

**PUBLIC PARTICIPATION IN THE DRAFTING OF THE 2013 ZIMBABWEAN  
CONSTITUTION: THE ROLE AND SIGNIFICANCE OF THE RURAL POPULACE**

**A DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE  
LLM DEGREE**

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## DECLARATION

I, **MUSINDO TARIRO (Student No. 11585467)**, hereby declare that this dissertation for the LLM degree at the University of Venda, hereby submitted by me, has not been submitted previously for a degree at this or any other university, and that it is my own work in design and in execution, and that all reference materials contained therein have been duly acknowledged.

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Signature.....

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## DEDICATION

This research work is dedicated to my parents, Mr. and Mrs. Musindo and siblings, Enock (and family), Divine and Shepherd Musindo, without whose unrelenting support and encouragement I would not have completed this research.

And to the people of Zimbabwe, united in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression, the struggle continues.

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‘Whatever the mind of man can conceive and believe, it can achieve’ – Napoleon Hill

## LIST OF ABBREVIATIONS AND ACRONYMS

<b>AU</b>	: African Union
<b>CIO</b>	: Central Intelligence Organisation
<b>COPAC</b>	: Constitution Parliamentary Committee
<b>CSO(s)</b>	: Civil Society Organisation(s)
<b>GNU</b>	: Government of National Unity
<b>GPA</b>	: Global Political Agreement
<b>ISOZ</b>	: International Socialist Organisation in Zimbabwe
<b>MDC</b>	: Movement for Democratic Change
<b>MDC99</b>	: Movement for Democratic Change (Job Sikhala faction)
<b>MDC-N</b>	: Movement for Democratic Change (Ncube/Mutambara faction)
<b>MDC-T</b>	: Movement for Democratic Change (Tsvangirai faction)
<b>MP(s)</b>	: Member(s) of Parliament
<b>NCA</b>	: National Constitutional Assembly
<b>NGO(s)</b>	: Non-Governmental Organisation(s)
<b>OAU</b>	: Organisation of African Unity
<b>UN</b>	: United Nations
<b>US</b>	: United States (of America)
<b>ZANLA</b>	: Zimbabwe African National Liberation Army
<b>ZANU</b>	: Zimbabwe African National Union
<b>ZANU PF</b>	: Zimbabwe African National Union (Patriotic Front)
<b>ZAPU</b>	: Zimbabwe African People's Union
<b>ZBC</b>	: Zimbabwe Broadcasting Corporation
<b>ZCTU</b>	: Zimbabwe Congress of Trade Unions
<b>ZEC</b>	: Zimbabwe Electoral Commission
<b>ZESN</b>	: Zimbabwe Election Support Network
<b>ZINASU</b>	: Zimbabwe National Students Union
<b>ZIPRA</b>	: Zimbabwe People's Revolutionary Army
<b>ZLHR</b>	: Zimbabwe Lawyers for Human Rights

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Interception of Communications Act [Chapter 11:20].  
Private and Voluntary Organizations Act [Chapter 17:05].  
Public Order and Security Act [Chapter 11:17].  
Referendums Act [Chapter 2:10].  
Urban Councils Act [Chapter 29:15].  
Zimbabwe Electoral Act [Chapter 2:13].  
Zimbabwe Electoral Commission Act [Chapter 2:12].

### SOUTH AFRICA

Constitution of the Republic of South Africa, Act 108 of 1996.

## TABLE OF CONTENTS

CONTENTS	PAGE
DECLARATION .....	ii
DEDICATION .....	iii
ACKNOWLEDGEMENT .....	iv
LIST OF ABBREVIATIONS AND ACRONYMS.....	v
TABLE OF CASES .....	vi
TABLE OF LEGISLATION.....	vii
TABLE OF CONTENTS.....	viii
TABLE OF FIGURES.....	xiii
ABSTRACT.....	xiv
CHAPTER ONE .....	1
INTRODUCTION TO THE STUDY .....	1
1.1 Introduction.....	1
1.2 Background and Context of the Study .....	1
1.3 Statement of the Problem.....	6
1.4 Aim and Objectives of the Study .....	8
1.4.1 Aim .....	8
1.4.2 Objectives .....	8
1.5 Research Questions .....	8
1.6 Hypothesis .....	9
1.7 Scope of the Study .....	9
1.8 Justification of the Study .....	9
1.9 Research Methodology.....	10
1.9.1 Doctrinal Research.....	10
1.9.2 Empirical Research .....	11
1.10 Literature Review .....	16
1.11 Definition of Operational Concepts .....	20
1.11.1 Civil society.....	20



1.11.2	Constitution .....	20
1.11.3	Constitutionalism.....	20
1.11.4	Constitutional Reform.....	21
1.11.5	Constitution making.....	22
1.11.6	Constitutional legitimacy.....	22
<b>1.12</b>	<b>Ethical Considerations .....</b>	<b>23</b>
<b>1.13</b>	<b>Limitations of the Study .....</b>	<b>23</b>
1.13.1	Time and Financial Resources .....	23
1.13.2	Political Nature of the Research .....	24
<b>1.14</b>	<b>Overview of Chapters .....</b>	<b>24</b>
1.14.1	Chapter One .....	24
1.14.2	Chapter Two .....	24
1.14.3	Chapter Three .....	24
1.14.4	Chapter Four.....	25
1.14.5	Chapter Five .....	25
	<b>CHAPTER TWO.....</b>	<b>26</b>
	<b>A HISTORICAL BACKGROUND ON CONSTITUTIONAL REFORM AND DEVELOPMENT IN ZIMBABWE FROM 1979 TO 2013.....</b>	<b>26</b>
2.1	Introduction.....	26
2.2	The Colonial Lancaster House Constitution (1979).....	26
2.3	Post-independence Amendments (1980 – 1998).....	30
2.4	Constitutional Commission Draft Constitution (1999 - 2000) .....	33
2.5	The Kariba Draft Constitution (2007).....	41
2.6	The COPAC Constitution Making Process (2009 – 2013).....	43
2.7	Conclusion .....	49
	<b>CHAPTER THREE .....</b>	<b>51</b>
	<b>PART I .....</b>	<b>51</b>
	<b>CONSTITUTION MAKING AND THE NORMATIVE STANDARDS OF PUBLIC PARTICIPATION IN THE CONSTITUTION MAKING PROCESS .....</b>	<b>51</b>
3.1	Introduction.....	51
3.2	Definition of a Constitution .....	51
3.3	Types of Constitutions .....	52

<b>3.4</b>	<b>Features of a Constitution.....</b>	<b>53</b>
<b>3.5</b>	<b>The Constitution Making Process.....</b>	<b>54</b>
<b>3.6</b>	<b>Characteristics of Constitution Making in the 21<sup>st</sup> Century .....</b>	<b>55</b>
<b>3.7</b>	<b>The Concept of Participatory Constitution Making .....</b>	<b>56</b>
<b>3.8</b>	<b>Normative Standards of Participatory Constitution Making .....</b>	<b>58</b>
3.8.1	Inclusivity .....	59
3.8.2	Ownership and Control of the Process .....	60
3.8.3	Financial Capacity .....	63
3.8.4	Forms of Communication .....	63
3.8.5	Political Equality .....	64
3.8.6	Civic Education .....	65
3.8.7	Public Consultation .....	66
3.8.8	Reasonable Time-frame.....	67
3.8.9	Motives of the Power Holders .....	69
3.8.10	Credibility and Competence of Institutions.....	69
3.8.11	Enabling Political and Legal Environment.....	70
3.8.12	Referendum .....	70
<b>3.9</b>	<b>Forms of Public Participation .....</b>	<b>71</b>
<b>3.10</b>	<b>The Role of the International Community: A United Nations' Perspective .....</b>	<b>72</b>
<b>3.11</b>	<b>The Benefits of Public Participation .....</b>	<b>75</b>
3.11.1	Legitimacy and Acceptability .....	75
3.11.2	Conflict Resolution, Conciliation and Unity .....	77
3.11.3	A Well-informed and Active Citizenry .....	78
<b>3.12</b>	<b>The Downside and Challenges of Public Participation .....</b>	<b>79</b>
<b>PART II</b>	<b>.....</b>	<b>82</b>
	<b>THE INTERNATIONAL, REGIONAL AND NATIONAL LEGISLATIVE FRAMEWORK FOR PUBLIC PARTICIPATION IN CONSTITUTION MAKING .....</b>	<b>82</b>
<b>3.13</b>	<b>Introduction.....</b>	<b>82</b>
<b>3.13.1</b>	<b>Meaning of Human Rights .....</b>	<b>82</b>
<b>3.13.2</b>	<b>International Human Rights Instruments.....</b>	<b>84</b>
3.13.2.1	The International Covenant on Civil and Political Rights.....	84
3.13.2.2	The Universal Declaration of Human Rights.....	86

<b>3.13.3 Regional Human Rights Instruments .....</b>	<b>88</b>
3.13.3.1 African (Banjul) Charter on Human and Peoples' Rights .....	88
<b>3.14 Monitoring and Enforcement of Human Rights Treaties.....</b>	<b>89</b>
3.14.1 Monitoring and Implementation of the International Covenant on Civil and Political Rights ... ..	90
3.14.2 Monitoring and Implementation of the African Charter on Human and Peoples' Rights .....	92
<b>3.15 The Recognition and Impact of International Human Rights Law in the Zimbabwean Constitution .....</b>	<b>100</b>
<b>3.16 Zimbabwe's Domestication of International Human Rights Treaties .....</b>	<b>101</b>
<b>3.17 The Legislative Framework for Public Participation in Constitution Making in Zimbabwe.....</b>	<b>104</b>
3.17.1 Constitution of the Republic of Zimbabwe .....	104
<b>3.18 Zimbabwe's Legal and Political Environment for the Recognition and Protection of International Human Rights.....</b>	<b>106</b>
<b>3.19 A Case Study of South Africa .....</b>	<b>110</b>
3.19.1 Public Participation in the Constitution Making Process of South Africa .....	110
3.19.2 The Legislative Framework for Public Participation in Constitution Making in South Africa .....	113
<b>3.20 Conclusion .....</b>	<b>114</b>
<b>CHAPTER FOUR .....</b>	<b>116</b>
<b>AN EVALUATION OF THE RURAL POPULACE'S PARTICIPATION IN THE DRAFTING OF THE 2013 ZIMBABWEAN CONSTITUTION .....</b>	<b>116</b>
<b>4.1 Introduction .....</b>	<b>116</b>
<b>4.2 Meaning and Purpose of a Constitution .....</b>	<b>118</b>
<b>4.3 Constitutional History of Zimbabwe .....</b>	<b>119</b>
<b>4.4 Inclusivity .....</b>	<b>120</b>
<b>4.5 Ownership and Control of the Process .....</b>	<b>122</b>
<b>4.6 Reasonable Time-frame.....</b>	<b>124</b>
<b>4.7 Forms of Communication.....</b>	<b>124</b>
<b>4.8 Political Equality .....</b>	<b>125</b>
<b>4.9 Civic Education .....</b>	<b>126</b>
<b>4.10 Public Consultation .....</b>	<b>127</b>

<b>4.11</b>	<b>Referendum.....</b>	<b>131</b>
<b>4.12</b>	<b>Motive of the Power Holders .....</b>	<b>133</b>
<b>4.13</b>	<b>Credibility and Competence of Institutions .....</b>	<b>134</b>
<b>4.14</b>	<b>Enabling Legal and Political Environment .....</b>	<b>136</b>
4.14.1	Political Environment.....	136
4.14.2	Legal and Policy Environment .....	138
<b>4.15</b>	<b>Conclusion .....</b>	<b>141</b>
	<b>CHAPTER FIVE .....</b>	<b>142</b>
	<b>CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>142</b>
<b>5.1</b>	<b>Introduction .....</b>	<b>142</b>
<b>5.2</b>	<b>Awareness of the Constitution .....</b>	<b>142</b>
<b>5.3</b>	<b>Inclusivity .....</b>	<b>143</b>
<b>5.4</b>	<b>Ownership and Control of the Constitution Making Process .....</b>	<b>144</b>
<b>5.5</b>	<b>Legal and Political Environment .....</b>	<b>145</b>
5.5.1	Legal Environment .....	145
5.5.2	Political Environment.....	146
<b>5.6</b>	<b>Credibility and Competence of Institutions .....</b>	<b>147</b>
<b>5.7</b>	<b>Forms of Participation .....</b>	<b>148</b>
<b>5.8</b>	<b>Summary .....</b>	<b>149</b>
	<b>BIBLIOGRAPHY .....</b>	<b>152</b>
	Books.....	152
	Journals Articles.....	154
	Dissertations .....	158
	Papers and Reports .....	159
	Internet sources .....	162
	<b>APPENDIX A: INFORMED CONSENT FORM .....</b>	<b>165</b>
	<b>APPENDIX B: INTERVIEW QUESTIONNAIRE .....</b>	<b>169</b>
	<b>APPENDIX C: CONFIDENTIALITY AGREEMENT.....</b>	<b>171</b>

## TABLE OF FIGURES

Figure 1: Political Map of Zimbabwe .....	12
Figure 2: Detailed results of the 2000 referendum according to votes per province .....	40
Figure 3: Project Management Structure.....	46
Figure 4: Eight Rungs on a Ladder of Citizen Participation.....	57

## ABSTRACT

The defining moment of Zimbabwean constitutional reform came in 2008 after the disputed and violence riddled elections of 2008 when the three main political parties entered into a transitional Government of National Unity and were tasked with the establishment of a new constitution which was ultimately adopted in 2013 following a protracted and turbulent process which began in 2009. Some segments of the civil society however argued that the concerned political parties had ‘captured the constitutional project and narrowed it to a short-term struggle motivated by the pursuit of party political interests at the expense of the will of the people and nation’s broad long-term interests’, and thereby subverted and/or negated the aspirations of the people. It is against this background that the study therefore assesses the participation, role and significance of the rural populace in the drafting of the 2013 Zimbabwean Constitution. The study traces the history of constitutional reform efforts in Zimbabwe, beginning with the colonial Lancaster House Constitution of 1979, to the protracted exercise of 2009 to 2013 which gave birth to the current Constitution. It focuses on the 2009-13 constitution making process as a case study. The study employs an interdisciplinary approach by adopting both doctrinal and empirical research approaches. The study employed the doctrinal research approach to provide for a doctrinal analysis of the relevant global, regional and domestic legislation and case law. The empirical research approach, through interviews, was used to collect qualitative data from the general members of the rural populace and key institutions such as political parties and human rights organisations from three selected rural districts, namely Bulilima, Makonde and Mutasa. The study indicated that while a significant number of the rural populace participated in the constitution making process, the legal environment which subsisted during the constitution making process did not allow for the unfettered flow of information and ideas, as a direct result of repressive legislation such as AIPPA, Criminal Law (Codification and Reform) Act, Interception of Communications Act and POSA, among others similar laws, and as well as the deeply polarised political environment owing to the nature of the relationship between the ZANU PF-led government and the opposition political parties. The study further showed that the process was heavily dominated by the political parties to the Global Political Agreement and all the political parties wanted to ensure the adoption of a constitution that best reflected their preferences and partisan views rather than the will of the masses, making the 2013 Constitution an elitist negotiated document, contrary to the provisions of Article VI of the GPA which provided for the right of Zimbabweans to make a constitution for themselves and by themselves.

**Keywords:** Bulilima, constitution, constitution making, democratic, inclusive, legitimacy, Makonde, Mutasa, people-driven, participatory constitution making, public participation, rural populace

## CHAPTER ONE

*'New constitutionalism is characterised by the view that the process is as important, if not more important, than the ultimate content of the final charter. The theory underlying this view is that an open and inclusive process will contribute to healing and reconciliation'*

– Louis Aucoin<sup>1</sup>

### INTRODUCTION TO THE STUDY

#### 1.1 Introduction

This chapter gives an overview of the research. It introduces the research topic, provides a brief background on the study, statement of the problem, aims and objectives, research questions, hypothesis, justification of the study, research methodology, scope of the study, literature review, definition of key words, ethical considerations, overview of chapters, research schedule and limitation of the study.

#### 1.2 Background and Context of the Study

Constitution making is now recognised as a step towards democratic empowerment. As such, a democratic constitution has ceased to be simply one that only ascertains democratic governance, but also one that has been made through a democratic process.<sup>2</sup> In democratic civilisations, constitution making has the ability to influence enormous changes if it is attentive and responsive to the needs of its most vulnerable and marginalised sections (such as the rural populace in Zimbabwe) and on the other hand, deficiencies in the constitution making process can negatively impact on the ability of the resultant constitution to engender change on the political, social and economic sphere.<sup>3</sup> This sentiment is aptly captured in the above statement by Aucoin who argues that new constitutionalism is premised on the notion that in constitution making, the process is just

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<sup>1</sup> L Aucoin 'Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict' (2007) *The Whitehead Journal of Diplomacy and International Relations* 35.

<sup>2</sup> V Hart 'Democratic Constitution Making' (2003) *United States Institute of Peace: Special Report* 107 4.

<sup>3</sup> A Aparajita, C McConnachie, D Sharma, D Mehta, F Carelli & K Dhru 'A Comparative Survey of Procedures for Public Participation in the Lawmaking Process - Report for the National Campaign for People's Right to Information' (2011) *Oxford Pro Bono Publico* 1.



as important as the final document, to guarantee a constitution that contributes to healing and reconciliation.<sup>4</sup>

To that end, policy makers have of late begun focusing more on the process by which constitutional reforms are made, and not just the substance of the reforms. This has given rise to a new norm which is known as 'participatory constitution making'.<sup>5</sup> Participatory constitution making gives emphasis to the need for citizen participation in the drafting and implementation of constitutions.<sup>6</sup> Participation in matters of national governance is fast emerging as an international phenomenon with Article 25 of the International Covenant on Civil and Political Rights (Covenant on CPR) indirectly providing for the right to participate in constitution making in the form of the right to take part in the conduct of public affairs.<sup>7</sup> In *Marshall v. Canada*, the United Nations Human Rights Committee (Human Rights Committee) confirmed that the right to participate in the conduct of public affairs extends to constitution making.<sup>8</sup>

The right to participate in matters of national governance, from which the right to participate in constitution making can be logically derived, is deemed to be the most important right to which all citizens are entitled.<sup>9</sup> Public participation in the constitution making process is thought to support national unity and strengthen the legitimacy and acceptance of the constitution.<sup>10</sup> As posited by Dann *et al*, the idea that a participatory constitution making process evokes feelings of ownership is predicated on the belief that 'people who fought and argued for their constitution often feel more responsible to defend it and to advocate for its effective implementation.'<sup>11</sup>

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<sup>4</sup> Aucoin (note 1 *supra*) 35.

<sup>5</sup> AM Banks 'Expanding Participation in Constitution Making: Challenges and Opportunities' *Vol. 49 Issue 4, William & Mary Law Review* 1046.

<sup>6</sup> *Ibid* 1046.

<sup>7</sup> Article 25 of the Covenant on CPR provides that everyone shall have the right and opportunity...and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

<sup>8</sup> *Marshall v. Canada*, Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991, para 5.3.

