of the Kariba Draft, which set out the Constitutional Commissions. Although the reconstitution of the Commissions preceded the GPA, it is important to consider whether any of these Commissions have the power to ensure the implementation of some of its provisions.

a) The Zimbabwe Electoral Commission (ZEC)

To suggest that the ZEC which conducted the 2008 elections was biased in favour of ZANU PF would be to minimize its role in this regard. It was little more than a mechanism by which ZANU PF strategy was implemented, as the fiasco over a vote recount and delay in announcing election results revealed. The mandatory statutory report on the elections compiled by ZEC for presentation to the President and parliament²⁰⁰ egregiously makes no mention of the endemic violence before the presidential run-off election, now admitted by all, other than to say:

¹⁹⁷ Chapter 10:20.

¹⁹⁸ Section 2 of the Act.

¹⁹⁹ *Enforcing the Rule of Law in Zimbabwe* Zimbabwe Human Rights NGO Forum (2001). By 2001, the President had used his powers under the Act to make 450 separate legislative interventions.

²⁰⁰ Required by Section 12 of the Zimbabwe Electoral Commission Act [Chapter 2: 12]. The report was presented on 13.05.09, five months after the statutory deadline.

*According to the police, save for some parts of Mashonaland Central and Mashonaland East provinces where some incidents of interparty violence were reported, the rest of the country was generally peaceful.*²⁰¹

ZEC now comprises a chairperson, appointed by the President after consultation with the Judicial Service Commission and the CSRO, and eight other members appointed by the President from a list of not fewer than twelve nominees submitted by the CSRO. The reconstitution of ZEC with a significant number of reform-minded members is a positive step and may prove to be one of the most useful instruments in attempts to advance democracy in Zimbabwe. However, this development is not unadulterated and, like the Zimbabwe Media Commission, is tainted by the MDC's seemingly unnecessary compromise on the nominees to this important body.

ZEC's report on the 2008 elections was not debated in parliament and the opportunity to expose the failings of the Commissioners responsible for its contents lost. Two of the previous Commissioners responsible for the report were reappointed to the new ZEC.²⁰² Furthermore, Justice Mtambanengwe was appointed as chairperson. This appointment is curious for two reasons. Firstly, Prof. Reginald Austin, who had been proposed by the MDC for this position, was quite obviously the most qualified candidate, as a lawyer with extensive international experience in electoral observation and electoral management.²⁰³ Secondly, Justice Mtambanengwe, who initially sought to carry out his duties while still a judge in Namibia, but has now returned to Zimbabwe, appears to be in a fragile state of health. He may thus be unable to give robust direction to the affairs of the Commission and act decisively in the face of fractious caucuses within the Commission.²⁰⁴ Deputy Chairperson, Joyce Kazembe, of the previous and discredited ZEC, wields undue influence within the body.²⁰⁵

There are several other adverse factors that affect the salutary operation of ZEC. ZEC has not attempted to replace the senior members of its secretariat, most of whom are partisan appointees acceptable to ZANU PF, and has no general power to replace the Chief Elections Officer without the authority of Minister of Justice.²⁰⁶ The Minister of Justice must also approve electoral regulations made by ZEC in terms of the Electoral Act.²⁰⁷ These provisions are unsatisfactory in that the Minister is not a politically impartial actor in the electoral process. The Minister of Foreign Affairs also has the power to veto the accreditation of any foreign elections observer.²⁰⁸

²⁰¹ See D. Matyszak, *Hear no Evil, See no Evil, Speak no Evil: A Critique of the Zimbabwe Electoral Commission Report on the 2008 General Elections* ([Harare]: Research and Advocacy Unit, 2009), available at <http://idasa.org/gbOutputFiles.asp?WriteContent=Y&RID=2575>.

²⁰² Joyce Kazembe and Theophilus Gambe.

²⁰³ He has served as the Head of Legal and Constitutional Affairs for the Commonwealth Secretariat; as Chief Electoral Officer of the United Nations Transitional Authority in Cambodia; as a Director of the Electoral Unit at International IDEA in Stockholm; as Chief Electoral Adviser for Afghanistan's 2004 presidential election; and as Director of the Electoral Component, United Nations Observer Mission in South Africa.

²⁰⁴ *Elections Chief to Operate From Namibia* Zimonline, 12.02.10 <http://www.zimonline.co.za/Article.aspx?ArticleId=5704>.

²⁰⁵ The other members are Daniel Chigaru, Geoff Feltoe, Petty Makoni, Sibongile Ndhlovu, Bessie Nhandara, Mukuni Nyathi.

²⁰⁷ Section 192(6) of the Electoral Act.

²⁰⁸ Section 6(4)(a) of the Electoral Act. This provision is apparently under review as part of proposed reforms to the Electoral Act.

