

The Shortcomings of
THE KARIBA DRAFT CONSTITUTION



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I. INTRODUCTION

This report analyzes the Kariba Draft Constitution, a document negotiated in secret in September 2007 and referenced in Article 6 of the Global Political Agreement between Zimbabwe's three primary political parties. The report briefly considers the process that led to the creation of the Kariba Draft and then explores the content of that document. The substance of the Kariba Draft is compared to that of the current Constitution and the Constitutional Commission Proposal which was rejected in a national referendum in February 2000.

This report concludes that the Kariba Draft is inadequate in terms of both process and content. If the Kariba Draft were to be used as the basis for constitution-making in the country, Zimbabweans would be denied their right to write a constitution for themselves. Moreover, the content of the Draft is inadequate. It fails to protect fundamental rights and freedoms and promotes the continued dominance of government by the Executive.

Zimbabwe's political leaders should immediately denounce the use of the Kariba Draft as a fundamental document in the constitution-making process. They should instead embrace people-driven, democratic processes as the basis for constitutional reform in Zimbabwe.

II. BACKGROUND

In November 1999, a Constitutional Commission led by Justice Godfrey Chidyausiku unveiled a proposed Constitution for Zimbabwe. The National Constitutional Assembly (NCA), along with partners in civil society and opposition political parties, organized the NO Vote Campaign, which led to the defeat of the proposal in a February 2000 referendum. The NCA and others alleged that the will of the people, as expressed during months of public consultation, had not been reflected in the Constitutional Commission Proposal. Specifically, it was argued that the proposal, if enacted, would produce an unworkable system of government with an unchecked Executive, a weak Parliament, and inadequate protections for fundamental rights and freedoms.

In September 2007, representatives of the ruling ZANU-PF and the two formations of the opposition Movement for Democratic Change met in secret at Lake Kariba and drafted a new constitutional proposal. This document, which is now known as the Kariba Draft Constitution, was referenced in the Global Political Agreement signed on September 15, 2008. Article 6 of the agreement establishes a 19-month constitution-making process. Many have speculated that certain politicians want to use the Article 6 process to impose the Kariba Draft on the people of Zimbabwe. In February 2009, President Robert Mugabe seemed to confirm these suspicions by saying:

“There is already a draft that the three parties agreed on. They call it the Kariba Draft because that is where they came up with the document. We shall all look at it and when we are all satisfied, it shall be put to the people in a referendum.”

III. PROCESS

The Kariba Draft was written during a clandestine meeting between the principal negotiators of Zimbabwe's three primary political parties. For this reason, very little is known about the process that went into the creation of the Draft. It has been suggested that no more than six individuals assumed primary responsibility for writing the Draft. The content of the Kariba Draft indicates that the framers of this document used the Constitutional Commission Proposal as the basis of the Draft, with portions being rewritten or imported from Zimbabwe's current Constitution.

The process that led to the creation of the Kariba Draft is inappropriate for two broad reasons:

First, and most importantly, Zimbabweans must be given the right to determine the rules by which they will be governed. This view is reflected in the Zimbabwe People's Charter, which calls for a "people-driven, participatory" process of constitutional reform spearheaded by an inclusive All Stakeholders Commission. The writing of the Kariba Draft by a handful of political elites without consulting the public is an undemocratic usurpation of the right of Zimbabweans to write a constitution for themselves.

Second, the Kariba Draft should be rejected because it is based on the Constitutional Commission Proposal, a document that has already been rejected by the people of Zimbabwe. Moreover, as described below, the ways in which the Kariba Draft differs from the Constitutional Commission Proposal generally reflect compromises of democratic principles of governance and further divergence from the will of the people.

IV. SUBSTANCE OF THE KARIBA DRAFT

As described above, the content and structure of the Kariba Draft are closely tied to the content and structure of the Constitutional Commission Proposal. Over half of the articles in the two documents are identical, and most of the changes that have been made are extremely minor. Therefore, nearly all of the weaknesses that led to the rejection of the Constitutional Commission Proposal are replicated in the Kariba Draft.

Despite the broad similarity of the two documents, a number of major changes to the Constitutional Commission proposal were made by the framers of the Kariba Draft. In many cases, these changes involve the replacement of a provision of the Constitutional Commission Proposal with one from the current Constitution. In some places, changes have been made which clarify or strengthen provisions in the Constitutional Commission Proposal. For example, the Kariba Draft adds section 121, which specifies the composition of the Committee on Standing Rules and Orders, a matter which the Constitutional Commission Proposal did not address.¹ However, there are many places where changes have been made which weaken the Draft. Extremely worrying are many small changes that

¹ [121] Committee on Standing Rules and Orders.

appear to be insignificant but may open the door for political manipulation of government structures. For example, the Kariba Draft makes the removal of a member of Parliament automatic after he or she is absent from 21 consecutive sittings, whereas the Constitutional Commission Proposal makes removal contingent on a vote of the Senate or House of Assembly.² This change appears inexplicable, but given Zimbabwe's history of violence and intimidation in the political arena, it is possible to imagine that the change was crafted to allow the expulsion of opposition politicians after they have been arrested or forced into hiding. Many seemingly minor changes reflected in the Kariba Draft raise similar questions about the intent of the drafters.³

The sections that follow analyze the provisions of the Kariba Draft as they relate to major constitutional issues.