<sup>9</sup> Zimbabwe Human Rights NGO Forum 'Right to Participate in Governance' (2011) *Vol. 58, Human Rights Bulletin* 1.

<sup>10</sup> P Dann, M Riegner, J Vogel & M Wortmann 'Lessons Learned from Constitution Making: Processes with Broad Based Public Participation' (2011) *Briefing Paper No. 20, Democracy Reporting International* 2.

<sup>11</sup> *Ibid* 3.

Public participation reconciles conflicting parties and thereby contributes to political stability if it is open and inclusive.<sup>12</sup> As such, with the recent change of focus from constitutionality to constitutionalism, constitutions have come to be recognised as implements for bridge-building.<sup>13</sup> The benefits of a participatory constitution making process are accentuated in Zimbabwe, a post-conflict and deeply polarised state. An inclusive, people-driven and popularly participated constitution making process in Zimbabwe is crucial to the establishment of 'a new political, economic and social culture of a multiparty constitutional democracy in a country that has been characterised by political intolerance and violence, electoral conflicts, economic mismanagement, social disintegration and international isolation'.<sup>14</sup> It is for that reason that this researcher theorises that such a constitution making process is the only way out of Zimbabwe's deepening economic and political crisis, a participatory constitution making process will ensure the legitimacy and acceptance of the constitution and possibly the entire constitutional and legal order as well.

Zimbabwe adopted its first ever home grown and 'democratic' constitution in 2013, after several years of failed constitutional reform.<sup>15</sup> Prior to this adoption, Zimbabwe used a 'ceasefire compromise'<sup>16</sup> document commonly referred to as the Lancaster House Constitution as its principal tool of national governance.<sup>17</sup> The Lancaster House Constitution was a negotiated document which was entered into by and between the colonial regime of Ian Douglas Smith (former Prime Minister of Rhodesia) and the representatives of the liberation movements at the Lancaster House Conference in 1979 as a political settlement primarily to transfer power from the colonial government to the people

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<sup>12</sup> *Ibid* 3.

<sup>13</sup> L Sachikonye 'Zimbabwe's Constitution Making and Electoral Reform Processes: Challenges and Opportunities' Draft Paper Prepared for the Conference on 'Legitimacy of Power – Possibilities of Opposition' Organised by the Department of Political Science and Public Administration, Makerere University and Chr. Michelsen Institute, 2011, 3.

<sup>14</sup> W Zembe & J Sanjeevaiah 'Developing a Democratic Constitutional Framework through a People-Driven Constitution Making Process for Zimbabwe' (2013) *Vol. 2 Issue 8, International Journal of Science and Research* 10.

<sup>15</sup> Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>16</sup> The Lancaster House Constitution is referred to as a 'ceasefire' constitution in the sense that its primary purpose was to bring to an end a protracted liberation war that had raged for two decades. It is a 'compromise' document in that it was mostly an integrative solution, neither of the negotiating parties achieved their initial demands; they had to make several concessions. For example, after an impasse due to disagreements Robert Mugabe finally agreed to wait ten years before instituting land reform. See Sachikonye (note 13 *supra*) 4. See also 'Land Reform and Property Rights in Zimbabwe' *Zimbabwe Human Rights NGO Forum* (2010) 3.

<sup>17</sup> The document originated from the British parliament as a schedule to the Zimbabwe Constitution Order of 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

of Zimbabwe. The purpose of the conference was, among others, to discuss and reach an agreement on the terms of an Independence Constitution.<sup>18</sup>

The most striking feature of the negotiations that culminated in the adoption of the Lancaster House Constitution is that the negotiations did not provide for public participation. Moreover, in terms of its substantive provisions, the Lancaster House Constitution did not reflect the deep seated aspirations and wishes of the masses back home.<sup>19</sup> It is evident that the liberation war movements in Zimbabwe were aware of the inadequacy of the Lancaster House Constitution but possibly believed in gaining independence first and then making amendments to the Constitution later on.<sup>20</sup> In light of the many compromises that the liberation war movements had to make in the Lancaster House negotiations, specifically on the restrictive land acquisition provisions, Magaya claims that the liberation war movements were in a haste to end the war and assume power.<sup>21</sup> However, despite this apparent inadequacy and deficiency of the Lancaster House Constitution and the various concessions that the liberation movements had to make,<sup>22</sup> it is surprising that there were no serious efforts to comprehensively review the Constitution and institute reform, even after the expiry of the restriction that the Constitution should not have its significant provisions amended for ten years.

It is worthy to note that most of the constitutional amendments that were introduced thereafter were primarily to centralise and consolidate power and authority in the executive, despite many critical issues regarding democracy, land reform and social rights, amongst others.<sup>23</sup> At the time of the 2009-13 constitutional reform process, the Lancaster House Constitution had over 19 amendments, none of which had been adopted through a referendum or popular participation.<sup>24</sup> It is therefore not surprising that the initial calls for a comprehensive constitutional reform came from outside the government, with the civil

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<sup>18</sup> Zembe & Sanjeevaiah (note 14 *supra*) 10.

<sup>19</sup> K Magaya 'Constitution by the People or to the People: A Critical Analysis of Zimbabwe's Constitutional Development in View of the Constitution Select Committee (COPAC)-Led Process' (2015) Vol. 3(2), *Journal of Political Science and Public Affairs* 5.

<sup>20</sup> L Laakso 'Opposition Politics in Independent Zimbabwe' (2004) *African Studies Quarterly* 3.

<sup>21</sup> Magaya (note 19 *supra*) 5.

<sup>22</sup> The Lancaster House Constitution was inherently deficient because of its undemocratic origins and the frequent amendments which negated public participation.

<sup>23</sup> Sachikonye (note 13 *supra*) 4.

<sup>24</sup> Magaya (note 19 *supra*) 5.

society being of the opinion that no significant political, economic or social transformation could happen without rewriting the Constitution.<sup>25</sup>

It is against this background that serious attempts at constitutional reform began. However, constitution making in Zimbabwe has been a turbulent and prolonged process, with four most significant exercises in Zimbabwe's constitutional reform efforts since independence, beginning with the compromise Lancaster House Constitution of 1979,<sup>26</sup> Constitutional Commission/Chidyausiku Commission draft constitution of 2000,<sup>27</sup> Kariba draft constitution of 2007<sup>28</sup> and most importantly, the protracted exercise of 2009 - 2013 which gave birth to the subsisting Constitutional Parliamentary Committee (COPAC)<sup>29</sup> Constitution. The constitution making exercise of 2009 -13 is briefly discussed below.

The defining moment of Zimbabwean constitutional reform came in 2008 after the disputed and violence riddled elections of 2008. The three main political parties of Zimbabwe, under the facilitation of Thabo Mbeki (the former President of South Africa), entered into an inclusive government, also referred to as the Government of National Unity (GNU), guided by the principles of the Global Political Agreement (GPA).<sup>30</sup> The 2008 GPA recognised the inadequacies of the Lancaster House Constitution and the right of Zimbabweans to make a constitution by themselves and for themselves.<sup>31</sup> In terms of Article VI of the GPA, the transitional inclusive government was tasked with the setting up of the COPAC and the establishment of a new constitution within 20 months of its formation.

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<sup>25</sup> Sachikonye (note 13 *supra*) 8.

<sup>26</sup> The Constitution of Zimbabwe as published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom), as amended by Constitution Amendment No. 19.

<sup>27</sup> The Constitutional Commission was constituted in 1999, with 400 appointed individuals, of which 150 were Members of Parliament. The Commission was headed by the Chief Justice of the Supreme Court of Zimbabwe, Justice Godfrey Chidyausiku; hence it is sometimes referred to as the 'Chidyausiku Commission'. It was tasked to gather, analyse and evaluate data from the people on the issue of a new democratic constitution and to produce a final draft constitution for presentation to the government for adoption.

<sup>28</sup> In September 2007, as part of inter-party dialogue, members of ZANU PF and the two MDC formations met secretly at Lake Kariba in Zimbabwe, where they unilaterally negotiated and produced the 'Kariba Draft Constitution'. The name of the document comes from the town in which the negotiations took place.

<sup>29</sup> COPAC is the Constitution Select Committee tasked with the drafting of a new constitution for Zimbabwe by the Government of National Unity. Article VI of the GPA provides for the appointment of a Select Committee of Parliament as a special purpose vehicle to lead and manage the constitution making process.

<sup>30</sup> The GPA is an agreement consisting of 25 Articles which was entered into in September 2008 by the three main political parties in Zimbabwe, namely, MDC-T, MDC-N and ZANU PF. The GPA was facilitated by the former President of South Africa, Mr. Thabo Mbeki, to form a Government of National Unity following the disputed June 2008 presidential run-off election.

<sup>31</sup> Article VI of the GPA.

However, various civil society organisations, led by the National Constitutional Assembly (NCA),<sup>32</sup> boycotted the constitution making process on the grounds that the concerned political parties had ‘captured the constitutional project and narrowed it to a short-term struggle motivated by the pursuit of party political interests at the expense of the will of the people and the nation’s broad long-term interests.’<sup>33</sup> The NCA rejected Article of the GPA for ‘its failure to satisfy the demands of the Zimbabwean people for a people-driven constitution making process.’<sup>34</sup> A referendum was nonetheless held on March 16 2013 and approved by an overwhelming majority. The document was eventually promulgated into law on May 22 2013, after a turbulent and protracted process which began in 2009, with certain provisions coming into force after the general elections.

Accordingly, the 2013 COPAC Constitution effectively replaced the 1979 Lancaster House Constitution as the supreme law of Zimbabwe. It is therefore against this backdrop that this study seeks to critically assess the participation, role and significance of the rural populace in the process which led to the adoption of the COPAC-led Constitution of Zimbabwe.

### 1.3 Statement of the Problem

The process of constitutional reform has played a critical role in the political development of Southern Africa, especially during the last 20 years, with regard to the number of constitutions that have been adopted during this period. Though there are two aspects to constitutional reform: the process and the content, until the turn of the 20<sup>th</sup> century, the debate and literature on constitutional reform tended to place emphasis on the substance of reform rather than the process.<sup>35</sup> However lately, guided by the new found belief that the constitution making process is as important as the final document, policy makers have begun focusing more on the process by which constitutional reforms are made and not just the substance of the reform, giving birth to a new norm, ‘participatory/democratic constitution making.’<sup>36</sup> This new norm gives emphasis to the need for public participation in the constitution making process to guarantee a constitution making process that ensures

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<sup>32</sup> The National Constitutional Assembly is an NGO comprised of opposition political parties, churches, workers, trade unions, human rights organisations, student bodies, professional associations, women’s groups, youth movements and individual citizens. It was formed in 1997 to campaign for a new democratic and people-driven constitution. The NCA considers a democratic constitution to be the ‘basis of good governance’. See generally the organisation’s website, <http://www.ncazimbabwe.org/> (accessed 15 March 2014).

<sup>33</sup> GA Dzinesu ‘Zimbabwe’s Tortuous Road to a New Constitution and Elections’ (2012) *Institute for Security Studies: Situation Report*, 2.

<sup>34</sup> NCA Secretariat Proposal for People-driven Constitution Making Process, 2010, 1.

<sup>35</sup> Magaya (note 19 *supra*) 1.

<sup>36</sup> Aucoin (note 1 *supra*) 35.

the legitimacy and recognition of the constitution.<sup>37</sup> However, not only is a participatory constitution making process thought to offer legitimacy and acceptance of the new constitution, it is also believed to offer legitimacy to the entire constitutional and legal order,<sup>38</sup> making a participatory constitution making process an attractive and beneficial option to politicians.

With attainment of independence in April 1980, Zimbabwe inherited a defective colonial Lancaster House Constitution which apart from its numerous defects in content, was also inherently flawed with regard to the process by which it was negotiated and adopted. The Constitution lacked popular participation as it was negotiated primarily as a means to end the war between the Ian Smith regime and the liberation movements, and to bring about Zimbabwe's independence.<sup>39</sup> Thereafter, Zimbabwe has over the years attempted, unsuccessfully, to institute constitutional reform. The establishment of the GNU in 2008 in which the creation of a new constitution took center-stage re-ignited the hopes and aspirations of the Zimbabwean people for a people-driven and democratic constitution. A constitution was eventually adopted in 2013 after a protracted process which began in 2009. The new constitution was however adopted amid outcry from some segments of the civil society which argued that the process of drafting this constitution, as with the previous constitution making attempts, negated popular participation and was not people-driven. The International Socialist Organisation in Zimbabwe (ISOZ), which is one of the several civil society organisations that advocated for the rejection of the 2013 draft constitution, described the document as undemocratic and a 'politicians' gravy train.'<sup>40</sup> A prominent University of Zimbabwe lecturer and political activist Munyaradzi Gwisai dismissed the document as a 'peace pact' between the parties to the GPA and not a product of the common populace. As a result, some sections of the civil society refused to recognise the new Constitution and subsequently questioned the legitimacy of President Robert Gabriel Mugabe's 33-year rule.<sup>41</sup>

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<sup>37</sup> Dann (note 10 *supra*) 4.

<sup>38</sup> *Ibid* 4.

<sup>39</sup> See generally Sachikonye (note 13 *supra*) 4 – 7. See also Magaya (note 19 *supra*) 1 – 10; Zembe & Sanjeevaiah (note 14 *supra*) 10 – 16.

<sup>40</sup> Staff Reporter 'New Constitution Must Be Rejected' *NewZimbabwe* 16 February 2013. Available at <http://www.newzimbabwe.com/news/printVersion.aspx?newsID=10298> (accessed 15 September 2015).

<sup>41</sup> *Ibid*. See also Magaya (note 19 *supra*) 2.

It is in light of the above that the study intends to critically examine the process which led to the adoption of the current Constitution of Zimbabwe, with specific reference to the participation, role and significance of the rural populace in that process.

## **1.4 Aim and Objectives of the Study**

### **1.4.1 Aim**

The aim of the research is to assess the participation, role and significance of the rural populace in the drafting of the 2013 Constitution of Zimbabwe.

### **1.4.2 Objectives**

The objectives of the study are as follows:

1. To determine the extent of participation of Zimbabwean rural dwellers in the constitution making process of the 2013 Constitution.
2. To determine the extent to which the constitution making process was inclusive and people-driven.
3. To outline and prescribe a set of internationally recognised 'best practices' or guidelines for constitution making that will ensure the most fair, transparent and effective manner of enabling public participation.
4. To examine the extent of compliance with the above referred 'best practices' or guidelines in the making of the 2013 Zimbabwean Constitution.

## **1.5 Research Questions**

The study considers the following questions which are premised on the research objectives above:

1. What was the role and significance of the rural populace in the process leading to the promulgation of the 2013 Zimbabwean Constitution?
2. To what extent did the rural populace of Zimbabwe participate in the constitution making exercise?
3. To what extent was the constitution making process inclusive and people-driven?
4. What are the internationally recognised 'best practices' or guidelines that ensure the most fair, transparent and effective manner of enabling public participation in the constitution making process?



5. Were these internationally recognised ‘best practices’ or guidelines followed in the making of the Zimbabwean Constitution?

### **1.6 Hypothesis**

A hypothesis is an educated guess derived logically from previous predictions of a particular theory to answer the research question (problem statement). A hypothesis can therefore be a statement about the relationship between two or more measurable variables that suggest an answer to the research question, a declarative statement that predicts an expected outcome and can be tested by further investigation. It is there to give direction to the researcher on data collection, analysis and interpretation.<sup>42</sup>

The study is predicated on the assumption that increased popular participation and inclusivity in the constitution making process ensures fairness and guarantees the legitimacy and acceptability of not only the constitution, but also the entire constitutional and legal order.

### **1.7 Scope of the Study**

The study examines the processes adopted in the making of the Constitution of Zimbabwe Amendment Act 20 of 2013. It seeks to evaluate only the procedural aspects of participation of the rural populace in that constitution making process and not the substantive provisions of the Constitution.

### **1.8 Justification of the Study**

Public participation guarantees stability and underpins the legitimacy of a government.<sup>43</sup> Popular participation in the constitution making process, where it is inclusive and open, has in recent times emerged as an essential component of peace building and national reconciliation by sensitising the people to different beliefs and opinions.<sup>44</sup> In a post-conflict and deeply polarised state such as Zimbabwe, such benefits are without qualification. The importance of including the Zimbabwe’s rural populace in matters of governance specifically lies in the fact that the rural populace constitutes about 68% of the total population of the country and is thus the majority. Furthermore, the rural populace offers a

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<sup>42</sup> G LoBiondo-Wood & JD Haber *Nursing Research: Methods and Critical Appraisal for Evidence-based Practice* (2014) 35.

<sup>43</sup> Human Rights NGO Forum (note 9 *supra*) 1.

<sup>44</sup> *Ibid* 1 – 9.



different and diverse perspective on constitutional issues and denying them opportunities to be heard means that their views on constitutional matters cannot be adequately represented and protected by those who govern.<sup>45</sup> Given this highlighted importance of inclusion and rural participation in issues of national governance, the researcher hopes that the study will persuade the government and the civil society to create room for this historically vulnerable and marginalised section of the Zimbabwean society to play a central role in matters of national governance so as to guarantee a government that is legitimate and derives its mandate from the people.

The study is of relevance to both international and national academics, researchers, politicians and students since not only does it provides the reader with the history of Zimbabwean constitutional reform over the last 35 years but also the international guiding principles and normative standards in constitution making.

It is also hoped that the study will provide guiding principles for constitutional reform based on the practical experiences of Zimbabwe.

### **1.9 Research Methodology**

The study employed an inter-disciplinary approach by adopting both doctrinal (also known as 'black letter law') and empirical research approaches to further the relation between the legal and social science methodologies and expand expertise in the legal scholarship. Hutchison believes that the recent shift from exclusive usage of the doctrinal research approach stems from the fact that the doctrinal research approach is too constricting.<sup>46</sup> The benefit of integrating the two approaches is therefore that the study will provide a better understanding of the research problem which the doctrinal research approach alone would not have otherwise provided.

#### **1.9.1 Doctrinal Research**

Pearce *et al* define doctrinal research as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationships

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<sup>45</sup> For example, there was need to extensively consult with the rural populace on the constitutional provisions that were related to land and traditional leadership, among other provisions that were specific to the needs of the rural populace.

<sup>46</sup> T Hutchison 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' *Erasmus Law Review* 130.

between rules, and explains areas of difficulty and, perhaps, predicts future developments'.<sup>47</sup> The doctrinal research approach therefore entails a rigorous study and analysis of the law in detail. The approach is characterised by the study of legal texts, hence the name 'black letter law'. It uses interpretive methods to examine the sources of law, such as textbooks in law, cases and statutes. It envisions more than just a simple description of the law.

The study therefore includes a doctrinal analysis of the relevant case law and global, regional and domestic legislation which establish the right to public participation in constitution making, together with any judicial interpretation of the same.