Despite these unsatisfactory provisions, the Commission still has power over the conduct of the elections, must ensure that they are free and fair, and will be expected to table a suitably critical report if accepted international standards for a democratic election are not met.²⁰⁹ If the next elections do not meet these standards, given the composition of ZEC, the body is likely to be split by internal dissension in this regard. It is difficult to see a report on the elections emerging with the agreement of all. Nonetheless, there will be no repeat of a report on the elections reflecting the views of the Commission as a whole which falsely certifies the elections as meeting democratic standards while the current Commissioners are in office.

ZEC is also responsible for the maintenance and custody of the electoral roll,²¹⁰ a responsibility that the previous ZEC (unlawfully) left in the hands of the widely distrusted Registrar-General of Voters. The inflated voters' rolls, containing the names of deceased persons and duplicate entries, has long been believed to facilitate electoral fraud.²¹¹ The new ZEC has the power to ensure that accurate voters' rolls are in place before the next election.²¹²

b) The Zimbabwe Human Rights Commission (ZHRC)

The appointment of commissioners to the ZHRC, first established by Constitutional Amendment No. 18,²¹³ unlike those to the ZMC and ZEC, cannot presently be viewed as a positive achievement. The President appoints the chair to the Commission, *'after consultation with'* the Judicial Service Commission and CSRO, and appoints eight other members from a list of sixteen nominees submitted by the CSRO, at least four of whom must be women.²¹⁴ Persons appointed to the ZHRC must be chosen for *'their knowledge of and experience in the promotion of social justice or the protection of human rights and freedoms'*.

In contrast to the intense political manoeuvring that took place around the appointments to the ZMC and ZEC, the MDC and ZANU PF paid little heed to the composition of this body, an indication of its powerlessness. An Act of Parliament is to confer power on the ZHRC to enable it to carry out its functions.²¹⁵ However, no such Act has been passed nor is one even on the agenda for the next parliamentary session.²¹⁶ No monies were apportioned for the operations of the body in the 2010 budget, and it has neither the offices nor infrastructure necessary to carry out any activities. Even more telling is the fact that it is presently not properly constituted, and any action taken by it would be subject to legal challenge. The improper constitution arises from the fact that five of the eight appointees selected from the CSRO list are men. At least four must

²⁰⁹ Section 100C(1)(a) of the Constitution.

²¹⁰ Section 100C(1)(c) and (d) of the Constitution.

²¹¹ See, generally, D. Matyszak, 2013 *Vision – Seeing Double and the Dead: A Preliminary Audit of Zimbabwe's Voters' Roll* ([Harare]: Research and Advocacy Unit, 2009), available at http://www.kubatana.net/docs/demgg/rau_audit_voters_roll_091012.pdf.

²¹² Section 20(1) of the Electoral Act.

²¹³ Now section 100R of the constitution by virtue of Constitutional Amendment No. 19.

²¹⁴ Section 100R(1)(a) and (b) of the constitution.

²¹⁵ Section 100R(8) of the constitution.

²¹⁶ The Third Session of the Seventh Parliament, see Veritas, Bill Watch, 28/2010 (16.07.10). However, it is part of the reported 'implementation matrix' (see below).

be women. The breach arose from the fact that one of the five men is named Carroll Khombe.²¹⁷ Having interviewed Prof. Khombe, the CSRO was presumably aware of his sex (notwithstanding his first name). Those involved in the political horse-trading that determined the appointees appear not to have been, indicating the disinterest of those involved in the selection process.²¹⁸ Prof. Khombe is a researcher in animal science and has no known human-rights record. The only one of the eight who might be said to meet this criterion for selection is law lecturer Ellen Sithole, who has been involved in women's rights, though is not a prominent activist. Rather than having a record of advancing human rights, several of the commissioners have a reputation for the opposite. Jacob Mudenda is a former governor of Matabeleland North. He has been accused of interfering with development and food aid for people in the Binga area, which, despite rampant poverty, has resolutely voted for the MDC.²¹⁹ He was also implicated in the 'Willowgate' car scheme scandal.²²⁰

Joseph Kurebwa heads the political science department at the University of Zimbabwe. He gained some notoriety by conducting a 'poll' (reportedly in collaboration with the CIO and disowned by the university)²²¹ predicting that Mugabe would beat his rivals in the 2008 elections, and issued comments supporting a ban by police on public demonstrations:

*The police are incapacitated. The World Cup is one area they need to focus on, but I think the broader perspective of these bans is to do with the constitution outreach programme, which needs the police to be on high alert. ... I know some people are now thinking some political party has started to use POSA again, but let us face the reality, no party would want to come to power without a strict security law. It is in the interest of the country and such laws are important.*²²²

Such sentiments do not inspire confidence that he has the perspective required to protect civil liberties in Zimbabwe.