1. Structure and Powers of the Executive. Under the Kariba Draft, all executive authority rests in the President, who "takes precedence over all other persons in Zimbabwe," and his Cabinet. Alternatively, the Constitutional Commission Proposal suggests that the President share executive authority with a Prime Minister. Although the Prime Minister's role under the Constitutional Commission Proposal is relatively weak, the complete absence of this office in the Kariba Draft removes a vital check on the power of the President.⁴

Under the current Constitution, the President enjoys expansive, unchecked powers that can be used for political advantage. These powers are not diminished under the Kariba Draft. The Draft allows the President to unilaterally declare a state of public emergency and suspend human rights protections. Even if Parliament fails to approve such a Declaration, the President may cause the state of emergency to remain in effect for up to 21 days.⁵ The Kariba Draft also maintains the President's ability to grant pardons or reprieves to those convicted of criminal offences.⁶

The Kariba Draft eliminates many of the checks on presidential power that were included in the Constitutional Commission Proposal.⁷ For example, the Kariba Draft removes the need to consult with another office or gain Senate approval when carrying out many executive functions.⁸ Moreover, the Draft adds a section from the current Constitution which limits the ability of courts to inquire into the manner in which Executive powers are exercised.⁹

In addition to these deficiencies, the Kariba Draft allows the President to unilaterally appoint many public officers and provides for the structural dominance of the other branches of government by the President. These problems are discussed below.

² [118] Tenure of seat of Member of Parliament.

³ [103] Legislative authority; [118] Tenure of a seat of a member of Parliament; [128] Quorum in Parliament.

⁴ [78] Executive Authority; [93] Appointment of Ministers; [96] Cabinet; [98] Executive functions of President; [101] Public emergencies.

⁵ [101] Public emergencies.

⁶ [100] Prerogative of mercy.

⁷ [81] Qualifications and disqualifications for election as President; [90] Removal of office of President; [93] Appointment of Ministers; [97] Vote of no confidence in government; [99] War and peace; [101] Public emergencies; [102] Extent to which exercise of President's powers justiciable.

⁸ [98] Executive functions of President.

⁹ [102] Extent to which exercise of President's powers justiciable.

2. Presidential Appointments. Generally, the Kariba Draft retains the current Constitution's framework for presidential appointments. Appointments are most often made after "consultation" with some other individual or body. In most cases, that person or body is also appointed by the President. Whereas the Constitutional Commission requires the Senate to approve most presidential appointees, the Kariba Draft contains very few limits on the President's power to appoint individuals of his choice. The Draft also eliminates checks on the President's power to appoint by eliminating the office of Prime Minister. For these reasons, very few public institutions would operate independently under the Kariba Draft.

In addition to presidential appointments to the legislature and judiciary (discussed below), under the Kariba Draft, no individual or body has the authority to block a President's appointment to the following offices or bodies:

- Vice-Presidents¹⁰
- Ministers¹¹
- Cabinet members¹²
- Diplomats, ambassadors and "principal representatives of Zimbabwe abroad"¹³
- Judicial Service Commission¹⁴
- Attorney-General and Deputy Attorney-General¹⁵
- Chairperson of the Public Service Commission¹⁶
- Permanent Secretaries¹⁷
- Commander of the Defence Forces and commanders of particular services of the Defence Forces¹⁸
- Defence Forces Service Commission¹⁹
- Commissioner-General of Police²⁰
- Police Service Commission²¹
- Commissioner of Prisons²²
- Prison Service Commission²³
- Chairperson of the Zimbabwe Electoral Commission²⁴
- Chairperson of the Zimbabwe Human Rights Commission²⁵
- Zimbabwe Anti-Corruption Commission²⁶

¹⁰ [88] Vice-Presidents.

¹¹ [93] Appointment of Ministers.

¹² [96] Cabinet.

¹³ [98] Executive functions of President; [185] Ambassadors and other principal representatives of Zimbabwe abroad.

¹⁴ [172] Judicial Service Commission.

¹⁵ [174] Appointment of Attorney-General; [179] Deputy Attorney General.

¹⁶ [182] Public Service Commission.

¹⁷ [184] Permanent Secretaries.

¹⁸ [190] Command of Defence Forces.

¹⁹ [192] Defence Forces Service Commission.