### **1.9.2 Empirical Research**

The study complements the doctrinal research approach with an empirical research approach. To that end, qualitative interviews were conducted in a field study in three selected rural areas. Merriam defines qualitative research as research that uses methods which result in a narrative, descriptive account of a setting or practice.<sup>48</sup> Qualitative research seeks to develop interpretation of social phenomena using a holistic perspective that preserves the complexities of human behavior. In simpler terms, qualitative research is 'research that uses data that do not indicate ordinal values'.<sup>49</sup> Using qualitative research, the study sought to understand the research problem from the perspectives of individuals in their natural settings. As such, qualitative data was collected in the form of detailed descriptions of the participants' experiences in the 2009-13 constitution making process.

#### **1.9.2.1 Field Study**

The researcher collected data from the general members (villagers) of the rural populace and key informants or service providers such as political parties, human rights organisations, educational and professional bodies, government entities and Non-Governmental Organisations (NGOs). Zimbabwe has a total population of 13, 061, 239 million people from 10 provinces (as of the 2012 census),<sup>50</sup> and as such, for the results to be more representative of the entire rural population in the country, the field study was

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<sup>47</sup> D Pearce, E Campbell & D Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) 6.

<sup>48</sup> SB Merriam *Qualitative Research: A Guide to Design and Implementation* (2009) 13.

<sup>49</sup> PN Nkwi, IK Nyamongo & GW Ryan *Field Research into Socio-cultural Issues: Methodological Guidelines* (2001) 1.

<sup>50</sup> See the Zimbabwe Statistical Office website, <http://www.zimstat.co.zw> (accessed 24 March 2015).

conducted on three rural districts which were selected from three different provinces around the country to reflect the differences in language, culture, ethnicity and probably, political beliefs or opinion.

### 1.9.2.2 Description of the Study Areas



**Figure 1:** Political Map of Zimbabwe.<sup>51</sup>

#### a) Mutasa District

The first area of study was Mutasa district, Zimbabwe. The area was specifically identified on the basis that it is rural. All the participants reside in Mutasa district which is predominantly rural (98.3% of the total population of the district is rural) or the key informants provide service in the area. The district forms part of Manicaland Province and is divided into 10 census districts, Buhera, Chimanemani, Chipinge rural, Makoni, Mutare rural, Mutasa, Nyanga rural, Mutare urban, Rusape and Chipinge urban. All the districts have an urban component. The district has a population of 168,747.<sup>52</sup>

<sup>51</sup> Available at <http://www.worldofmaps.com> (accessed 13 September 2015).

<sup>52</sup> *Ibid.*

### **b) Makonde District**

The second area of study was Makonde district, Zimbabwe. Similarly, the area was chosen on the basis that it is predominantly rural (98.1% of the total population of the district). The district is situated in Mashonaland West Province. It has an estimated population of 153,540 (10% of the population of the province).<sup>53</sup> The Province is divided into 13 census districts, Chegutu rural, Hurungwe, Mhondoro-Ngezi, Kariba rural, Makonde, Zvimba, Sanyati, Chinhoyi, Kadoma, Chegutu, Kariba, Norton and Karoi. The population in this province is mostly rural with only 25% of the total population residing in urban areas. All districts in this province have an urban area.

### **c) Bulilima District**

The third and final area of study was Bulilima district which was also selected for the same reasons as the former two districts. The district lies in Matabeleland South Province. According to the 2012 census, the district has a total population of 90, 561 people (13.2% of the population of the Province).<sup>54</sup> Matabeleland South Province is divided into 10 census districts, Beitbridge urban, Beitbridge rural, Plumtree, Bulilima, Mangwe, Gwanda rural, Insiza, Matobo, Umzingwane and Gwanda urban. The population in this Province is mostly rural with only 12% of the total population in urban areas. Bulilima, Beitbridge rural and Insiza are the only completely rural districts in the Province.

#### **1.9.2.3 Participants**

Participants were drawn from two diverse categories. The first category was made up of rural dwellers while the second category consisted of key institutions such as political parties, educational and professional bodies, government entities and NGOs. The former group of participants was selected for its experiences in the 2013 constitution making exercise. The latter type of participants was purposefully selected for their appropriate and specialist knowledge or opinion of the issue under research. Participants were drawn from these two distinct categories so as to capture, reflect and represent the broad and diverse opinions of the different members of the rural population and thus provide depth to the study.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

#### **1.9.2.4 Sampling Method**

##### **a) Purposive Sampling**

Purposive sampling (also known as judgmental, selective or subjective sampling), is a form of non-probability and non-representative method of sampling that is used to serve a particular or specific purpose. Participants were purposively selected basing on the judgement of the researcher; this sampling method was used on key informants. The researcher purposively selected institutions such as political parties, human rights organisations, educational and professional bodies on the basis of their appropriate and specialist knowledge of the research issue and/or because they provide service in the selected area of study.

##### **b) Stratified Random Sampling**

The study also employed a probability sampling method known as stratified random sampling to select participants from ordinary members of the rural populace. According to Chikoko and Mhloyi, stratified random sampling is used so as to ensure that a sample does not have an undue proportion of one type of unit in it.<sup>55</sup> Using a voter registration list from the respective areas of study, the population was listed and grouped into homogeneous subgroups on the basis of gender and age. Thereafter, a simple random sampling method was used to draw respondents from each stratum. The size of the sample in each stratum was taken in proportion to the size of the stratum. This is known as 'proportional stratified sampling'.

The evident advantage of stratified random sampling is that it improves representatives of the sample by reducing the potential for human bias in the selection of participants. The other advantage is that units tend to be evenly spread over the population when chosen through this sampling method.

#### **1.9.2.5 Research Instruments**

##### **Qualitative Interviews**

Interviews have become the most common method of data collection in qualitative research. An interview is a flexible way of asking people about their opinions and experiences. Data was therefore collected through face-to-face qualitative interviews which

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<sup>55</sup> V Chikoko & G Mhloyi *Introduction to Educational Research Methods* (1995) 82.

were carried out using semi-structured questionnaires. This type of interview was used to provide rich, in-depth and detailed information relating to the villagers' experiences and viewpoints on the 2013 constitution making process. The villagers were asked identical, broad and open-ended questions with the aim of eliciting as much detailed information as possible. Probing questions (prompts) and cues were also used as a follow up measure to encourage expansion of most important ideas and ensure optimal responses from participants. The researcher also took into consideration subjective factors in the form of nonverbal messages. Where necessary, the interview was also tailored to suit the age, education, knowledge or experience of the respondent. Due to the apparent political undertones of this research, sensitive questions were rephrased or reframed if they seemed to cause discomfort to the participant. Key informants were thereafter asked to comment, expand and explain further basing on the themes extracted from the interviews of the villagers.

To ensure that there were no flaws, limitations or other weaknesses within the interview design, a pilot test was conducted prior to the actual interviews. At least 10 volunteers from the first area of study, Mutasa district, took part in the pilot test. This helped the researcher to refine the research questions, data gathering technique and make any other necessary revisions prior to the implementation of the study.

An audio recorder was used to record the interviews as they were conducted. This was done to minimise loss of information. However, a tape recorder was only used after a participant had consented to its use. The audio tapes were discarded after the required information had been captured on paper. To protect the identity of the participants, respondents were allocated coded names. Furthermore, to protect the anonymity of key informants, the key informants are referred to as 'service providers' throughout this study.

#### **1.9.2.6 Data Analysis and Interpretation**

Data analysis is a time consuming process that entails bringing order, structure and meaning to the mass of data collected. In qualitative research, data analysis involves a search for general statements about relationships among categories of data. The purpose of data analysis was to use the data collected to describe and analyse the respondents' experiences in the 2009-13 constitution making process and understand what it means.

Collected data was compiled into sections of consistent phrases, expressions or ideas that were common among the research participants. These groups of information are known as themes or codes. Using information obtained from the interviews in the selected study areas, the researcher evaluated and interpreted the rural populace's participation in the 2009-13 constitution making process against identified international standards in participatory constitution making.

### **1.10 Literature Review**

Shonhe examined the extent to which participatory deliberative democracy is being practised in the constitution making process in Zimbabwe.<sup>56</sup> His study seeks to examine the processes available for public participation in constitution making in Zimbabwe. Similarly, he focuses on the 2009-13 constitution making process as a case study. While his research was very helpful as it offered invaluable information relevant to the current study, it focused on the participation of the broader populace in both urban and rural communities whereas this study is restricted to the participation of only the rural populace, hence it will be more detailed. The other difference is that his study only targets key informants and ignores the 'people' who are the authors of a constitution. The current research includes ordinary members of the rural populace, in addition to key informants. The advantage of integrating the two is that the current research reflects the broad and diverse opinions of the different members of the rural population thus being more representative, as opposed to an aristocratic preference by the previous researcher. Furthermore, the current researcher approaches the study from a legal perspective. The study provides a doctrinal analysis of the relevant global, regional and domestic legislation and case law together with any judicial interpretation of the same, with regards to the right of public participation in constitution making.

Masunda and Zembe presented a paper which aimed at providing an analytical assessment of the GPA constitution making process. Their paper explores the question of whether the new Constitution of Zimbabwe was a people driven and democratic process with regard to the control and ownership of the process.<sup>57</sup> Gwaravanda also conducted a

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<sup>56</sup> T Shonhe 'Public Participation in the Constitution Making Process in Zimbabwe (2009 to 2010)' unpublished Masters of Management Dissertation, University of Witwatersrand, 2011, 1-93.

<sup>57</sup> OC Masunda & W Zembe 'The Global Political Agreement (GPA) Constitution in Zimbabwe: A New People Driven Constitution or a Misnomer?' Draft Paper Prepared for the Conference on 'Constitution Making Processes in Africa' organised by the Faculty of Law, University of the Western Cape, 2013, 1.



study in which he applies the Harbemas' theory of deliberative democracy to 'argue for an objective, non-partisan and non-evil outcome' in the Zimbabwean constitution making process. He argues against partisan thinking where party interests and aspirations prevail over the views of the grassroots people.<sup>58</sup> Sachikonye explored different questions with specific reference to Zimbabwe's experience in constitution making and electoral reform.<sup>59</sup> While all these aforementioned studies are almost similar to the current study with regard to their objective of evaluating the significance of the involvement of the public in the constitution making process, they fundamentally differ in methodology. The aforesaid studies are all desktop or library-based while the researcher in the current study conducted a field research in three selected rural communities in Zimbabwe to determine the participation, role and significance of the rural populace in the 2009-13 constitution making process. The benefit of field research is that it offers the researcher a deeper understanding of the composition of the particular setting or society. The aforementioned studies are also broad and general in so far as they discuss the participation of the broader Zimbabwean populace whereas the current study restricts attention to the participation of the rural populace thus being more detailed and comprehensive.

Ndulo discusses the extent to which the process of constitution making can be used as a vehicle for national dialogue and the consolidation of peace.<sup>60</sup> He further examines the effectiveness of public participation in the constitution making processes and the relevance of international human rights norms to the constitution making process in post-conflict countries. Noteworthy, Ndulo does not address the 2009-13 constitution making process which is the primary focus of this study. The current study takes a step further and examines Zimbabwe's legislative framework for the recognition and protection of international human rights. The current study also assesses the effectiveness of the enforcement mechanisms of the international human rights treaties and Zimbabwe's domestication of the treaties.

Mulisa uses a library-based methodology to examine public participation in constitution making. He evaluates general public participation in the context of the Kenyan

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<sup>58</sup> ET Gwaravanda 'Habermas' Deliberative Democracy and the Zimbabwean Constitution Making Process' (2012) Vol. 6 Issue 6, *African Journal of Political Science and International Relations* 123.

<sup>59</sup> See generally Sachikonye (note 13 *supra*) 1-25.

<sup>60</sup> M Ndulo 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order' in LE Miller & L Aucoin (eds.) *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010) 1-28.



experience.<sup>61</sup> His work is significant to this study in that it provides a useful background on the concept of public participation upon which this work is premised. On the other hand however, this study is specific to Zimbabwe.

Hart's report on democratic constitution making examines the role of constitution making in peacemaking where participatory constitutionalism may provide a platform for reconciliation and negotiating conflicts. Her report analyses recent practices of constitution making across the globe and documents the emergence of international human rights norms that recognise the right to public participation in constitution making. Hart argues that the right to public participation in developing nations in Africa has often been taken to mean voting, for example, ratifying a constitutional text by referendum,<sup>62</sup> to the exclusion of all other forms of participation. This study therefore seeks to establish the premise of this statement and also look at other forms or methods of public participation.

Abdelgabar addresses the design of the constitution making processes in Sudan. The writer also briefly discusses international norms which pertain to the constitution making process. He recognises the existence of the right to public participation in constitution making under international law.<sup>63</sup> Constitutional expert, Hart, also acknowledges the existence the right to public participation in constitution making under international law although she is of the opinion that this right lacks 'legal teeth' and effective international enforcement mechanisms.<sup>64</sup> Whilst most writers generally concur on the existence of the right to public participation in constitution making under international law, a few other writers argue that although public participation in constitution making is desirable, it still remains a matter of opinion and not a right, and is therefore not enforceable. Renowned international law author Professor Franck, considers the right to democratic participation to be 'an emerging right' at its best.<sup>65</sup> This study will thus seek to critically analyse the

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<sup>61</sup> T Mulisa 'Public Participation in Constitution Making Process: A Critical Analysis of the Kenyan Experience' unpublished Master of Laws in Human Rights and Democratization in Africa Dissertation, University of Pretoria, 2009,1-57.

<sup>62</sup> Hart (note 2 *supra*) 1.

<sup>63</sup> NI Abdelgabar 'International Law and Constitution Making Process: The Right to Public Participation in the Constitution Making Process in Post Referendum Sudan' (2013) *Vol. 46, Verfassung und Recht in Übersee*131-151.

<sup>64</sup> Hart (note 2 *supra*) 1.

<sup>65</sup> TM Franck 'The Emerging Right to Democratic Governance' (1992) *Vol.86 (1), The American Journal of International Law* 46-91.

existence of this right under international law and the effectiveness of the enforcement mechanisms, if any.

Historically, constitution making has been viewed as a prerogative of the technically qualified elite.<sup>66</sup> Several constitutions such as the United States (US) Constitution were written by elites in closed session. The prevailing view was that a constitution would be judged democratic by its content rather than the manner in which it was adopted.<sup>67</sup> However, in his principle of deliberative democracy, Harbemas posits a theory where he argues that political deliberation must not be restricted to political elites (expert constitution making) but both the public and private actors play a part in the political process.<sup>68</sup> Although there are still some who argue that a participatory process is counter-productive and wasteful of resources due to the lengthy period required for mass participation, there has been a recent shift beginning in the early 1990s, with more attention now being paid to the process by which the constitution is adopted. For example, the constitution making of countries such as South Africa, Tanzania, Uganda and Kenya assumed a participatory or people-driven process. Harbemas' theory is relevant to this study in that it gives insight into this previously insignificant model of constitution making. Its importance is further highlighted by the fact that the negotiation and subsequent adoption of the Constitution of Zimbabwe was supposedly guided by the principles of participatory constitution making, as posited by Harbemas. The study goes a step further and looks into the benefits of involving the public in the constitution making process and also its downside and challenges.

There is extensive literature on constitution making processes apart from the briefly discussed writers. In most of these studies, the writers discuss and stress the need to involve the people in constitution making processes as a basis for legitimacy and ownership. Most probably owing to the fact that the Constitution of Zimbabwe was recently adopted in 2013, the writers on Zimbabwe's constitutional literature are yet to write on the participation, role and significance of the rural populace in the 2009-13 Zimbabwean constitution making process. It is this gap that this study seeks to bridge.

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<sup>66</sup> DC Moehler & E Marchant 'A Multi-Dimensional Model of Participatory Constitution Making and Legitimacy' Paper presented at conference 'The Gap from Parchment to Practice: Ambivalent Effects of Constitutions in Democratizing Countries', 2013, 2. Available at [http://www.american.edu/spa/gov/upload/democracy2013-moehler\\_marchant.pdf](http://www.american.edu/spa/gov/upload/democracy2013-moehler_marchant.pdf) (accessed 28 April 2015).

<sup>67</sup> *Ibid* 2.

<sup>68</sup> Gwaravanda (note 58 *supra*) 25.

### 1.11 Definition of Operational Concepts

In this context, the following technical terms shall assume the following meaning(s):

**1.11.1 Civil society** – Kibamba defines civil society as the aggregate of voluntary civic and social organisations and institutions that form the basis of a functioning society, whose institutional forms are distinct from those of a state. Civil society includes organisations such as registered charities, NGOs, community groups, faith-based organisations, professional associations, support groups, voluntary associations, non-profit organisations, trade unions, student groups and advocacy groups'.<sup>69</sup>

**1.11.2 Constitution** – Blacks' Law Dictionary defines a constitution as the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, the constitution defines the scope of governmental sovereign powers, and guarantees individual civil rights and liberties.<sup>70</sup> Duhaime's Constitutional, Human Rights and Administrative Law Dictionary similarly defines a constitution as the basic fundamental law of a state which sets out how that state will be organised and the powers and authorities of government between different political units and citizens.<sup>71</sup>

There are two basic types of constitutions. These are unwritten and written Constitutions, for example, the British Constitution and the United States Constitution, respectively. Though there is no universal and uncontested definition of a constitution, it is however broadly accepted that any working definition of a constitution would likely embrace a certain set of fundamental legal-political rules. These will be discussed in the successive chapters.

**1.11.3 Constitutionalism** – Constitutionalism is a nebulous concept. This is because constitutionalism can be understood as an idea, or as a principle, and sometimes as a process. As a result, different scholars usually have diverse views on what it really entails. The term stems from the word constitutional which has roots in the Latin term

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<sup>69</sup> DM Kibamba 'The Role of Civil Society in Broadening Participation in the Constitution Making Process in Tanzania' Draft Paper Prepared for Presentation at a Hakiardhi Forum on 'Land and Constitutionalism', Dar es Salaam, Tanzania, 2013, 1-21.

<sup>70</sup> HC Black *Black's Law Dictionary* (online). Available at <http://www.thelawdictionary.org/constitution> (accessed 23 February 2015).

<sup>71</sup> L Duhaime (ed.) *Duhaime's Constitutional, Human Rights and Administrative Law Dictionary* (online). Available at <http://www.duhaime.org/LegalDictionary/C/Constitution.aspx> (accessed 23 February 2015).

*constitutio* (which means ‘enactment’). Its plural form *constitutiones* refers to ‘a collection of laws’.<sup>72</sup> The term constitutionalism has also been used synonymously with constitutional democracy in modern legal lexicon.

According to Katz, constitutionalism ‘consists in a process within a society by which the community commits itself to the rule of law, specifies its basic values and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values.’<sup>73</sup> Constitutionalism is the doctrine that provides that governments must act within the constraints of the constitution, whether written or not. In its simplest and general sense, constitutionalism refers to the limitation of power and supremacy of law.<sup>74</sup> It can be noted, from the above definition, that the concept constitutionalism is thus predicated on the respect of the rule of law.

The inflationary use of the terms constitution and constitutionalism has however led to obscurity of their meanings. Notwithstanding there is a close relationship between a constitution and constitutionalism, the two should be differentiated. While a constitution refers to the document itself, constitutionalism refers to the substance and values entrenched in the provisions of the document. The latter serves as a means of evaluating the form, substance and legitimacy of the former. Constitutionalism is premised on the assumption of the existence of a constitution, but the opposite is however not necessarily true.