Elasto Mugwadi is a former Chief Immigration Officer, well known to human rights groups for his defiance of a High Court order interdicting his deportation of outspoken journalist, Andrew Meldrum. The other Commissioners have qualifications in social science, political science and economics. The ZHRC is headed by Prof. Reginald Austin, presumably as part of the compromise which denied him the chair of ZEC (see above). The composition of this

²¹⁷ The others are Kwanele Jirira, Joseph Kurebwa, Jacob Mudenda, Elasto Mugwadi, Japhet Ndabeni-Ncube, Nomathemba Nesenani and Ellen Sithole (Deputy Chair).

²¹⁸ The Zimbabwe Independent outlined the curricula vitae of the commissioners and referred to Prof. Khombe as 'she' throughout; see *Scepticism Greets Rights Commission*, Zimbabwe Independent, 09.04.10, <http://www.theindependent.co.zw/local/26025-scepticism-greets-rights-commission.html>.

²¹⁹ *Zanu PF bungling, Cronyism Alienated Binga People*, Daily News, 16.07.02, available at http://www.zimbabwe-situation.com/july17_2002.html.

²²⁰ Zimbabwe. Report of the Commission of Inquiry into the Distribution of Motor Vehicles [Chairman: W. R. Sandura] (Harare: Government Printers, March 1989), Chapter 11. When access to foreign currency was severely restricted in Zimbabwe, the Willowvale vehicle assembly plant was used to supply vehicles to the well-connected, ahead of those on waiting lists, who used this facility to financial advantage. The exposé of this scam caused a major scandal in 1988 and resulted in the Commission of Inquiry and the dismissal of several government ministers.

²²¹ *Scepticism Greets Rights Commission* Zimbabwe Independent 09.04.10.

²²² Quoted in *GNU Gets Stuck with Stinky POSA* Financial Gazette, 12.06.10. <http://www.financialgazette.co.zw/national-report/4463-gnu-gets-stuck-with-stinky-posa.html>.

commission is something of a mockery when one considers the theoretical importance and role of a body of this nature.

It should also be noted that the introduction of a Human Rights Commission was first mooted by the ZANU PF Minister of Justice in 2005.²²³ Since most international forums (to which successful communications have been made by human rights organizations concerning rights abuses by the Zimbabwe government) require that local remedies be exhausted first,²²⁴ the proposal was perceived to be intended to establish a government-controlled hurdle in the form of this additional local 'remedy'.²²⁵ When active, the ZHRC will act as an inhibiting mechanism before these bodies can be approached.

c) The Anti-Corruption Commission

ZANU PF and Mugabe have remained in power through electoral violence and an extensive web of patronage, in which the land invasions were an important component. Mugabe is unlikely to permit the existence of an anti-corruption body that threatens this system of patronage. Significantly, the Anti-Corruption Commission was not included when the changes to the method of appointments to the other commissions considered here were introduced in 2007. Until Constitutional Amendment No. 19, the Commission consisted of 'at least four and not more than nine members appointed by the President' in his sole discretion.²²⁶ Constitutional Amendment No. 19 added the phrase 'in consultation with the Committee on Standing Rules and Orders' but anomalously eschewed the formula of using a list submitted by CSRO that was adopted for all the other commissions.²²⁷ This body is yet to be reconstituted, though the previous appointees appear active.²²⁸

ZANU PF's antipathy to any probe into corrupt activities is reflected in a reluctance to undertake the land audit provided for by the GPA.²²⁹ It also emerged, when the Minister of Finance Tendai Biti suggested to Cabinet that an investigation be undertaken to establish how the Reserve Bank of Zimbabwe became so heavily indebted, that its assets were being auctioned to settle debts with creditors.²³⁰ The suggestion was greeted with outrage by ZANU PF Cabinet Ministers. As indicated above, the Reserve Bank has played a key role in the dispensing of patronage for ZANU PF and, besides the distribution of farm inputs and machinery and foreign currency, it is

²²³ See, for example *Chinamasa Censures NGOs* Zimbabwe Independent, 18.03.05, <http://www.Theindependent.co.zw/local/11021.html>. Provisions establishing a Human Rights Commission in 2007 were never implemented.

²²⁴ For example, the African Commission on Human and Peoples Rights, and the SADC Tribunal.

²²⁵ The Herald, 28.03.06, noted that the commission will 'pull the rug from under their [NGOs] feet as it will be tasked with communicating with all treaty bodies that they fed with lies over the human rights situations in the country.' The Zimbabwe Independent, 31.03.06, quoted the National Constitutional Assembly as contending that the Commission would 'serve as additional bureaucratic ruling to prevent and delay Zimbabwe from mounting human rights complaints in the international arena'; both quoted in Media Monitoring Project Zimbabwe, Weekly Media Update, 2006-13, 02.04.06 <http://www.mmpz.org/sites/default/files/2006-13.pdf>.