²⁰ [194] Commissioner-General of Police.

²¹ [196] Police Service Commission.

²² [198] Commissioner of Prisons.

²³ [200] Prison Service Commission.

²⁴ [201] Establishment and composition of Zimbabwe Electoral Commission.

²⁵ [209] Establishment and composition of Zimbabwe Human Rights Commission.

- Public Protector and Deputy Public Protector²⁷
- Auditor-General²⁸
- Governor of the Reserve Bank²⁹
- Provincial Governors³⁰
- Chiefs³¹

3. The Legislature. Under the Kariba Draft, the Legislature is dominated by the Executive. Whereas the Constitutional Commission Proposal suggests a Senate comprised of 60 elected members, the Kariba Draft replicates the current structure of the Senate, with its 17 presidential appointees.³² This provides an almost insurmountable senatorial majority for the President's party. The Kariba Draft, like the Constitutional Commission Proposal, permits the President to dissolve Parliament at any time, allowing him to override proposed legislation that he opposes and perhaps escape impeachment.³³ He may also unilaterally extend a term of Parliament during times of war.³⁴ Moreover, the Draft makes it very difficult for Parliament to pass a vote of no confidence.³⁵ In fact, the Draft removes the subsection in the Constitutional Commission Proposal that specifies that if a President fails to comply with the requirements of a vote of no confidence he must resign, allowing a President to simply ignore such an action.

The Kariba Draft also departs from the Constitutional Commission Proposal in a number of significant ways that do not directly touch upon executive power. For example, the Draft envisions a National Assembly composed entirely of members elected by a single constituency.³⁶ This eliminates the Constitutional Commission Proposal's establishment of 50 seats for members elected under a system of proportional representation, a provision which may have helped minority groups in Zimbabwe gain parliamentary representation. Additionally, the Kariba Draft makes it easier to alter some provisions of the Constitution.³⁷ Many of the departures from the Constitutional Commission Proposal in the chapter on Parliament seem inexplicable, except that they may be evidence of efforts by politicians to open the door for manipulation of the legislative system for political gains.³⁸

4. The Judiciary. The Kariba Draft, like the current Constitution and the Constitutional Commission Proposal, fails to ensure the independence of the Judiciary. Whereas the Constitutional Commission Proposal requires Senate approval of the President's judicial appointments, the Kariba Draft only requires that the President select an appointee from a

²⁶ [212] Establishment and composition of Zimbabwe Anti-Corruption Commission.

²⁷ [218] Public Protector.

²⁸ [235] Auditor General.

²⁹ [240] Structure and functions of Reserve Bank of Zimbabwe.

³⁰ [247] Provincial Governors.

³¹ [253] Recognition and appointment of Chiefs.

³² [106] Composition of National Assembly.

³³ [144] Prorogation or dissolution of Parliament.

³⁴ [143] Life of Parliament.

³⁵ [97] Vote of no confidence in Government.

³⁶ [111] Composition of National Assembly.

³⁷ [139] Amendment of Constitution.

³⁸ [118] Tenure of a seat of Member of Parliament; [124] Clerk of Parliament and other staff; [128] Quorum in Parliament.

list provided by the presidentially-appointed Judicial Service Commission or gain approval of his own choice from that group.³⁹ Moreover, the President closely controls the procedure for removing judges from office. The President may initiate an inquiry into a particular judge and personally appoint a three-member tribunal to consider his or her removal.⁴⁰

The Kariba Draft in many places adds to the provisions on the Judiciary contained in the current Constitution and the Constitutional Commission Proposal. In some instances, the changes give the President or a presidential appointee additional control over the structure of the judiciary.⁴¹

5. Elections. The Kariba Draft, the current Constitution and the Constitutional Commission Proposal establish frameworks for elections which are very similar. Where the Kariba Draft differs from the other two documents, it is usually for the purpose of filling in procedural details rather than making significant substantive changes.⁴² What all three constitutions have in common is the establishment of an electoral commission that is insufficiently independent. Each one gives the President ultimate authority in selecting commission members. Whereas the Constitutional Commission Proposal requires approval of appointments by the Senate, the current Constitution and the Kariba Draft only require insignificant “consultation” with the presidentially-appointed Judicial Service Commission and the Committee on Standing Rules and Orders, or in some cases, appointment from a list provided by the former group.⁴³

6. Rights and National Objectives. The Kariba Draft maintains the structure and most of the content of the Constitutional Commission Proposal in regard to the protection of fundamental rights and freedoms. Therefore the weaknesses of that proposal are replicated in the Kariba Draft. Specifically, the Kariba Draft fails to protect many vital rights, such as the freedom of the media and the right of workers to strike. Although the Draft adds a section making some rights non-derogable, this provision does not apply to internal limitations or limitations authorised during a period of public emergency.⁴⁴ Moreover, social and economic rights such as the right to housing, education and health are dealt with in a “National Objectives” section that is merely “directory in nature,” meaning that compliance is not mandatory.