**1.11.4 Constitutional Reform** – The Oxford Dictionary of Law defines constitutional reform as ‘the introduction of legislation to modify the rules and practices that determine the composition and functions of the organs of central and local government in a state.’<sup>75</sup>

It is however very important to distinguish between reform and review. Constitutional review is the process whereby a constitution is revised with the possibility or intention of changing it if it is necessary or desirable to do so. The process may culminate in a

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<sup>72</sup> S Giovanni ‘Constitutionalism: A Preliminary Discussion’ (1962) Vol. 56 Issue 4, *The American Political Science Review* 853.

<sup>73</sup> SN Katz *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience* (1994) 14.

<sup>74</sup> JP De Siqueira ‘What is Subnational Constitutionalism?’ A Sant’Anna Legal Studies Research Paper, 2010, 2. Available at [http://www.stals.sssup.it/files/stals\\_Pinheiro.pdf](http://www.stals.sssup.it/files/stals_Pinheiro.pdf) (accessed 23 February 2015).

<sup>75</sup> J Law & EA Martin (eds.) *Oxford Dictionary of Law*, 7<sup>th</sup> Ed (2009) 124.

completely revised constitution or one that is amended to make its original form unrecognisable. It is however argued that a more appropriate term for this form of constitutional review is constitutional reform.<sup>76</sup>

The term constitutional reform has been generally taken to denote the process of constitutional review, analysis, revision, amendment and adoption of a new constitution. Constitutional review therefore forms an inherent component of constitutional reform, with the process of constitution making also forming an inevitable component of constitutional reform.<sup>77</sup>

**1.11.5 Constitution making** – the term refers to both amending an existing constitution as well as making a new constitution. Shivji however argues that the term constitution making has often been used to mean the making of a new constitution only, to the exclusion of the other meaning.<sup>78</sup>

**1.11.6 Constitutional legitimacy** – Chau defines constitutional legitimacy as the acceptance that an exercise in power is justified and therefore authorised, either implicitly or explicitly, by society at large. The constitution lends legal legitimacy to all subsequent laws, institutions and actors, The creation of the constitution itself is in effect an extra-constitutional process which means that the constitution must therefore be legitimised by non-constitutional sources since it cannot ‘give birth’ to itself.<sup>79</sup> The author argues that establishing constitutional legitimacy is far more important than the substantive provisions of the constitution as a constitution defective in content may endure, compared to a model constitution that is however illegitimate in the eyes of the people.<sup>80</sup>

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<sup>76</sup> MK Mbondenyi & T Ojienda *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (2013) 23.

<sup>77</sup> *Ibid* 23.

<sup>78</sup> IG Shivji, HI Majamba, RV Makaramba & CM Peter *Constitutional and Legal Systems of Tanzania: A Civics Source Book* (2004) 47.

<sup>79</sup> B Chau ‘Constitutional Legitimacy: An analysis under Max Weber’s Traditional Sources of Authority’ (2012) *Social Science Research Network* 3.

<sup>80</sup> *Ibid* 3.

## **1.12 Ethical Considerations**

The purpose of this research is to assess the participation, role and significance of the Zimbabwean rural populace in the drafting of the 2009-13 Constitution. A field research was conducted in three selected rural communities in Zimbabwe. Given the importance of ethics in research that involves human participants, the personal and conversational nature of an interview, the researcher adhered to all codes of conduct associated with researches as outlined by the University of Venda, and obtained an Ethical Clearance Certificate from the university.

The researcher also duly acknowledged all the journal articles, books, cases legislation, internet sources and other relevant documents used in this study. The researcher did not coerce people into participating in the study; participation in the research was voluntary. Moreover, participants were also informed of their right to withdraw from participation at any time, without giving a reason. Closely related to voluntary participation is the concept of informed consent. As such, the researcher fully informed the participants about the procedures to be employed, purpose of the study and possible risks, before the participants agreed to take part in the study. The researcher used a University of Venda approved Informed Consent Form to provide participants with relevant information on the study. For purposes of confidentiality and privacy, the researcher undertook to protect all confidential communications, protect and make data anonymous, and to ensure that if ever there is need for identifying information, such information will not be made available to anyone not directly involved in the study due to political inferences which may be drawn from the research. The researcher also undertook to protect the participants and minimise harm (both physical and psychological) by not putting participants in situations where they might be at risk of harm as a direct result of their participation in the research. Throughout the research, the researcher was certain to maintain objectivity and to avoid bias in data collection, analysis and interpretation and other aspects of research where objectivity is expected or required.

## **1.13 Limitations of the Study**

### **1.13.1 Time and Financial Resources**

Constraints of time and financial resources limited the study to the convenience of sampling only the readily accessible above-mentioned areas, whereas more areas would have been

more representative. However, the researcher compensated for that by researching the selected areas in detail. The researcher also complemented the data collected from interviews with secondary sources of data such as newspaper articles and reports.

### **1.13.2 Political Nature of the Research**

The researcher encountered reluctance from potential participants who did not want to participate in the study for fear of political victimisation. In anticipation of the above challenge, the researcher had equipped himself with the necessary documentation from the University of Venda, outlining the importance, relevance, nature, purpose and extent of the study. Though some potential participants were still reluctant to participate, most of them agreed to participate after the researcher produced the documentation. The researcher also sought permission from the relevant authorities in Zimbabwe before visiting the research areas to avoid disruption of the interviews by authorities.

### **1.14 Overview of Chapters**

In achieving the aims and objectives, the study is arranged into five chapters:

**1.14.1 Chapter One** provides an introduction to the study. A brief background on the study is followed by the statement of the problem and thereafter, aims and objectives, research questions, hypothesis, justification of the study, research methodology, literature review, definition of key words, ethical considerations, scope of the study, and limitation of the study.

**1.14.2 Chapter Two** gives a detailed and comprehensive analytical review of the constitutional reform efforts or exercises that have happened since the adoption of the 1979 Lancaster House Constitution, previously discussed briefly in the first chapter. Such review is necessary in that it helps to expose the knowledge gap that this study aims to fill.

**1.14.3 Chapter Three** is divided into two parts. The first part explores the concept of participatory constitution making and examines the different relationships in and impact of public participation in constitution making. The part also prescribes a set of recognised principles and normative standards in constitution making that ensure the most fair, transparent and effective manner of enabling public participation. The second part identifies the international and regional human rights instruments that provide for

the right to public participation in constitution making and Zimbabwe's domestication of such instruments. It also discusses the country's legal framework for public participation in constitution making and the legal and political environment under which the current Constitution was adopted. The chapter concludes with a brief reference to South Africa's constitution making process and its current legislative framework for participatory constitution making for purposes of drawing lessons.

**1.14.4 Chapter Four** evaluates and interprets the rural populace's participation in the 2009-13 constitution making process against identified international standards in participatory constitution making using information obtained from the interviews conducted in the selected study areas.

**1.14.5 Chapter Five** concludes the study; it presents a summary of the study findings and gives conclusions and recommendations based on the study findings.



## CHAPTER TWO

*'Modern ideas on constitution making place emphasis on popular participation and widespread consultation in order to produce a constitution that will endure and which the people feel is truly their own.'* – **Ben Hlatswayo (Zimbabwean High Court Judge)**<sup>81</sup>

### A HISTORICAL BACKGROUND ON CONSTITUTIONAL REFORM AND DEVELOPMENT IN ZIMBABWE FROM 1979 TO 2013

#### 2.1 Introduction

The drafting and successive adoption of the current Constitution of Zimbabwe is best understood against a historical background of previous constitutional reform efforts. These earlier initiatives informed the *modus operandi* of constitution making in Zimbabwe. This chapter therefore provides a detailed and comprehensive analytical discussion and review of the history, background and development of constitutional reform efforts in Zimbabwe. The chapter focuses on the procedures which led to the creation of the 1979 Independence Lancaster House Constitution, post-independence amendments (1980 to 1998), 2000 Chidyausiku/Constitutional Commission draft constitution, 2007 Kariba draft constitution and the 2013 COPAC Constitution. This critical review is necessary in that it helps to expose the knowledge gap that the study seeks to fill.

#### 2.2 The Colonial Lancaster House Constitution (1979)

The process of drafting a new constitution is an exceptional moment in every country's history as detailed issues on the nature and future of the country are discussed. The constitution making process entails complex negotiations to arrive at a document that reflects a broad range of interests and not the views of a single political party.<sup>82</sup> This view is similarly resonated by Hlatswayo who stresses the importance of popular participation and widespread consultation in order to produce a legitimate document that endures.<sup>83</sup> Put differently, any constitution is as good or as bad as the process through which it was made. The significance of public participation is more pronounced in Zimbabwe. The country is

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<sup>81</sup> B Hlatswayo 'Democratisation and Constitutionalism through Constitution Making Process in Zimbabwe' (2009). Available at <http://zimpolitical.blogspot.co.za> (accessed 16 March 2016).

<sup>82</sup> AT Magaisa 'The Government Must Exercise Caution on Constitutional Amendments' *Nehanda Radio* 24 March 2015. Available at <http://nehandaradio.com/2015/03/24/government-must-exercise-caution-on-constitutional-amendments/> (accessed 23 June 2016).

<sup>83</sup> Hlatswayo (note 81 *supra*).

characterised by political intolerance and violence, electoral conflicts, economic mismanagement, social disintegration and international isolation.<sup>84</sup> If the process of drafting a constitution is popularly participated, people-driven and as inclusive as possible, the researcher posits that the process may significantly contribute to national healing and reconciliation. Conversely, if the constitution making process is elite-driven and negates popular participation, it may give rise to questions of legitimacy of not only the new constitution, but the entire constitutional and legal order as well, as is the case with Zimbabwe.<sup>85</sup>

After nearly a century under colonisation, Zimbabwe became independent on the 18<sup>th</sup> of April 1980. The decolonisation of Zimbabwe took the form of a negotiated settlement, the Lancaster House Agreement of 1979.<sup>86</sup> The talks were held at the Lancaster House in London, where a 'ceasefire compromise' constitution was negotiated between the colonial Zimbabwe-Rhodesia government, represented by Bishop Abel Tendekayi Muzorewa<sup>87</sup> and Ian Douglas Smith,<sup>88</sup> and the main political parties at the time, ZANU and ZAPU which were united politically under the Patriotic Front. The liberation war movements were represented by their leaders, Robert Gabriel Mugabe and Joshua Mqabuko Nyongolo Nkomo, respectively. The main object of these talks was to bring to an end a protracted liberation war that had raged for two decades. At the conference, a draft constitution document which originated from the British Parliament as a schedule to the Zimbabwe Constitution Order of 1979 was used as the basis for these negotiations.<sup>89</sup> This document was subsequently adopted by the negotiating parties as part of the agreement and was enacted by Order in Council on 6 December 1979. The Lancaster House negotiations, which were chaired by Lord Peter Carrington,<sup>90</sup> reached an agreement which resulted in the establishment of the Republic of Zimbabwe. The Zimbabwean Independence Constitution is accordingly referred

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<sup>84</sup> W Zembe & J Sanjeevaiah (note 14 *supra*) 10.

<sup>85</sup> Magaya (note 19 *supra*) 2.

<sup>86</sup> Formerly Southern Rhodesia, Zimbabwe was colonised by the British South African Company in 1890.

<sup>87</sup> Bishop Abel Muzorewa served as Prime Minister of Zimbabwe-Rhodesia from the Internal Settlement (the Internal Settlement was an agreement between Prime Minister of Southern Rhodesia, Ian Smith and Bishop Abel Muzorewa in 1978. Under this government of national unity, the country was renamed Zimbabwe-Rhodesia in 1979) to the Lancaster House Agreement. He occupied the office from 01 June to 11 December 1979. He was preceded by Ian Douglas Smith as Prime Minister of Southern Rhodesia and was succeeded by Robert Gabriel Mugabe as Prime Minister of Zimbabwe.

<sup>88</sup> Ian Douglas Smith was the 8<sup>th</sup> Prime Minister of Southern Rhodesia. He was in office from 13 April 1964 to 01 June 1979. He was preceded by Winston Field and succeeded by Bishop Abel Muzorewa.

<sup>89</sup> Statutory Instrument 1979/1600 of the United Kingdom.

<sup>90</sup> The then Foreign and Commonwealth Secretary of the United Kingdom and representative of the British government.

to as the 'Lancaster House Constitution'. The most remarkable feature of this Constitution is that it did not provide for public participation.

The Lancaster House Constitution was mostly an integrative solution since neither of the negotiating parties achieved their initial demands as they had to make several concessions. For example, after an impasse due to disagreements over restrictive land acquisition provisions, Robert Mugabe finally relented to the pressure and agreed to wait for ten years before instituting land reform.<sup>91</sup> It can be postulated that the liberation groups made these concessions with the belief and hope that a new democratic constitution would be adopted soon after independence was achieved, and the majority post-colonial African government would deal with the unfavourable constitutional provisions afterwards - as eventually happened.<sup>92</sup> In the elections that followed after the conference, ZANU PF won and Zimbabwe became an independent state. The party formed the first post-colonial government.<sup>93</sup>

In view of the Lancaster House negotiations, Ndulo notes the importance of recognising the conditions under which a constitution making process is negotiated. He opines that the 1979 constitution making process would have benefited more from separating the constitution making process from that of securing a cease-fire. He believes this would have prevented the dominant and prominent groups from having an overwhelming influence in producing the constitution, and further helped to create room for public participation.<sup>94</sup>

It is against a backdrop of the above negotiations that modern Zimbabwe came to inherit a seriously defective constitution which was a negotiated settlement document that lacked popular participation. The document did not come by as a product of an inclusive and participatory constitution making process. The constitution was imposed on Zimbabwe. The Lancaster House Constitution is thus appropriately viewed as a compromise document, negotiated to end a protracted liberation war between government forces and the liberation war fighters and usher Zimbabwe into a peaceful, lawful and internationally recognised

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<sup>91</sup> It had been agreed at the Lancaster House that Prime Minister Robert Mugabe would have to wait for ten years before instituting land reform. See 'President Mugabe Champion of Land Reform' *Manica Post* (online), 17 April 2015. Available at <http://manicapost.co.zw/president-mugabe-champion-of-land-reform/> (accessed 11 July 2016).

<sup>92</sup> Laakso (note 20 *supra*) 3.

<sup>93</sup> *Ibid* 3.

<sup>94</sup> Ndulo (note 60 *supra*) 191.

independent state. The document and the process that produced it was not a product of the common populace. The process adopted and the provisions entrenched only put paid to the theoretical underpinning that constitutions are elite driven rather than popularly legislated.<sup>95</sup> It further buttressed the perception that constitution making in Zimbabwe can only be realised within the theoretical framework of the elite theory of negotiation.<sup>96</sup>

The power-brokerage tag synonymous with the Lancaster constitutional conference disparaged the democratic theory of constitution making, whether it is the direct democratic or representative democratic theory.<sup>97</sup> The Patriotic Front leaders who were supposed to represent the people were apparently more concerned with assuming power than resonating the wishes and aspirations of the people back home.<sup>98</sup> The constitution as the supreme law of the land derives its supremacy from its endorsement by the people of that land. The document that emanated from the Lancaster House Conference was not endorsed by the people of Zimbabwe. Cocooned in London, the liberation war movements could not consult with the people.<sup>99</sup>

To perhaps illustrate the above point, a report by the Zimbabwe Election Support Network (ZESN)<sup>100</sup> indicates that a large majority of Zimbabweans has never felt emotionally attached to the Lancaster House Constitution.<sup>101</sup> A 2005 *Afrobarometer* survey also reveals that 47% of Zimbabweans did not feel that the Lancaster House Constitution expressed their values and hopes and a staggering 88% percent favored its reform.<sup>102</sup> Julius Nyerere<sup>103</sup> explains that a constitution should fit in with the traditions of the people. It should be felt to belong to the country and only then can it foster a sense of nationhood and inspire a sense of loyalty.<sup>104</sup> The Lancaster House Constitution did not however evoke such

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<sup>95</sup> E Matinenga 'Constitutional Review Process in Zimbabwe' Unpublished Paper Presented on the Occasion of the 14th Annual General Meeting and Conference of the SADC Lawyers Association (SADCLA), Lilongwe, Malawi, 2013, 5.

<sup>96</sup> Magaya (note 19 *supra*) 6.

<sup>97</sup> *Ibid* 6.

<sup>98</sup> *Ibid* 6.

<sup>99</sup> JH Choma *The Relevance of the Courts and Human Rights Organisations in the Enforcement and Monitoring of Socio-Economic Rights in South Africa* (2012) 42.

<sup>100</sup> ZESN is a network of 31 independent, non-partisan non-governmental organisations formed in 2000 to promote democratic elections in Zimbabwe. See generally the network's website, [www.zesn.org.zw](http://www.zesn.org.zw) (accessed 19 May 2016).

<sup>101</sup> Zimbabwe Election Support Network Referendum Report: Zimbabwe Constitution Referendum Report and Implications for the Next Elections', 2013, 4.

<sup>102</sup> *Ibid* 4.

<sup>103</sup> Julius Mwalimu Nyerere is a former President of Tanzania.

<sup>104</sup> Choma (note 99 *supra*) 57.

feelings of ownership on the citizens largely as a result of the process by which it was negotiated and adopted.

The period after the adoption of the Lancaster House Constitution (1980 to 1998) witnessed several fragmentary parliamentary amendments to the Constitution. Sachikonye refers to this period as the 'lost decade' in that there were no urgent efforts to comprehensively review and reform the Lancaster House Constitution. The writer believes that the period would have provided a more conducive political environment and conjuncture for constitutional reform as political positions had not yet become firm to be too adversarial and the Zimbabwean society was not yet deeply polarised as it was at the time of the 2009-13 constitution making process.<sup>105</sup>

### 2.3 Post-independence Amendments (1980 – 1998)

As argued earlier, the liberation movements had made several concessions in the belief that they would later institute constitutional reform after attaining independence.<sup>106</sup> It is however surprising to note that there were no efforts at comprehensive reform of the colonial Lancaster House Constitution, even after the expiry of the ten year restriction.<sup>107</sup> Later attempts at constitutional reform resulted in convenient, piecemeal and self-serving amendments which were all spearheaded by a ZANU PF-led Parliament. At the time of the 2009-13 COPAC constitution making exercise, the Lancaster House Constitution had over 19 amendments, none of which came through a referendum or popular participation.<sup>108</sup> Constitutional amendments that were introduced were mostly for the consolidation of power and authority in the executive, despite many critical issues relating to democracy, land reform<sup>109</sup> and social rights, among others. The ZLHR criticised the government for 'manipulating and implementing piecemeal amendments which negate the need for broad-based and inclusive consultation with all stakeholders.' The organisation argued that

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<sup>105</sup> Sachikonye (note 13 *supra*) 4.

<sup>106</sup> Laakso (note 20 *supra*) 3.

<sup>107</sup> It had been agreed at the Lancaster House negotiations that the Constitution should not have its significant provisions amended for ten years; serious land redistribution (compulsory land reform programme) would however begin 15 years after the expiry of the restriction with the enactment of Constitutional Amendment No. 17 of 2005 which nationalised Zimbabwe's agricultural land and denied the farm owners the right to challenge appropriation of such land by the state.