²²⁶ Section 108A of the unamended constitution. As presidential appointments, the consent of Tsvangirai is still required in terms of article 20.1.3(p) of Schedule 8 to the Constitution.

²²⁷ Section 100K of the current Constitution.

²²⁸ *Corruption Investigator Faces Disciplinary Action* <http://www.theindependent.co.zw/> 17.03.11.

²²⁹ Article 5.9(a).

²³⁰ *Biti Storms Out of Cabinet* Zimbabwe Independent, 18.06.10, <http://www.theindependent.co.zw/local/26959-biti-storms-out-of-cabinet.html>.

doubtful that its commercial ventures with ZANU PF officials were entered into at arm's length.²³¹ Biti has not sought to exercise his power under the Reserve Bank of Zimbabwe Act to conduct a full audit of the Bank.

ZANU PF officials have also (unlawfully) prevented a parliamentary committee from investigating corruption and rights violations in diamond mining in Chiadzwa, blocking its attempts to visit the area.²³² Farai Maguwu, who has exposed human rights abuses taking place in Chiadzwa, has been arrested and charged with 'publishing or communicating false statements prejudicial to the State'.²³³ A similar fate befell Harare City Councillors who reported corruption in the sale of municipal properties to senior ZANU PF officials by members of the previous municipal administration. They have been charged with criminal defamation,²³⁴ providing an interesting cameo of the interplay between the executive components of the ZANU PF-controlled police and Attorney-General and democratic power in the hands of the MDC.

Conclusion

The GPA is replete with lofty provisions designed to widen democratic space in Zimbabwe, but there is, however, a dearth of provisions by which they may be implemented. To ensure implementation the MDC required control over ministries and statutory institutions with the appropriate executive power. None of the ministries Mugabe allocated to the MDC afforded it such control. This left two other avenues to be exploited by the MDC. One is the requirement that all key appointments in terms of the Constitution and any appointment in terms of any Act of Parliament can only be lawfully made by the President with the consent of the Prime Minister. Mugabe has simply ignored this requirement where it suited him to do so, and Tsvangirai has not sought to exercise this right in all instances.²³⁵ The importance of this right in the implementation of the GPA does not appear to have been grasped by SADC, as manifested in the demand that the MDC-T "park" the issues arising from Mugabe's unilateral appointments to executive and other positions. The correct approach is to insist on compliance, something the MDC itself has not done with due rigour. The other avenue open to exploitation was for the MDC to use its dominance of the Standing Committee on Rules and Orders of Parliament to ensure that the Constitutional Committees – particularly the all important Zimbabwe Electoral Commission – comprised resilient, resourceful and informed individuals who could robustly advance an agenda

²³¹ *Minister to Evict RBZ Over Rent*, The Standard, 13.06.10 <http://www.thestandard.co.zw/local/25117-minister-to-evict-rbz-over-rent.html>. See also *RBZ Repossess [sic] Vehicles*, Radio VoP, 22.08.10 available at http://www.zimbabwesituation.com/aug23_2010.html, for interesting revelations on how and to whom the Reserve Bank of Zimbabwe distributed vehicles.

²³² *Zimbabwe Parliament Mines Committee Again Blocked in Diamond Oversight Mission*, VOA News, 20 Apr. 2010, <http://www.voanews.com/zimbabwe/news/Zimbabwes-Mines-Committee-Fails-Again-To-Access-Marange-Diamond-Zone-20Apr10-91620004.html>. The Minister of Mines claimed that police clearance was required; the police claimed that clearance was required from the Minister of Mines.

²³³ Under section 31 of the Criminal Law (Codification and Reform) Act; see interview with Farai Maguwu, SW Radio Africa, 4 June 2010: transcript, 'Arrested Zimbabwean diamond researcher "set up" by Kimberley Process monitor', at <http://www.swradioafrica.com/pages/hotseat070610.htm>.

²³⁴ Under section 96 of the Criminal Law (Codification and Reform) Act; see *Defamation Case Against Masunda, Councillors moved to June* NewsDay, 26 May 2010, <http://www.newsday.co.zw/article/2010-05-26-defamation-case-against-masunda-councillors-moved-to-june>.

²³⁵ For example in the appointment of the Vice-Presidents and ZANU PF Ministers, permanent secretaries, police promotions and appointment of traditional leaders.

of democratic reform. This it failed to do. While the MDC failed to exploit the few opportunities open to it, Mugabe continued to control all vital sectors, ministries and institutions capable of effecting reform – the military, the media and those concerned with the enforcement of the law. Implementation of democratic reform contemplated by the GPA has thus depended on the goodwill and political willingness of Mugabe and his Ministers, qualities that were notably lacking prior to the signing of the GPA and notably lacking thereafter.

Accordingly, one should exercise some caution before referring to the GPA as an “African solution to an African problem” as certain uncomfortable readings of the maxim may suggest themselves.

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