The Kariba Draft strengthens a few of the rights contained in the Constitutional Commission Proposal.⁴⁵ For example, pregnant women are added to the classes of persons protected

³⁹ [157] Constitutional Court; [163] Appointment of judges; [164] Acting judges.

⁴⁰ [166] Removal of judges from office.

⁴¹ [157] Constitutional Court; [159] High Court; [163] Appointment of judges; [165] Tenure of office of judges; [166] Removal of judges from office; [167] Appointment of judicial officers other than judges; [172] Judicial Service Commission.

⁴² [145] When parliamentary elections must be held; [147] Electoral Law; [148] Fixing boundaries of National Assembly constituencies and frequency of revisions; [149] Factors to be considered in delimiting constituencies; [150] Delimitation of Senatorial Constituencies; [151] Delimitation of Wards of Local Authorities; [152] Report on Delimitation; [153] Declaration of boundaries of constituencies.

⁴³ [201] Establishment and composition of Zimbabwe Electoral Commission.

⁴⁴ [62] General limitations, subsection (4).

⁴⁵ [43] Freedom from discrimination; [45] Freedom of speech and expression; [50] Protection of law: fairness in criminal cases; [54] Rights of children, their parents and guardians; [60] Political rights.

from unfair discrimination.⁴⁶ However, most of these changes are relatively minor and just as often the Kariba Draft weakens rights protections by including additional exceptions or limitations.⁴⁷

Of particular significance is the Kariba Draft's word-for-word incorporation of the sections in the current Constitution that deal with the right to property.⁴⁸ This portion of the current Constitution has been scarred by numerous amendments and fails to protect anything except the state's unchecked ability to acquire and distribute land. The complete reproduction of this text demonstrates that the Kariba Draft is a hastily negotiated document that reflects narrow political considerations rather than a rigorous analysis of rights protections or consideration of the will of the people.

7. Local Government and the Devolution of Powers. The Kariba Draft provides for the establishment of provincial councils and local authorities.⁴⁹ The functions assigned to these bodies, though very limited, are greater than those provided in the current Constitution or the Constitutional Commission Proposal.⁵⁰ However, these powers are not guaranteed and can be taken away by the central government at any time.⁵¹ Provincial and local bodies may be manipulated by the central government, which, through an Act of Parliament determines their composition. Furthermore, Provincial Governors, who chair provincial councils, are presidential appointees.⁵²

8. Size of Government. The Kariba Draft opens the door for the establishment of a bloated, inefficient government. Compared with the Constitutional Commission Proposal, all three branches of government are potentially larger. The Constitutional Commission Proposal contains a clause limiting to 20 the number of Ministers that the President can appoint. This clause is dropped in the Kariba Draft, allowing the President to appoint as many Ministers as he chooses and create a Cabinet of any size.⁵³ Both the Senate and National Assembly have more members than are provided for in the Constitutional Commission Proposal.⁵⁴ The Kariba Draft provides more detail than the Constitutional Commission Proposal on the composition of the Constitutional Court and Supreme Court, but unlike that proposal allows the President to appoint as many judges as he likes to the High Court.⁵⁵

V. CONCLUSION

The Kariba Draft Constitution is an undemocratic document in terms of both process and content. The Draft was written in secret, usurping the right of the people of Zimbabwe to

⁴⁶ [43] Freedom from discrimination.

⁴⁷ [38] Right to personal liberty; [40] Freedom from slavery and forced labor; [41] Freedom from torture and inhuman or degrading treatment; [56] Right to property; [57] Agricultural land acquired for resettlement.

⁴⁸ [56] Right to property; [57] Agricultural land acquired for resettlement.

⁴⁹ [245] Provincial councils; [248] Urban local authorities; [249] Districts and district local authorities.

⁵⁰ [246] Functions of provincial councils.

⁵¹ [246] Functions of provincial councils, subsection (2).

⁵² [247] Provincial Governors.

⁵³ [93] Appointment of Ministers; [96] Cabinet.

⁵⁴ [106] Composition of Senate; [111] Composition of National Assembly.

⁵⁵ [157] Constitutional Court; [158] Supreme Court; [159] High Court.

write a constitution for themselves. If the Draft were enacted, it would establish a government that would be dominated by the Executive. Parliament, the Judiciary and numerous public offices and bodies would be subject to political manipulation and control. Many of the fundamental rights and freedoms to which Zimbabweans are entitled would not be protected.

For these reasons, the Kariba Draft should play no role in constitution-making in Zimbabwe. The country's political leaders should publicly reject the use of the Kariba Draft as the basis for constitutional reform and embrace people-driven solutions to Zimbabwe's crisis of governance.