<sup>108</sup> Magaya (note 19 *supra*) 5.

<sup>109</sup> The colonial government implemented an unequal distribution of land ownership between blacks and whites. One of the primary reasons for the liberation war was to reclaim ownership of the land from white settlers. After the expiry of the ten year restriction, land redistribution was therefore one of the most critical issues that needed to be addressed. See section 72(7) (a) & (b) [Rights to agricultural land] of the Constitution of Zimbabwe Amendment Act 20 of 2013.

Zimbabwe needs a new home-grown constitution and not piece-meal constitutional amendments that have created a 'mutilated' Bill of Rights.<sup>110</sup>

Magaisa, a constitutional expert and political analyst, notes that the government's conduct demonstrated its obsession with legality or constitutionality in terms of which the constitution was used by the government as a tool for legitimising arbitrary power, in total disregard of constitutionalism by which principles the government's power must be limited.<sup>111</sup> This can however be partly explained by the fact that the President had personally benefited immensely from these constitutional amendments, specifically the Constitutional Amendment No. 7 of 1987 that fused the offices of the Prime Minister and that of the President to create an Executive President with near-absolute powers.<sup>112</sup>

It is therefore not a surprise that the initial calls for constitutional reform originated from outside the ruling party. This clamor for a new constitution arose because of the need to right the imbalances created by the Lancaster House Constitution and also because the Constitution had been made increasingly less democratic through several parliamentary amendments which negated popular participation and were enacted to serve elite political interests.<sup>113</sup> This consequently effected the revival of trade unionism and the emergence of a powerful civil society which had been alarmed by the unabated and continued increase of power of the executive through successive parliamentary amendments to the Lancaster House Constitution. The civil society was of the view that no significant economic, political or social transformation could be achieved without rewriting the Constitution.<sup>114</sup>

To that end, the NCA, an alliance of the civil society organisations was formed in 1997 to push through far-reaching constitutional reforms. The alliance was guided by the belief that the social, economic and political problems of Zimbabwe were deep-rooted in the Lancaster House Constitution. The NCA was formed to campaign for a new people-driven and democratic constitution as the solution to the problems bedeviling the country. The

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<sup>110</sup> 'Home-grown Constitution the Answer, Say Lawyers' *Zimbabwe Independent* (online) 31 March 2006. Available at <http://www.theindependent.co.zw/2006/03/31/home-grown-constitution-the-answer-say-lawyers/> (accessed 11 May 2016).

<sup>111</sup> AT Magaisa 'Lessons for Zimbabwe's Constitutional Reform Process' (2011) *Open Society Initiative for Southern Africa* 1.

<sup>112</sup> ZESN Referendum Report (note 101 *supra*) 5.

<sup>113</sup> Sachikonye (note 13 *supra*) 3.

<sup>114</sup> *Ibid* 8.

organisation considered a democratic constitution as the heart of good governance. The objectives of the NCA were as follows: (i) to identify shortcomings of the current Constitution and to organise debate on possible constitutional reform, (ii) to organise the constitutional debate in a way that allows broad-based participation and, (iii) to subject the constitution making process in Zimbabwe to popular scrutiny in accordance with the principle that constitutions are made by and for the people.<sup>115</sup>

These objectives clearly set the civil society on a collision course with the government which in 1999 had made known its position regarding constitutional reform. The government had revealed its intention to dominate the constitutional reform process. Of the three positions that the government had regarding constitutional reform, two had emanated from within the government itself. The first approach termed the 'Mugabe Way'<sup>116</sup> was:

One which would first enable our party at the provincial and then at the Central Committee levels to address the matter and come to some initial conclusions on the various parts of the Constitution needing amendment. The views of other organisations will be collected in the process *but only for consideration* by us and in comparison with our own.<sup>117</sup>

An alternative approach termed the 'Zvobgo Way'<sup>118</sup> recognised that the ruling party should not completely dominate the constitutional reform process but should instead allow the civil society to contribute meaningfully to the process. This approach sought to integrate the party congress resolution with a party resolution that called on the executive to introduce a mechanism to review the constitution. This approach was however criticised on the ground that it still envisaged a constitution making process dominated by ZANU PF. These approaches were considered unpalatable by the civil society, except for the approach advocated by the NCA that proposed for a broader participatory constitutional reform process.<sup>119</sup>

Thus, whereas there was general consensus on the need for a new democratic constitution, there was disagreement regarding the process to adopt in the drafting of the constitution. This resulted in increased disillusionment with the ZANU PF government and

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<sup>115</sup> See generally the organisation's website, <http://www.ncazimbabwe.org> (accessed 15 March 2016).

<sup>116</sup> The first approach is named after the President of Zimbabwe, Robert Gabriel Mugabe.

<sup>117</sup> President RG Mugabe (1998). See Sachikonye (note 13 *supra*) 9. Emphasis supplied.

<sup>118</sup> The second approach is named after the then leading constitutional expert in ZANU PF, the late Edison Zvobgo Hlatshwayo.

<sup>119</sup> Sachikonye (note 13 *supra*) 9-10.



the formation of the Movement for Democratic Change (MDC),<sup>120</sup> a formidable opposition political party which probably owes its success to this general disenchantment with the ruling party. The party became an outlet for the deep-seated grievances with ZANU PF. The formation of MDC and its entry into politics heralded a new era in the Zimbabwean political landscape.

## 2.4 Constitutional Commission Draft Constitution (1999 - 2000)

The year 1999 is very significant as it marked the turning point in the history of Zimbabwean politics. Since attaining independence in 1980, ZANU PF had dominated Zimbabwe's political scene and won every election. The year saw the birth of a strong opposition party named MDC.<sup>121</sup> It contested its first elections in the watershed March 2000 parliamentary elections and won 57 seats while ZANU PF won 63 seats out of the 120 parliamentary constituencies contested.<sup>122</sup> The election results were encouraging as the opposition party realised that it was possible to dislodge ZANU PF from its authoritarian rule. This optimism led to an even stronger and determined campaign for a new constitution.

As a result of mounting pressure from the civil society and several other interest groups and, fearing the potential political repercussions, President Mugabe finally capitulated to the relentless and growing clamor for constitutional reform and decided to overhaul the Lancaster House Constitution and institute reform.<sup>123</sup> The President used his powers under the Commissions of Inquiry Act<sup>124</sup> and appointed a 400-member Constitutional Commission/Chidyausiku Commission, in direct conflict to a properly empowered independent National Constitutional Conference suggested by the MDC and the NCA, to review the Lancaster House Constitution and come up with recommendations. This had two note-worthy concerns; firstly, it permitted the President to control the size and

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<sup>120</sup> The MDC was formed in 1999 out of an alliance of civil society organisations such as the NCA and the Zimbabwe Congress of Trade Unions (ZCTU), among other organisations.

<sup>121</sup> Prior to the formation of the MDC, more than 12 opposition parties had been formed in the early 1990s but these were weak and small and had little or no political impact. In 1980 ZANU PF won 63% of the votes, in 1985 it won 77%. In the 1990 elections it secured 80% and further won 81% in the 1995 elections. For detailed results, see *African Elections Database: Elections in Zimbabwe*, available at <http://africanelections.tripod.com/zw.html> (accessed 24 May 2015).

<sup>122</sup> 'Grand Coalitions No Panacea for Electoral Victory over ZANU PF'. *The Financial Gazette* (online) 17 March 2016. Available at <http://www.financialgazette.co.zw/grand-coalitions-no-panacea-for-electoral-victory-over-zanu-pf/> (accessed 11 May 2016).

<sup>123</sup> Magaya (note 19 *supra*) 6.

<sup>124</sup> Commissions of Inquiry Act [Chapter 10:07].



composition of the Constitutional Commission. Secondly, the Constitutional Commission was simply tasked with submitting a report with recommendations to the President who was however not bound legally to accept any or all of the recommendations.<sup>125</sup>

Hatchard observes that the composition of the Constitutional Commission evidently and from the onset betrayed President Mugabe's intent to maintain control over the constitution making process.<sup>126</sup> The Constitutional Commission was headed by a High Court judge, Justice Godfrey Chidyausiku, who was believed to be a close ally of President Mugabe.<sup>127</sup> The majority of the members of the Commission were also known to be ZANU PF members, supporters or sympathisers. Of the 150 Members of Parliament in the Constitutional Commission, only three had different political affiliations. The Constitutional Commission was therefore demonstrably and undeniably not independent as it was susceptible to manipulation by the President. It is also argued that the Constitutional Commission's membership was purely elitist and therefore not fully representative of the Zimbabwean civil society.<sup>128</sup> As a result, the NCA-led coalition of civil society organisations boycotted the process criticising the Constitutional Commission as partisan and lacking independence.<sup>129</sup>

The integrity of the public consultation process was also undermined by the fact that although the Constitutional Commission had been mandated to canvass, collate and consider the views of the public and prepare a draft constitution, the President was not lawfully bound by the findings of the Constitutional Commission nor was he obligated to present the Constitutional Commission's draft constitution for a referendum. The Commission's mandate was therefore reduced to that of merely submitting recommendations to the President. The civil society argued that there should have been a legally binding guarantee that the recommendations of the Constitutional Commission would be final.<sup>130</sup>

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<sup>125</sup> See generally J Hatchard 'Some Lessons on Constitution Making from Zimbabwe' (2001) *Vol. 45 Issue 2, Journal of African Law* 210 – 216.

<sup>126</sup> *Ibid* 210.

<sup>127</sup> Magaya (note 19 *supra*) 6. Incidentally, Justice Chidyausiku was later on appointed Judge President (head of the High Court) and subsequently as Chief Justice in 2001.

<sup>128</sup> Hatchard (note 125 *supra*) 212.

<sup>129</sup> Ndulo (note 60 *supra*) 186.

<sup>130</sup> *Ibid* 186.

The Constitutional Commission's constitution making process seemingly assumed a participatory nature. The Constitutional Commission embarked on a broad and extensive public consultation process which was carried out over a space of five months. The Constitutional Commission developed an outreach programme where the commissioners held public meetings in all the 11 provinces of the country and invited people to give their views on the contents of the new constitution. Official figures indicate that this attracted quite a significant number of people.<sup>131</sup> To help people address key issues, the Constitutional Commission produced a *List of Constitutional Issues and Questions* which was widely publicised in the national media with the objective being to 'promote public discussion and debate' on the new constitution. Hatchard concedes this was in principle a useful exercise as it provided some direction to people and organisations regarding the crucial issues that needed to be addressed. He however questions the practical value of the almost 400 individual questions which he argued were more suited to a constitutional law examination than to a public debate.<sup>132</sup>

Hatchard also notes that the very success of the consultation process undermined the overall success and integrity of the constitution making process. It raised questions on how to read through the thousands of submissions received and distil the will of the people. This proved very problematic, with the reports demonstrating a wide range of views on several important matters with phrases such as 'the majority of the participants stated...', 'there was a view that...', 'a strong minority advocated...'<sup>133</sup> Hatchard argues that this made the draft susceptible to manipulation by a reasonably competent drafter and claims that this is precisely what happened as regards the *Corrections and Clarifications* made to the original draft constitution.

In order to meet the needs of the widest possible section of the populace and to make the widest possible consultations meaningful, Hatchard suggests that the method of consultation be properly structured and proposes the adoption of the South African approach in constitution making which provided for the selection of a group of experts, representative of all the political parties in the country and other stakeholders (and not 'a

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<sup>131</sup> Figures reflect that 4,321 meetings were held nationwide. The meetings were attended by 556,276 people and 150,000 people attended special meetings. There were over 7,000 individual submissions. See *Mushayakarara v. Chidyausiku* 2001 (1) ZLR 248.

<sup>132</sup> Hatchard (note 125 *supra*) 211.

<sup>133</sup> *Ibid* 211.

body of the ridiculously unwieldy size' as in the case of Zimbabwe) that is tasked with the drawing up of the draft constitution. He further suggests that the drafting be informed by thematic committees whose mandate is to gather, collate and refine the views submitted. The author also recommends that the draft constitution be based on a list of constitutional principles established and agreed by all the stakeholders before the drafting exercise commences. The document should then be subjected to public scrutiny and analysis.<sup>134</sup>

In light of the sweeping powers of the President manage and control the process, the civil society argued that the legal framework of the Commissions of Inquiry Act was inadequate for constitution making as it gave the President extensive powers to revoke, alter or stop the process. The Act did not guarantee the effective participation of all stakeholders.<sup>135</sup> To provide an example, the Constitutional Commission's terms of reference required the Constitutional Commission to send the draft constitution to the President for finalisation. In accordance with these powers, and not being satisfied with the draft constitution, the President unilaterally altered the draft constitution to the extent that the draft compiled by the Constitutional Commission differed significantly from the draft that was put to a referendum, thus reducing the draft to an executive document.<sup>136</sup>

The unbridled powers of the President were exposed when, following a legal challenge by some constitutional commissioners to the referendum on the ground that the draft constitution being placed before the electorate had not been properly adopted, Bartlett J, in *Mushayakarara v. Chidyausiku NO* in the High Court stated:

[The President] is not, in my view, required to put before the voters a constitution approved by the Constitutional Commission. He is entitled to put forward a draft constitution he so wishes to ascertain the views of the voters. It may or may not be considered unwise to make changes to a document produced by a body specifically set up to produce a draft constitution, but it is certainly not unlawful.<sup>137</sup>

The constitution making exercise was further condemned for its very tight time-table which was imposed by the President for the Constitutional Commission to complete its work. The NCA remarked that the six months period to complete the exercise hampered full public participation as it was too short. The NCA accused the government of deliberately fast-

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<sup>134</sup> *Ibid* 212.

<sup>135</sup> Ndulo (note 60 *supra*) 186.

<sup>136</sup> Sachikonye (note 13 *supra*) 11.

<sup>137</sup> *Mushayakarara v. Chidyausiku*, at 248.

tracking the process. The short time period seemed to give credibility to the perception that the President was bent on pushing through his own constitutional and political agenda.<sup>138</sup> Ndulo argues that had the Constitutional Commission been given more time, it could have organised more consultations and resolved the differences that existed between the government and the opposing groups, thus lending legitimacy to the draft constitution.<sup>139</sup> Not surprisingly, these and other poor procedural choices severely undermined the legitimacy of the final draft.

It is against this background that the NCA, which from its inception has maintained its stance that Zimbabwe needs a new democratic and people-driven constitution, rejected the draft constitution and called on people of Zimbabwe to similarly reject it. The NCA's argument was predicated on the notion that constitution making is the preserve of the people and no government or individual must be allowed to usurp such a right. Joining forces with the fledgling opposition MDC party, it successfully<sup>140</sup> campaigned for a 'No' vote arguing that the draft constitution was seriously flawed as it did not reflect the views of the people taken during the public consultation process, among other claims.<sup>141</sup> On the other hand, the ruling ZANU PF party campaigned for a 'Yes' vote.

However, not only did the NCA refuse to participate in the constitution making process and campaign for a 'No' vote, it also launched its own parallel consultation process with the people and published its own draft constitution. This resulted in the establishment of two parallel processes, the government-led process and the one led by the civil society. The NCA concentrated on providing civic education and gathering views on the Constitution. It sought to develop an alternative constitution to the one being developed by the Constitutional Commission.<sup>142</sup>

The government nonetheless ignored the NCA draft constitution and put aside the debate on the new constitution after the rejection of the Constitutional Commission's draft

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<sup>138</sup> It is widely believed that the President was intent on having the new constitution complete before the general elections to lure the rural voters with the compulsory land acquisitions provisions. See Hatchard (note 125) 210.

<sup>139</sup> Ndulo (note 60 *supra*) 192.

<sup>140</sup> The MDC's success may partly be credited to the prevailing socio-economic decline which may have resulted in the general disenchantment with ZANU PF.

<sup>141</sup> SR Dorman 'NGOs and the Constitutional Debate in Zimbabwe: From Inclusion to Exclusion' (2003) Vol. 29 Issue 4, *Journal of Southern African Studies* 853.

<sup>142</sup> Magaya (note 19 *supra*) 6.

constitution. Magaya asserts that the NCA draft constitution was largely ignored by the government because, as alluded earlier, constitution making in Zimbabwe has been a prerogative of the ruling elites and since no ruling elites were involved in its drafting, it was evidently fated to suffer a stillbirth.<sup>143</sup> He believes that this further strengthens the perception that successful constitution making in Zimbabwe can only be achieved within the theoretical context of the elite theory<sup>144</sup> and not the democratic theory which embraces the involvement of the common people and civil society organisations.<sup>145</sup> For Magaya, the elite theory elucidates well the rejection of the Constitutional Commission draft constitution as the process that gave birth to it was vigorously contested by the opposition parties and a coalition of civil societies whose interests were largely ignored. In light of the above rejected NCA and Constitutional Commission draft constitutions, the elite theory proves to inform the method of constitution making in Zimbabwe.<sup>146</sup> Even though the government ignored the NCA draft constitution, the organisation 'managed to keep the constitutional issue on the national agenda despite operating in a difficult political, social and economic environment over the years.'<sup>147</sup>

The subsequent referendum was purely a consultative exercise because the President was not legally obliged to abide by the result. The verdict of the referendum was thus intended to be rather informing and not binding. Following Parliament's approval in 1999 with voter turnout at about 26%, the draft constitution failed to attain public approval when it was put to a referendum. The draft constitution was rejected with 696, 363 'No' votes to 585, 939 'Yes' votes, representing 54.31% and 45.69%, respectively<sup>148</sup> (a table with detailed results of the referendum is given below). The rejection of the draft constitution was the high water mark for Zimbabwean civil society and opposition political parties and, probably the boldest

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<sup>143</sup> *Ibid* 6.

<sup>144</sup> The elite theory, particularly its offshoot, the elite cohesion theory, envisages a consensus by the ruling elite who may come from different ideological backgrounds but whose common interest is power. It can only be by consensus and compromise of these opposing elites (but motivated by the common interest of power) that there can be progress and adoption of policies and laws. It is the agreement between these classes which can ensure progress when there is contestation. See Magaya (note 19 *supra*) 6.

<sup>145</sup> Magaya (note 19 *supra*) 6.

<sup>146</sup> *Ibid* 6 & 7.

<sup>147</sup> C Lumina 'Evaluation of the National Constitutional Assembly (NCA) of Zimbabwe: Final Report' (2009) *NORAD Collected Reviews* 2. Available at [www.zimbabwedocument.com/download-attachment/160/](http://www.zimbabwedocument.com/download-attachment/160/) (accessed 15 May 2016).

<sup>148</sup> Electoral Institute for Sustainable Democracy in Africa (EISA), Zimbabwe Election Update, 2000, 8-9. Available at <https://www.eisa.org.za/wep/zimresults2000r.htm> (accessed 15 May 2016).

and most resounding achievement in its history.<sup>149</sup> The 'No' vote affirmed the Zimbabwean people's resolve to have a meaningful contribution to their constitution making process.

Though the government seemingly accepted the results of the referendum, the rejection of the draft constitution was not taken kindly. It was perceived by ZANU PF to be a conspiracy by the black urban middle-class elite represented by the MDC, the country's white commercial farmers and the government's external enemies.<sup>150</sup> The government became vindictive. Soon after the referendum, political violence flared up as war veterans led by (the late) Chenjerai 'Hitler' Hunzvi (the then Chairman of the Zimbabwe National Liberation War Veterans Association (ZNLWVA) unlawfully occupied white commercial farms.<sup>151</sup> The constitutional provision allowing for the compulsory appropriation of the farms was to be enacted five years after the unconstitutional seizures.

In hindsight however, Tsvangirai, whose MDC party had campaigned for the 'No' vote against the draft, conceded that the constitutional reform debate could have been handled differently. He further conceded that, in spite of its imperfections, the 2000 draft constitution was a 'lost opportunity'.<sup>152</sup>

Public perception is that the 2000 draft constitution was a more liberal document than the Lancaster House Constitution. The most pertinent question is why then was it rejected? In summary of the foregoing, it is widely understood that the people of Zimbabwe rejected the Constitutional Commission draft constitution mainly because the process had been dominated and controlled by the President; hence the process was not people-driven but rather government-driven. The people are the authors of a constitution and no one must be allowed to usurp such right. The draft constitution was also rejected for the method in which the Constitutional Commission was established and constituted. The writing of a

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<sup>149</sup> R Lee 'Civil Society's Present and Future Role in Zimbabwe' (2011) *Open Society Initiative for Southern Africa*. Available at <http://www.osisa.org/openspace/zimbabwe/civil-societys-present-and-future-role-zimbabwe> (accessed 15 May 2016).

<sup>150</sup> Commonwealth Secretariat, *The Report of the Commonwealth Observer Group: Zimbabwe Presidential Election, 9-11 March 2002*, 8. Available at <https://books.google.co.zw/books?isbn=0850927188> (accessed 15 May 2016).

<sup>151</sup> Zimbabwe Human Rights NGO Forum 'Human Rights and Zimbabwe's June 2000 Election' Special Report 1. Available at <http://hrforumzim.org/wp-content/uploads/2010/06/SR27-Human-Rights-and-Zimbabwes-June-2000-Election.pdf> (accessed 19 May 2016).

<sup>152</sup> Sachikonye (note 13 *supra*) 11.

constitution should be initiated through an independent and impartial constitutional commission that is not based on presidential or partisan appointments.

Despite its flaws, the 2000 draft constitution is highly credited for its efforts at inclusivity. The process made efforts to include participation of the youths as demonstrated by consultations in schools, colleges, universities, churches and youth centres. The process also targeted people living with disabilities as evidenced by meetings held at various disability centres such as Jairos Jiri.<sup>153</sup>

Province	No vote	Yes vote	Total
Bulawayo	90 422	27 737	118 159
Harare	218 298	73 410	291 708
Manicaland	67 787	38 993	106 780
Mashonaland Central	43 385	96 661	140 046
Mashonaland East	39 930	60 354	100 284
Mashonaland West	53 328	75 251	128 597
Masvingo	49 658	61 927	111 585
Matabeleland North	31 224	26 413	57 637
Matabeleland South	31 759	33 606	65 365
Midlands	70 572	91 587	162 159
National	<b>696 363</b>	<b>585 939</b>	<b>1 282 302</b>

**Figure 2:** Detailed results of the 2000 referendum according to votes per province.<sup>154</sup>

<sup>153</sup> National Youth Development Trust 'Constitution Making Process in Zimbabwe: Avenues for Effective Youth Participation' Bulawayo Youth Council, 2011. Available at <https://bulawayoyouthcouncil.wordpress.com/author/bulawayoyouthcouncil/page/3/> (accessed 15 May 2016).

<sup>154</sup> Electoral Institute for Sustainable Democracy in Africa (EISA), Zimbabwe Election Update, 2000, 9.



## 2.5 The Kariba Draft Constitution (2007)

Seven years after the rejection of the Constitutional Commission draft constitution, in a bid to curb the unrelenting calls for new democratic constitution, members of ZANU PF and the two MDC formations<sup>155</sup> met clandestinely behind closed doors in the town of Kariba as part of Southern Africa Development Committee (SADC)-brokered inter-party dialogue before the 2008 elections. The parties unilaterally negotiated and produced a document now commonly known as the 'Kariba draft constitution'.<sup>156</sup> As a result, not much is known about the process that led to the creation of the draft. The draft was only made available to the public for the first time as Annexure B to the power sharing agreement in 2008. This draft which is acknowledged by the GPA closely resembles the rejected 1999 draft of the Constitutional Commission.<sup>157</sup> It is widely believed to have been drafted by three lawyers from the three parties to the power sharing government, namely, Tendai Biti (MDC–T), Welshman Ncube (MDC–N) and, Patrick Chinamasa (ZANU PF) in the town of Kariba.<sup>158</sup>

The Kariba draft constitution was intended by the government and the opposition parties to be the basis of later constitutional reform. President Mugabe confirmed these suspicions when in 2009 he was quoted as 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 look at it and when we are all satisfied, it shall be put to the people in a referendum.<sup>159</sup>

The civil society on the other hand argued against the use of the Kariba draft constitution as a point of reference in the 2009-13 constitution making exercise. This rejection was predicated on the draft constitution's failure to accommodate public participation and the fact that the process that produced it was secretive, not based on consensus. Though the

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<sup>155</sup> The MDC split in 2005 and both formations elected to retain the name MDC. The stronger of the two and still headed by the founding president is known as MDC-T (named after its founder and former Prime Minister of Zimbabwe, Dr. Morgan Richard Tsvangirai), whilst the smaller MDC is known simply as MDC or sometimes referred to as MDC-N or (named after its founder and former Secretary-General of MDC, Prof. Welshman Ncube).

<sup>156</sup> The document is named after the town in which these negotiations took place.

<sup>157</sup> It is argued that over half of the articles in the rejected Chidyausiku draft constitution and the Kariba Draft Constitution are identical, and most of the changes that were made were minor. See National Constitutional Assembly Report on Kariba Draft: The Shortcomings of the Kariba Draft Constitution, 2007, 2. Available at [http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Zimbabwe\\_6\\_National\\_Constitutional\\_Assembly\\_Report.pdf](http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Zimbabwe_6_National_Constitutional_Assembly_Report.pdf) (accessed 11 May 2016).

<sup>158</sup> N Ncube 'Another Twist to Constitution Making Process' *Financial Gazette* (online), 2 October 2009. Available at <http://www.financialgazette.co.zw/another-twist-to-constitution-making-process/> (accessed on 11 May 2016).

<sup>159</sup> NCA Report on Kariba Draft (note 157 *supra*) 1.



deficiencies of the Lancaster House Constitution were imploring for constitutional reform, the people of Zimbabwe were not prepared to reprise the same mistake of accepting a document which they had not authored.<sup>160</sup> The process by which this draft constitution was negotiated denied the people of Zimbabwe the right to write a constitution for themselves and by themselves, in clear violation of the Zimbabwe People's Charter which calls for a people-driven, participatory process of constitutional reform, fronted by an inclusive All Stakeholders Commission.<sup>161</sup> It has been suggested that not more than six people crafted the draft.<sup>162</sup>

The NCA rejected the Kariba draft constitution and maintained that it has no role in constitution making in Zimbabwe. The NCA rallied Zimbabwe's political leaders to publicly reject the use of the Kariba draft constitution as the basis for constitutional reform and embrace people-driven solutions to 'Zimbabwe's crisis of governance.'<sup>163</sup> A constitution making process should not be a prerogative of the mightiest political players, but of all the people. A people driven process requires the participation of all people, irrespective of their political opinion or affiliation. The Kariba draft constitution was an undemocratic document which usurped the right of the people of Zimbabwe to write their own constitution and determine the rules by which they were to be governed. The 2007 attempt at constitutional reform thus suffered a still-birth. The Kariba draft constitution reemerged again as a model document for the 2009 constitutional reform process.

After the abortive 1999 Chidyausiku draft constitution and the spurned 2007 Kariba draft constitution, Zimbabwe's recent past years have been characterised by political, economic and social crisis that resulted in a deeply polarised political atmosphere within which the March 2008 Presidential and Parliamentary elections were held. The period soon after the 2008 elections was followed by a political impasse and unprecedented economic decline after the withdrawal of the MDC-T presidential elections candidate, Tsvangirai, from the run-off elections. In the GPA that formed the inclusive government, the making of a new constitution took centre-stage. Inevitably, the polarisation in Zimbabwean politics pervaded the GNU and the 2009-13 COPAC constitution making process that followed.

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<sup>160</sup> TH Nyabeze 'Progressive Reform in the New Constitution of Zimbabwe' (2015) *Konrad-Adenauer-Stiftung (Foundation) Zimbabwe* 2.

<sup>161</sup> NCA Report on Kariba Draft (note 157 *supra*) 2.

<sup>162</sup> *Ibid* 2.

<sup>163</sup> *Ibid* 8.

## 2.6 The COPAC Constitution Making Process (2009 – 2013)

The defining moment of Zimbabwean constitutional reform came in 2008, after the disputed and violence-wracked elections of 2008. On 29 March 2008, Zimbabwe held harmonised elections under the Lancaster House Constitution. The MDC–T secured control of the parliament with 100 seats to the 99 seats of the ruling party ZANU PF and with a further 10 seats won by another opposition party, MDC–N. The presidential elections were widely believed to have been won by MDC-T but ‘official’ figures would later indicate that the MDC–T candidate, Tsvangirai garnered 4.7% more than the ZANU PF candidate President Mugabe, but less than an outright majority.<sup>164</sup> The elections were characterised by inter-party violence amongst the members of the ruling ZANU PF party and the opposition parties. The results of the elections were withheld for almost two months<sup>165</sup> and as a result, Tsvangirai withdrew from the subsequent necessary runoff<sup>166</sup> against a background of an unprecedented repressive campaign by security forces and government-controlled militia against his supporters.<sup>167</sup>

Following this political impasse, the three main political parties of Zimbabwe reached a power sharing deal and entered into a tripartite inclusive government which was guided by the principles of the GPA, ending six months of political violence.<sup>168</sup> The requirements of the GPA were however unconstitutional as they created the office of the Prime Minister which had been abolished years earlier. The GPA was therefore appended to the Lancaster House Constitution in the form of Constitutional Amendment No. 19. The 2008 GPA recognised the inadequacies of the Lancaster House Constitution and the need for the Zimbabwean people to make a constitution by themselves and for themselves.<sup>169</sup> It was observed in the Government of Zimbabwe and the United Nations Development Programme Project Document<sup>170</sup> that if Zimbabwe was to develop a democratic

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<sup>164</sup> Bertelsmann Stiftung, BTI 2010 - Zimbabwe Country Report, 2009, 8. Available at <http://www.bti2010.bertelsmann-transformation-index.de/77.0.html> (accessed 11 May 2016).

<sup>165</sup> Overwhelming public perception is that the results were being manipulated to favor the ruling party, or at least prevent an outright winner. See Z Wurayayi & J Sanjeevaiah (note 14 *supra*) 10.

<sup>166</sup> This is in terms of section 110 of the Electoral Act that provides that if the results of a presidential election were less than 50%+1 of the total votes cast, then a presidential election run-off between the two candidates who secured the highest number of votes in the first election would be conducted within 90 days of the announcement of the results.

<sup>167</sup> Bertelsmann Stiftung (note 164 *supra*) 8.

<sup>168</sup> The International IDEA, Zimbabwe - Country Constitutional Profile, 2016, 1. Available at <http://www.constitutionnet.org/country/zimbabwe-country-constitutional-profile> (accessed 7 October 2016).

<sup>169</sup> This is in terms of Article 6 of the GPA.

<sup>170</sup> The project's main goal was to strengthen national capacities for the implementation of a transparent, impartial, inclusive and participatory constitution making processes, with particular focus on strengthening the

constitution, it was imperative that public participation in the constitution making process be as broad and inclusive as possible and the constitution be designed to help rally a society that is largely seen as polarised and divided. To that end, public participation in gathering the views of the ordinary people was seen as an essential precondition in ensuring that the new constitution was not a product or preserve of one section of society to the exclusion of others,<sup>171</sup> as was the case with the previous constitution making exercises. The Project Document also acknowledged the importance of participation in decision making processes by historically marginalised groups and the need to develop appropriate strategies to get the views of these hard to reach communities.<sup>172</sup>

An academic conference on the Zimbabwe constitution was planned by academic staff from Zimbabwean and South African universities and was held in Harare in October 2009. The conference was comprised of constitutional experts from Zimbabwe, South Africa, other African countries and Europe. Some of the experts had wide ranging experience in constitution making processes which was acquired from their participation in the constitution making processes of South Africa, Ghana and Kenya. The conference was predicated on the understanding that academic inputs are valuable in constitutional development.<sup>173</sup>

In terms of Article VI of the GPA, the transitional inclusive government was tasked with the setting up of the COPAC and the establishment of a new constitution within 20 months of its formation.<sup>174</sup> COPAC was inaugurated in April 2009, within two months of the establishment of the inclusive government. Selected to reflect Parliament's gender balance and the relative strengths of the three parties in both the Senate and the House of

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national leadership of the national management structures on the constitutional making process and engagement of the media, civil society, the private sector, academia as well as development partners, in contributing to this overall goal. See The Government of Zimbabwe and the United Nations Development Programme Project Document 'Support to Participatory Constitution Making in Zimbabwe, 2009 – 2011, 6. Available at <https://info.undp.org/docs/pdc/Documents> (accessed 20 May 2016).

<sup>171</sup> *Ibid* 6.

<sup>172</sup> *Ibid* 7.

<sup>173</sup> The Project Document recognises the benefit from sharing of best practices from countries that have undergone similar experiences. *Ibid* 8.

<sup>174</sup> COPAC is the Constitutional Parliamentary Committee charged with the drawing up of a new constitution for Zimbabwe by the GNU. Supported by the thematic sub-committees, the Committee was responsible for preparation and management of the outreach programs and consultations, and drafting of the constitution based on the findings of the consultations, and presentation of the draft to the second All Stakeholders Conference, and report to Parliament.

Assembly, COPAC consisted of 25 parliamentarians<sup>175</sup> and to enable it to carry out its mandate effectively, the Committee was assisted by 17 thematic sub-committees<sup>176</sup> that were comprised of Members of Parliament and representatives of civil society. To provide for quick decisive action, the Government established a Management Committee,<sup>177</sup> a Steering Committee<sup>178</sup> and an Independent Secretariat<sup>179</sup> to support the Committee in the discharge of its mandate. Three Principal drafters, namely, Justice Moses Chinhengo, Mr. Brian Crozier and Mrs. Priscilla Madzonga were appointed by the Select Committee. The drafters were chosen for their competence and expertise in drafting.<sup>180</sup> Although not without its shortcomings, the COPAC process marked a pronounced departure from the previous constitutional reform processes which had allowed the President to dominate the constitution making process.

The implementing partner for the project was the Ministry of Constitutional and Parliamentary Affairs working in close collaboration with the Management Committee, the Parliamentary Select Committee and its sub-committees as the national structure for the process of constitution making. The Ministry of Constitutional and Parliamentary Affairs was specifically charged with providing the link between the Government and Development Partners.<sup>181</sup> The national management structure charged to oversee the entire constitution making process comprised of the Management Committee, the Steering Committee and

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<sup>175</sup> COPAC comprised of representatives of the three political parties. The Committee was headed by representatives from the three parties namely, Hon. Paul Mangwana (ZANU PF), Hon. Douglas Mwonzora (MDC-T) and Hon. Edward Mkhosi (MDC-N). See The Constitution Select Committee (COPAC) Report to Parliament, 2013, 5. Available at [http://archive.kubatana.net/docs/legisl/copac\\_final\\_narrative\\_report\\_130207.pdf](http://archive.kubatana.net/docs/legisl/copac_final_narrative_report_130207.pdf) (accessed 24 May 2016).

<sup>176</sup> The thematic sub-committees were established to support the COPAC to extensively consult and document the views of the public and civil society. This was double the number of themes that the Constitutional Commission had worked with, and as such there was some concern that the large number of themes would make both public consultation and drafting more difficult. See The Government of Zimbabwe and the United Nations Development Programme Project Document (note 170 *supra*) 4.

<sup>177</sup> The Management Committee was responsible for policy direction, strategic planning, decision making and political consensus. It also served as a deadlock-breaking mechanism. The Management Committee was composed of two negotiators from each of the three GPA political parties, the Minister of Constitutional and Parliamentary Affairs, and the three co-chairpersons of COPAC. *Ibid* 5.

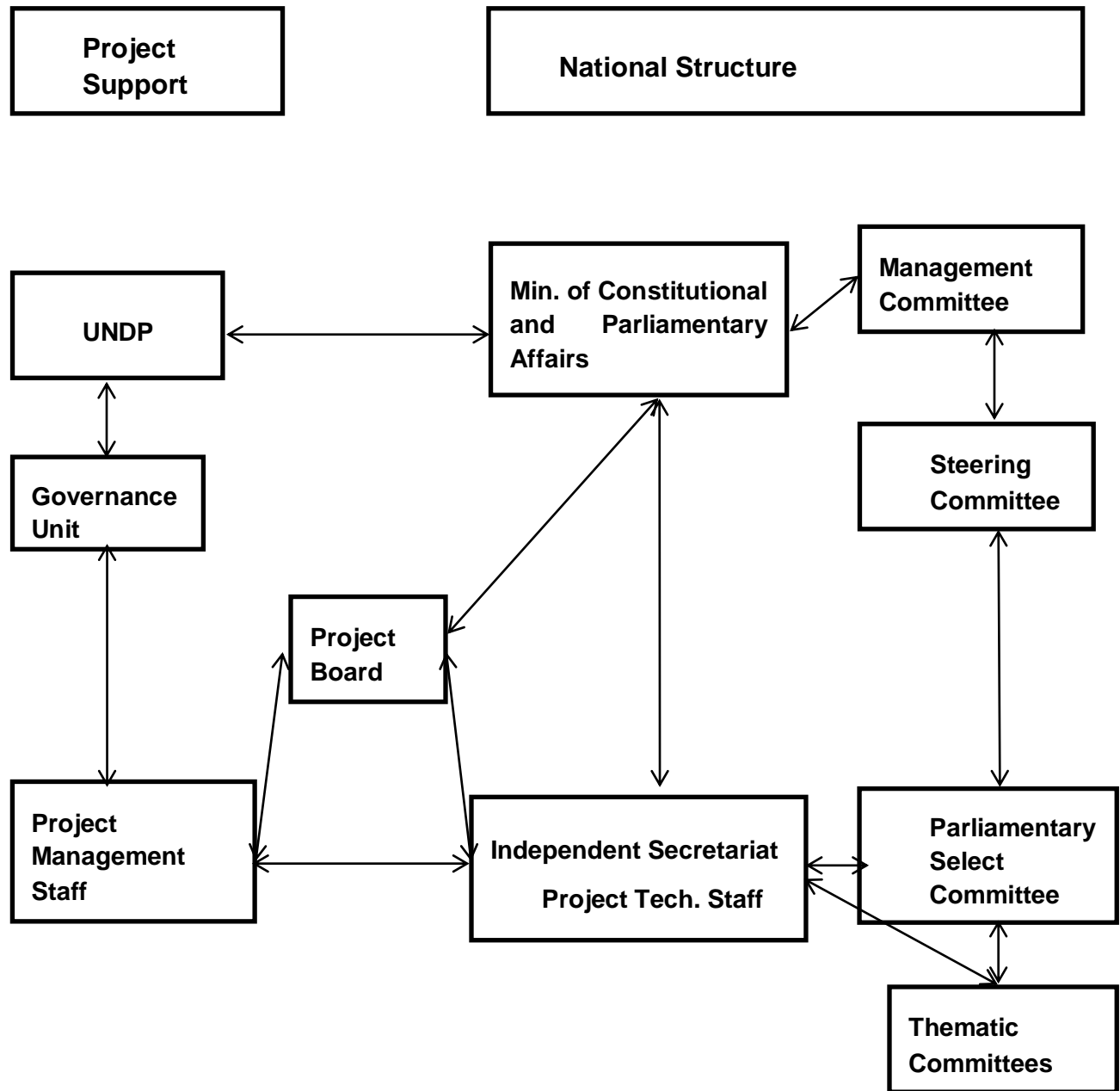
<sup>178</sup> The Steering Committee was established to provide technical support to the operations of the day to day implementation of the approved plans of the constitution reform process. *Ibid* 5.

<sup>179</sup> The Independent Secretariat was created to provide administrative support to the process. *Ibid* 5.

<sup>180</sup> COPAC Report to Parliament (note 175 *supra*) 18.

<sup>181</sup> The Government of Zimbabwe and the United Nations Development Programme Project Document recognised that constitution making is a complex and resource intensive process that often requires support from development partners but should however be led and owned by the nationals of that particular country to ensure a national constitution that reflects the desires and aspirations of the citizens of that country. The development partners agreed to financially support the constitution making project through a basket funding mechanism managed by United Nations Development Programme. See The Government of Zimbabwe and the United Nations Development Programme Project Document (note 170 *supra*) 5.

the Select Committee. The Select Committee's related thematic groups and sub-committees were supported by a full time Independent Secretariat. An illustration of the relationships above-explained is given in Fig. 2.2 below.



**Figure 3:** Project Management Structure.<sup>182</sup>

<sup>182</sup> The Government of Zimbabwe and the United Nations Development Programme Project Document 'Support to Participatory Constitution Making in Zimbabwe, 2009 – 2011, 18.

The GPA provided an extensive work and time-plan as to how the constitution making process would progress.<sup>183</sup> The implementation of the Article VI timetable was however delayed for over a year due to differences on issues such as the status of the Kariba draft constitution, as well as financial and administration challenges, sporadic instances of intimidation and violence amongst the parties to the GPA.<sup>184</sup> The First All Stakeholders' Conference was held in July 2009 and was attended by 4,000 delegates, including all parliamentarians as well as nominees from political parties and civil society, and delegates chosen to represent special interest groups such as war veterans. Outreach consultations commenced in June 2010 and concluded in October 2010.<sup>185</sup> The consultation process took place in a space of four months. It was argued that the time in which these consultations took place was too short and not sufficient to reach out to all people. Predictably, the process was also dented by political violence emanating from political party influence in the outreach consultations.<sup>186</sup>

The sitting of the thematic committees began in May 2011. The committees were mandated with the process of compiling and organising data gathered from the outreach consultations, and identifying common issues and classifying the views submitted.<sup>187</sup> Thereafter, the draft constitution was tabled before the Second All Stakeholders' Conference held in October 2012.<sup>188</sup> The purpose of this Conference was to bring together

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<sup>183</sup> These stages can be illustrated as follows:

1. The Appointment of the Constitution Select Committee
2. First All Stakeholders' Conference
3. Outreach consultations
4. Data uploading
5. Sitting of thematic committees.
6. Drafting stage
7. Second All Stakeholders Conference
8. Draft constitution debate in Parliament
9. Referendum

<sup>184</sup> See 'COPAC Blasts Government, Donors over Funds' *Zimbabwe Independent* 14–20 January 2013 4. Due to the fact that the government could not adequately fund the constitution-making process, COPAC also had to rely on donor funds, see 'UNDP Receives Additional Funding from Development Partners for COPAC to Support Constitution Making in Zimbabwe' *UNDP Press Release* 24 November 2011, available at: <http://www.undp.org.zw/media-centre/news/22> (accessed 03 December 2014). Some of the activities of the project focused on conflict management and conflict building, owing to the polarised environment of the country. See The Government of Zimbabwe and the United Nations Development Programme Project Document (note 170 *supra*) 7.

<sup>185</sup> COPAC Report to Parliament (note 175 *supra*) 11–12.

<sup>186</sup> For example, the outreach process in Harare and Chitungwiza had to be suspended because of violence. See press statement by COPAC in *The Standard* 26 September 2010.

<sup>187</sup> COPAC Report to Parliament (note 175 *supra*) 45.

<sup>188</sup> Zimbabwe Europe Network 'Zimbabwe Special Focus 1/2012: 2nd All Stakeholders Conference', 2012. Available at <http://zimassoc.files.wordpress.com/2010/09/zenspecialfocus2ndstakeholders.pdf> (accessed 11 September 2014).

representatives from different stakeholders to review and make recommendations on the draft constitution. Following the Second All Stakeholders' Conference, the draft constitution was tabled before Parliament before it was submitted to the people to decide in a referendum.

It was however argued that the time-frame between the finalisation of the draft constitution and the referendum was too short to allow for any meaningful discussion of the draft constitution's contents. In *National Constitutional Assembly v. The President of the Republic of Zimbabwe NO and Others*, the High Court however rejected an application wherein the applicants argued that the time set by the President for the holding of the referendum was grossly inadequate to allow for meaningful debate as the draft constitution had not been circulated to several stakeholders to allow for the proper discussion of its provisions. The court rejected the application on the basis that the President had wide, discretionary and unfettered powers, in terms of section 3 of the Referendums Act [Chapter 2:10], to set whatever date he pleased, and such powers were not subject for review by a court.<sup>189</sup> The court did not consider the merits of the applicants' argument. The primary argument of the court was that the President had acted within the limits set by the Referendums Act and as such, the President's actions were lawful.<sup>190</sup>

The NCA, Zimbabwe Congress of Trade Unions (ZCTU) and a faction of Zimbabwe National Students Union (ZINASU) boycotted the constitution making process with Lovemore Madhuku<sup>191</sup> questioning the purpose of a constitution born out of supposedly deficient constitution making process as he said:

Do we want a new Constitution that reflects the values that we want? Or do we simply want some document which we can use for the next election? The NCA and the ZCTU has said to the MDC, if the current process is said to be simply the writing of an interim Constitution, whose purpose is to live to the next election, and you make it clear that it's not a people-driven Constitution, it's just a transitional arrangement, fine, no one will have a problem with that – we'll be like where we were with Lancaster.<sup>192</sup>

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<sup>189</sup> *National Constitutional Assembly v. The President of the Republic of Zimbabwe NO and Others* HH-68-13, at 4.

<sup>190</sup> *Ibid* 4 & 5.

<sup>191</sup> Dr. Lovemore Madhuku is a professor of law, politician and democracy activist. He is also a founding member and former chairperson of the NCA.

<sup>192</sup> A Atwood 'Lovemore Madhuku on Constitution Making in Zimbabwe' (2010). Available at [www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec](http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec) (accessed 23 July 2014).



With all the three political parties to the GNU campaigning for a 'Yes' vote, the referendum was held on 16 March 2013 and 3,079,966 (95%) people voted for the adoption of the draft, with only 179,489 voting against it.<sup>193</sup> The Lancaster House Constitution was repealed with the coming into force of the new Constitution on 9 May 2013.

## 2.7 Conclusion

Zimbabweans have been unequivocal in their demand for a people-driven democratic constitution that guarantees the creation of a legitimate system of governance and the recognition of human rights for the past two decades. However, experience since independence has proven the government's pre-occupation with the constitution as a means of legitimising its power (constitutionality) and less as a mechanism for limiting such powers (constitutionalism). The constitution making process in Zimbabwe has historically been exclusively elite and sometimes parliamentary driven. The constitution had simply become an instrument for autocratic control, legalising rather than preventing arbitrary power.

Notwithstanding the fact that the 2013 COPAC Constitution was voted for by the majority of the Zimbabwean voters, questions were raised as to whether it is not a misnomer to call the Constitution people-driven in view of the fact that the process was seemingly heavily dominated by the three main political parties to the GPA.<sup>194</sup> It is also questioned whether the civil society were in the wrong to suggest that ZANU PF and the two MDC formations had captured the constitutional project and narrowed it to a struggle over party-political interests at the expense of the will of the people, making the 2013 Constitution a negotiated and elitist peace charter by the three primary political parties in Zimbabwe? Questions also arose as to whether all that which was gathered from the people was included or represented in the reports and how it was then put into the Constitution. It is questioned whether it was not ultimately down to a hand-picked elite group to decide whether the contributions by Zimbabweans were worthy of inclusion in the national constitution. Zembe explains:

The source of the law is the people. For the law to be legitimate, the citizens, who will become subjects of their own law, should participate in its evolution. The law should not be used to deny people their rights and freedoms. Citizens should enjoy even more freedoms. The law must lead to social, economic, and political development. In other

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<sup>193</sup> African Democracy Encyclopaedia Project, Zimbabwe: 2013 Referendum Results, 2013. Available at <https://eisa.org.za/wep/zim2013referendum.htm> (accessed 19 May 2016).

<sup>194</sup> OC Masunda & W Zembe (note 57 *supra*) 21.



words, the rule of law based on the legality and practice of constitutional law should lead to human development where all citizens are free to actualise their full potential in the fulfillment of their human needs. The principle of constitutional rule of law should create peace and prevent violence in society. The concept works well in a system of government where there is popular participation of citizens in public policy decision-making processes.<sup>195</sup>

To effectively respond to the preceding questions it is categorically imperative to first understand and appreciate what public participation in constitution making entails. The concept of participatory constitution making and its normative standards is therefore explored in the next chapter.

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<sup>195</sup> W Zembe *Constitutionalism in Zimbabwe: Unfinished Business; A People-Driven Process* (2009) 37.

## CHAPTER THREE

*'Now, therefore, The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.'* – **Preamble of the Universal Declaration of Human Rights**

### PART I

## CONSTITUTION MAKING AND THE NORMATIVE STANDARDS OF PUBLIC PARTICIPATION IN THE CONSTITUTION MAKING PROCESS

### 3.1 Introduction

This chapter consists of two parts. The first part defines a 'constitution', outlines the features of a constitution, distinguishes between the two types of constitutions and discusses the constitution making process and how it has evolved to acquire a distinctive feature in the 21<sup>st</sup> century. The part further discusses the concept 'participatory constitution making', explores the different relationships in and impact of participatory constitution making. The part also outlines and prescribes a set of recognised 'best practices', guidelines or normative standards for constitution making that will ensure the most fair, transparent and effective manner of enabling public participation in constitution making.

### 3.2 Definition of a Constitution

The Oxford Advanced Learner's Dictionary defines a constitution as the 'system of laws and basic principles that a state, a country or an organization is governed by'.<sup>196</sup> Aristotle analogously defines a constitution as 'the arrangement of magistracies in a state, especially the highest of all'.<sup>197</sup> He further relates a constitution to the government as he explains, 'the government is everywhere sovereign in the state, and the constitution is in fact the government'.<sup>198</sup> Duhaime's Constitutional, Human Rights and Administrative Law

<sup>196</sup> A Hornby (ed.) *Oxford Advanced Learner's Dictionary, 7<sup>th</sup> Edition: International Student's Edition* (2005) 312.

<sup>197</sup> S Everson (ed.) *Aristotle: The Politics and the Constitution of Athens* (1996) 69.

<sup>198</sup> *Ibid* 69.

Dictionary, correspondingly defines the constitution as ‘the basic fundamental law of a state which sets out how that state will be organized and the powers and authorities of government between different political units and citizens’.<sup>199</sup> Black’s Law Dictionary is more comprehensive in its definition, it defines a constitution as ‘the fundamental and organic law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.’<sup>200</sup> It is clear from the above definitions that, in its simplest form, a constitution is a set of rules and principles which describe how that particular society is to be formed and governed.

### 3.3 Types of Constitutions

There are two basic types of constitutions, written (codified) and unwritten (uncodified) constitutions.<sup>201</sup> Most countries are in favour of the written constitution.<sup>202</sup> With most written constitutions, the document itself is the higher law and every legislation and political institutions are subservient to the constitution.<sup>203</sup> The constitutional laws are inscribed in the form of a book or a collective of documents combined in the form of a book,<sup>204</sup> for example, the Constitution of Zimbabwe Amendment Act 20 of 2013. A written constitution is a duly passed and legislated constitution. It is often drafted and adopted by a constituent assembly or a parliament.<sup>205</sup> This kind of constitution can be modified only in accordance

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<sup>199</sup> L Duhaime (ed.) *Duhaime’s Constitutional, Human Rights and Administrative Law Dictionary* (online). Available at <http://www.duhaime.org/LegalDictionary/C/Constitution.aspx> (accessed 23 February 2016).

<sup>200</sup> HC Black *Black’s Law Dictionary* (online). Available at <http://www.thelawdictionary.org/constitution> (accessed 23 February 2015).

<sup>201</sup> There are several different classifications of constitutions and these include: (i) Whether it is written or unwritten, (ii) The simplicity of amending it, (ii) The content of the constitution and the institutional architecture that it establishes and (iv) The degree to which the constitution is observed in practice. Traditionally, however, the emphasis has been between the written and unwritten constitutions. See A Pisani ‘The Paradigm of Constitutional Democracy: Genesis, Implications and Limitations’ in A Bosl, N Horn & A Pisani (eds.) *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (2010) 10-11.

<sup>202</sup> *Ibid* 9.

<sup>203</sup> A constitutional democracy is a system based on popular sovereignty in which the structures, powers, and limits of government are set forth in a constitution. In a constitutional democracy, the constitution is the supreme law of the country and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency, e.g. section 2 [Supremacy of Constitution] of the current Constitution of Zimbabwe. Available at <http://www.dictionary.com/browse/constitutional-democracy> (accessed 22 June 2015).

<sup>204</sup> ‘What Is The Difference Between The Written And Unwritten Constitution’. Available at <http://www.quora.com/what-is-the-difference-between-the-written-and-unwritten-constitution> (accessed 5 June 2015).

<sup>205</sup> *Ibid*.

with the procedure of amendment provided in the constitution itself.<sup>206</sup> For instance, the current Constitution of Zimbabwe provides for its amendment in section 328. The major disadvantages of this type of constitution are that it is more rigid and therefore less responsive to the ever changing social and political dynamics,<sup>207</sup> and it is difficult to apply to cultural societies as it entails the imposition of values and principles to others.<sup>208</sup>

On the other hand, an unwritten constitution is one that is neither drafted nor legislated by a constituent assembly or parliament.<sup>209</sup> The constitution itself is not written in the form of a book, for example, the British Constitution. It is found in several statutes, historical charters, custom, usage, precedent and conventions.<sup>210</sup> It is a creation of slow and gradual development.<sup>211</sup> The nature of this type of constitution suggests that the legislature enjoys a near-sovereign status.<sup>212</sup> An unwritten constitution is not totally unwritten. Some parts of it are found in written forms but these are not codified in the form of a legal document, code or book.<sup>213</sup> An unwritten constitution has the advantage of elasticity and adaption, while the major disadvantage is that its interpretation is susceptible to disputes as a result of misunderstandings of the usages and customs.<sup>214</sup>

### 3.4 Features of a Constitution

Though there is no universally accepted definition of a constitution, it is however broadly accepted that any working definition of a constitution would embrace a set of fundamental legal and political rules that:

1. are binding on everyone in the state, including ordinary lawmaking institutions;<sup>215</sup>
2. concern the structure and operation of the institutions of government, political principles and the rights of citizens;<sup>216</sup>

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<sup>206</sup> *Ibid.*

<sup>207</sup> Pisani (note 201 *supra*) 11.

<sup>208</sup> *Ibid* 11.

<sup>209</sup> 'What Is The Difference Between The Written And Unwritten Constitution'. Available at <http://www.quora.com/what-is-the-difference-between-the-written-and-unwritten-constitution> (accessed 5 June 2015).

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> Pisani (note 201 *supra*) 10.

<sup>213</sup> 'What Is The Difference Between The Written And Unwritten Constitution'. Available at <http://www.quora.com/what-is-the-difference-between-the-written-and-unwritten-constitution> (accessed 5 June 2015).

<sup>214</sup> Pisani (note 201 *supra*) 11.

<sup>215</sup> WE Bulmer 'What Is a Constitution? Principles and Concepts' (2014) *The International Institute for Democratic and Electoral Assistance* 1.

<sup>216</sup> *Ibid* 1.

3. are based on widespread public legitimacy;<sup>217</sup>
4. are harder to change than ordinary rules (e.g. a two-thirds majority vote in parliament or a referendum is needed);<sup>218</sup>
5. as a minimum, meets the internationally recognised criteria for a democratic system in terms of representation and human rights.<sup>219</sup>

### 3.5 The Constitution Making Process

Constitution making refers to both amending an existing constitution as well as making a new constitution.<sup>220</sup> Shivji posits that the term constitution making has often been used to mean the making of a new constitution only, to the exclusion of the other meaning.<sup>221</sup> This section shall consider both meanings.

One of the oldest written constitutions in the world, the US Constitution, was crafted in secrecy in 1787 by a small elite group of mostly wealthy, property holding white males.<sup>222</sup> The process did not provide for public participation. In recent years, constitution making has evolved; the process has come to be recognised as a step towards democratic empowerment, with the effect that a democratic constitution has ceased to be simply one that only establishes democratic governance, but also one that has been adopted through a democratic process.<sup>223</sup> In democratic societies, constitution making has the ability to influence enormous changes if it is observant and responsive to the needs of its most vulnerable and marginalised sections. Deficiencies in the constitution making process can negatively impact on the ability of the resultant constitution to engender change on the political, social and economic sphere.<sup>224</sup> As Aucoin argues, the constitution making process is as important as the contents of the final constitution to guarantee a constitution that contributes to healing and reconciliation.<sup>225</sup> In the present day, the stages of constitution making are conceptualised as follows: drafting, consultation, deliberation, adoption and ratification.<sup>226</sup>

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<sup>217</sup> *Ibid* 1.

<sup>218</sup> *Ibid* 1.

<sup>219</sup> *Ibid* 1.

<sup>220</sup> IG Shivji *et al* (note 78 *supra*) 47.

<sup>221</sup> *Ibid* 47.

<sup>222</sup> T Ginsburg *et al* 'The Citizen as Founder: Public Participation in Constitutional Approval' (2008) *Vol. 81(2), Temple Law Review* 361.

<sup>223</sup> Hart (note 2 *supra*) 4.

<sup>224</sup> Aparajita *et al* (note 3 *supra*) 1.

<sup>225</sup> Aucoin (note 1 *supra*) 35.

<sup>226</sup> Ginsburg *et al* (note 222 *supra*) 364.

### 3.6 Characteristics of Constitution Making in the 21<sup>st</sup> Century

Since the adoption of the US Constitution in 1787, a large number of constitutions have been adopted across all the regions of the world, generating a wealth of constitutional experience over the years. Contemporary constitution making has since progressed and acquired a distinctive feature in the 21<sup>st</sup> century. These features are briefly discussed hereunder:

1. It has now come to be universally accepted that a constitution derives its mandate from the people of that state. To that effect, the ordinary people are increasingly becoming aware of their role in the constitution making process. Public participation is now thought as a categorically important prerequisite for the success of the constitution making process.<sup>227</sup>
2. Constitutions are now made for diverse cultural societies contrary to the tradition that constitutions are made for a people with a common history or ethnic background. To that end, constitutions have more often been used to resolve conflicts in multi-ethnic societies with an ongoing conflict and build unity in multi-ethnic post conflict states such as Zimbabwe (1979) and South Africa (1996), respectively.<sup>228</sup>
3. Traditionally, constitution making has been touted as an exclusive prerogative of the state and its people. Constitution making in the 21<sup>st</sup> century has now opened doors to the involvement of the international community through organisations such as the United Nations (UN) and other states, especially when the constitution making processes is preceded by a conflict. The international community has been extensively involved in the constitution making processes of several countries in various ways, mostly through the provision of technical expertise and financial aid.<sup>229</sup>
4. The other characteristic of constitution making in the 21<sup>st</sup> century is its emphasis on the process, as opposed to only the substance of the constitution. Even though the process has long been thought to be equally important, its significance is now further enhanced since the recognition that any constitution is as good or bad as the process through which it was made. The process through which a constitution is adopted is believed to

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<sup>227</sup> C Saunders 'Constitution Making in the 21<sup>st</sup> Century' (2012) Vol. 2012:4, *International Review of Law* 3.

<sup>228</sup> *Ibid* 2 & 3.

<sup>229</sup> *Ibid* 3.

underpin its legitimacy, increase public knowledge of it and instill a sense of public ownership in it, thereby creating an expectation that the constitution will be observed.<sup>230</sup>

### 3.7 The Concept of Participatory Constitution Making

Concerned about democratisation in post-conflict states, such as Zimbabwe,<sup>231</sup> policy makers have of late begun focusing more on the process by which constitutional reforms are made, and not just the substance of the reforms.<sup>232</sup> This has given birth to a new norm, democratic, popular or participatory constitution making, which lays emphasis on the need for citizen participation in the drafting and implementation of constitutions.

This research hypothesises that increased popular participation in the constitution making process ensures fairness and guarantees the legitimacy and acceptability of not only the constitution, but also the entire constitutional and legal order. It should be noted that the phrase 'increased popular participation' is not merely a reference to quantity, as defined by the sum total of persons and civil society organisations that have participated in the process. Nor does it refer to the number of public hearings that have been held or the amount of submissions received.<sup>233</sup> Even though these are important aspects of public participation, they do not necessarily reveal the extent of influence the participants had over the decisions that were made.<sup>234</sup>

In explaining the concept of 'public participation', Arnstein's ladder of citizen participation identifies eight levels and three tiers which are illustrated as follows:

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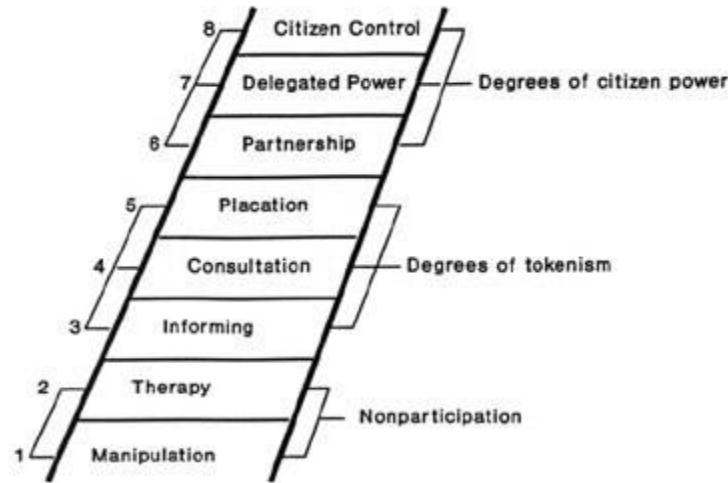
<sup>230</sup> *Ibid* 3.

<sup>231</sup> Zimbabwe may still be regarded as a post-conflict state, having won its independence in 1980 after a protracted liberation war between the Ian Smith colonial regime and the liberation war movements.

<sup>232</sup> Banks (note 5 *supra*) 1046.

<sup>233</sup> A Saati 'Public Participation in Constitution Building Processes; What Does It Mean?' Department of Political Science, Umea University, Sweden. Paper Prepared for the IPSA World Congress (Madrid, Spain), 2012, 4. Available at <http://www.paperroom.ipsa.org/> (accessed 23 October 2016).

<sup>234</sup> *Ibid* 4.



**Figure 4:** Arnstein's Ladder of Citizen Participation.

Arnstein's ladder of citizen participation conceives public participation as consisting of eight rungs (and three tiers, namely, non-participation, tokenism and citizen control). Each rung or tier corresponds with the extent of the citizens' power to influence the outcome of the process. In the first tier (non-participation), communication is one way as decisions are made from the top and handed down to citizens. The power holders merely inform the citizens of the decisions taken.

The second tier is in which the government may consult the people but just as a formality, the people lack the power to influence decisions. Even though their views are gathered, the citizens are not guaranteed that their views may be heeded. In this instance, the power holders are not obligated, legally or otherwise to consider the views of the public. Public participation in this instance is merely tokenistic.<sup>235</sup> A case in point is the 1999-2000 Zimbabwe constitution making process in which the President was not legally bound by the findings of the Constitutional Commission nor was he obligated to present the Constitutional Commission's draft constitution for a referendum. The Constitutional Commission's mandate was therefore reduced to that of merely submitting

<sup>235</sup> S Arnstein 'A Ladder of Citizen Participation' (1969) Vol. 35:4, *Journal of the American Planning Association* 217.



recommendations to the President. The civil society argued that there should have been a legally binding guarantee that the recommendations of the Constitutional Commission will be final.

At the top of Arnstein's ladder of citizen participation, the power holders empower the citizens to take control of the decision making processes and to directly influence policy formulation and implementation.<sup>236</sup> In this instance, genuine and meaningful participation ensures. Genuine and meaningful participation envisages that the people express their views, have those views listened to and influence how the constitution making process evolves.

### 3.8 Normative Standards of Participatory Constitution Making

This section discusses some of the international guidelines, 'best practices' or requirements for constitution making that will ensure the most fair, transparent and effective manner of enabling public participation, and against which the 2009-13 constitution making can be judged. At this point, it is worthy to note that there are no universally accepted norms and standards in constitution making. The modalities and methods of constitution making may vary from country to country. The decision to adopt a certain method is dependent upon the *Grundnorm*, which according to Kelsen, determines the process and the content.<sup>237</sup> It is important however that regardless of whatever method or modalities that a country may adopt, the people, as the authors of a constitution, should occupy a central role and be involved at all stages of the constitution making process.

Bannon laments that even though researchers and writers endorse public participation and deliberation as the best methods by which constitutions ought to be adopted, there is however little case studies on why such processes matter.<sup>238</sup> She notes that:

Despite this extensive theoretic literature, there is a dearth of carefully targeted case studies on constitution-drafting processes, as well as a surprising lack of scholarly analysis of why particular constitution-writing processes succeed or fail.<sup>239</sup>

Thus, in an effort to bridge this gap, comparisons will be made against selected global, regional and domestic case studies relevant to this research.

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<sup>236</sup> *Ibid* 217.

<sup>237</sup> Magaya (note 19 *supra*) 2.

<sup>238</sup> AL Bannon 'Designing a Constitution-Drafting Process: Lessons from Kenya' (2007) Vol. 116(8), *The Yale Law Journal* 1827.

<sup>239</sup> *Ibid* 1827-1828.

### 3.8.1 Inclusivity

Several literature in constitution making recognise that the best constitution is the one that reflects the country's political, cultural, religious and social diversity, and in such instances, an inclusive and participatory constitution making process is far more critical for the legitimacy and acceptance of the constitution than its contents.<sup>240</sup> Saati identifies the degree of inclusion in the constitution making process as one of the means by which the extent of public participation can be measured. The author is of the view that inclusivity necessitates the inclusion of all segments of the populace such as ethnic minorities, historically marginalised and disadvantaged groups such as women, youths, disabled and elderly in the constitution making process and should not be limited to a particular group of people or individuals.<sup>241</sup> On the other hand, exclusion is one of the most significant barriers to the effective use of participatory constitution making in a polarised society. Hindrances to public participation exist in many contexts. Exclusion may include, but not limited to, direct and indirect discrimination or exclusion on the grounds such as sex, race, language, political or other opinion, descent, religion, disability and ethnic or social origin, among other grounds.<sup>242</sup>

In post-conflict states, inclusion is crucial in fostering peace and nation building. Saati notes that it is common in such states to exclude the perpetrators of the conflict in constitution making processes. Saati further notes that excluding conflict agitators as a direct consequence for their actions in the conflict will however severely undermine the prospect of long term peace, and in the end, defeat the overall objectives of participatory constitution making in conflict or post conflict states.<sup>243</sup> Zimbabwe is a deeply polarised country that has been characterised by political and cultural intolerance and violence.<sup>244</sup> Inclusion in the constitution making process is therefore necessary for the establishment of a multi-party constitutional democracy. An inclusive and participatory process will ensure the legitimacy and acceptance of not only the constitution, but the entire constitutional and legal order as well.<sup>245</sup> It is for that reason that the researcher believes participatory constitution making

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<sup>240</sup> Aucoin (note 1 *supra*) 35.

<sup>241</sup> See generally Saati (note 234 *supra*) 13-15.

<sup>242</sup> 'Factors that Impede Equal Political Participation and Steps to Overcome those Challenges' Human Rights Council 27 Session: Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/27/29 United Nations General Assembly, 2014.

<sup>243</sup> Saati (note 233 *supra*) 14.

<sup>244</sup> Zembe & Sanjeevaiah (note 14 *supra*) 10.

<sup>245</sup> See generally Moehler & Marchant (note 66 *supra*) 1-41. See also Dann *et al* (note 10 *supra*) 4.

and inclusion is the only way out of Zimbabwe's deepening economic and political quagmire. In the face of its inherent defects, the rejected 2000 Zimbabwean draft constitution was comparatively inclusive. The constitution making process made efforts to include the participation of the youths through consultations in schools, colleges, universities, churches and youth centres. The process also targeted people living with disabilities, evidenced by meetings held at various disability centres such as Jairos Jiri.<sup>246</sup>

### 3.8.2 Ownership and Control of the Process

Notwithstanding the emphasis on local ownership and sovereignty in constitution making, the parties to the constitution making process can be ideologised as consisting of outsiders and insiders.<sup>247</sup> Outsiders or international actors, are found mostly in the form of external actors such as international and regional non-governmental organisations (NGOs), international institutions, aid agencies, commercial companies, individual advisors, group of states and individual states whose primary role is to give advice and assistance.<sup>248</sup> The International Institute for Democracy and Electoral Assistance interprets the role of international actors as being supportive in nature, meaning that it is the national actors who must take charge and control of the process.<sup>249</sup> Though a heavy involvement of the international community in the constitution making process may lend legitimacy to the process in the international political scene, the constitution might lack legitimacy where the local populace feels that it was imposed on them.<sup>250</sup>

On the other hand, insiders refer to national actors such as ruling parties, opposition parties or a coalition of ruling and opposition parties, military elites, civil society organisations and the ordinary members of the public. The government derives its mandate from the people who elected them. The people are the custodians of the constitution and therefore should take control of the process of constitution making and be involved at every stage of the

<sup>246</sup> National Youth Development Trust 'Constitution Making process in Zimbabwe: Avenues for Effective Youth Participation' Bulawayo Youth Council, 2011. Available at <https://www.bulawayoyouthcouncil.wordpress.com/author/bulawayoyouthcouncil/page/3/> (accessed 15 May 2016).

<sup>247</sup> Saati (note 233 *supra*) 6.

<sup>248</sup> A Ladley 'Constitutional Building after Conflict: External Support to a Sovereign Process' *The International Institute for Democracy and Electoral Assistance*. Policy Paper Presented on the Topic 'International Partnerships for Constitution Building' in Stockholm, Sweden on 8 & 9 April, 2010, 12. Available at <http://www.idea.int/publications/catalogue/constitution-building-after-conflict-external-support-sovereign-process?lang=en> (accessed 26 November 2016).

<sup>249</sup> *Ibid* 12.

<sup>250</sup> Moehler & Marchant (note 66 *supra*) 4.

drafting process.<sup>251</sup> The citizens have the sole prerogative of setting up the agenda for and taking control of the constitution making process.<sup>252</sup> The proper meaning of local ownership of the constitution making process entails the people's right to decide on what should or should not be included in the constitution. Where the agenda is defined by the elites (who in most cases are largely urban based), the 'people', who are likely to present new perspectives, end up disenfranchised.<sup>253</sup> So, even though it may be evident that it is the national actors who are in charge of formulating the agenda of the constitution making process, it does not necessarily imply that it is the 'people' who are in control of the process. The insiders may thus become outsiders in their own constitution making process.

For instance, concern was raised about the legitimacy of the Malawian Constitution because of the dominance of the local and international experts in the process. The constitution implicitly reflected the views of the international experts and not of the people.<sup>254</sup> Similarly, in Zimbabwe, as intimated in the previous chapter, the 2000 draft constitution is widely understood to have been rejected by the people because the process had been dominated and controlled by the President and it was thus widely seen as an attempt by ZANU PF to sneak in a constitution that suits its purpose. It was argued by the civil society that the constitution making process was owned, managed and controlled by the ruling political party and its government; hence the process was not people-driven but government-driven.<sup>255</sup> Equally in 2008, after the disputed and violence-wracked elections of 2008, the three main political parties of Zimbabwe entered into a tripartite inclusive government and were tasked with the establishment of a new constitution. In the course of the constitution making process, some segments of the civil society accused the GNU of capturing the constitution making project and narrowing it to a struggle over party political interests at the expense of the will of the people.<sup>256</sup> This argument was raised against a backdrop of perceived heavy dominance of the political parties to the GPA and the political elites in the constitution making process.

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<sup>251</sup> Mulisa (note 61 *supra*) 24.

<sup>252</sup> *Ibid* 24.

<sup>253</sup> Y Ghai & G Galli 'Constitution Building Processes and Democratization: Lessons' (2006) *The International Institute for Democracy and Electoral Assistance* 241.

<sup>254</sup> Mulisa (note 61 *supra*) 24.

<sup>255</sup> Sachikonye (note 13 *supra*) 11.

<sup>256</sup> Dzinesu (note 33 *supra*) 2.

Ghai is skeptical of using the term ‘the people’ in reference to the populace. He argues that such usage renders it difficult to effectively evaluate the impact of public participation. He maintains that a society is composed of ‘religious groups, ethnic groups, the disabled, farmers, peasants, capitalists, workers, lawyers, doctors, auctioneers, and practicing, failed or aspiring politicians’ who are all pursuing their own agenda. The constitution making process may sometimes favour one group above the other. The author suggests that the phrase has to be ‘disaggregated’.<sup>257</sup>

It should be noted that the researcher does not in any way intend to belittle the role and efforts of international actors or elite national actors. In fact, the researcher recognises that for the constitution making process to be successful, both players (international and national) have a critical role to play. The role players must however firstly acknowledge that a constitution making process is a sensitive political activity which includes the involvement of various role players with often overlapping, and sometimes, competing interests. In that regard, the role players must recognise the capacity and extent of their respective roles and work together to effectively carry out their mandates. With a few to reconcile these conflicting roles, it is submitted that the external actors should restrict their role to that of supporting the national actors who in turn should take the lead in the process. External actors should perform their roles without being intrusive on political issues which are clearly the domain of the concerned state or inadvertently end up violating that nation’s sovereign status.<sup>258</sup> Boege *et al* succinctly summarise the skepticism towards involving external actors in the constitution making process as follows:

This approach ignores (or conceals) the fact that state-building is not merely a technical exercise, limited to enhancing the capacities and effectiveness of state institutions. Rather, it is a highly controversial political endeavour which is likely to involve serious political conflicts as existing distributions of power are threatened. Hence a technical approach to state-building, guided by an administrative view of the state, glosses over its political and its social character. Finally, the “booming international state-building industry” rarely considers the possibility that under certain conditions it may not be possible to build a “sustainable state through external intervention or that intervention might end up doing more harm than good.”<sup>259</sup>

Similarly, the role of various national actors should be clearly established. Local ownership entails the common people taking control and being involved at each and every stage of

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<sup>257</sup> Ghai & Galli (note 253 *supra*) 242.

<sup>258</sup> Saati (note 233 *supra*) 7.

<sup>259</sup> V Boege, A Brown, K Clements & A Nolan *On Hybrid Political Orders and Emerging States: State Formation in the Context of ‘Fragility’* (2008) 5.

the process and elites must not usurp this role. It is when the different role players are not certain of their respective roles that chaos and mistrust ensure and in the end, the negation of the wishes of the people. The negation of the wishes and aspirations of the ordinary people impugns the legitimacy of the process and the resultant constitution.

Ideally, the ordinary people should take control and ownership of the process, however this researcher argues that where such is not feasible due to the social or political environment of the country, the power holders should do their utmost best to at least secure a higher degree of public participation for the constitution making process and the resultant constitution to attain a semblance of legitimacy.

### **3.8.3 Financial Capacity**

One of the common challenges confronting governments who aspire to undergo constitutional reform is lack of financial capacity. Extensive public participation procedures require dedicated significant amounts of financial resources for costly procedures such as dissemination of information, printing of the draft constitution, public consultation workshops and salaries for human labour, among others. It has been the norm in most African countries that where a government is financially incapacitated to adequately fund the constitution making process, it acquires such financial resources from the international donor community such as the UN. However, most governments are wary of accepting external aid as there is concern that the donors may attempt to dictate the pace and outcome of the process. It is therefore considered wise for governments to be financially capacitated first before embarking on constitutional reform. As is usually the case, it is the traditionally marginalised communities such as the rural populace which suffers the most when the government opts to meet only the minimum requirements of public participation procedures. Where the government acquires funding for the constitution making process from the international donor community, the government ought to clearly set out the roles and functions of the donors and have a guarantee that the donors will not act beyond the scope of their given mandate.

### **3.8.4 Forms of Communication**

Saati identifies the forms of communication in the constitution making process as another factor which impacts on the extent of public participation. The author contends that it is possible to unearth the motive behind the constitution making process by simply analysing

the forms and lines of communication between the power holders and the public. He is of the view that if the lines of communication are open and designed in such a manner that provides opportunities for the public to comment back on constitutional suggestions by the drafters, it can be assumed that the power holders are at least interested in hearing the views of the people.<sup>260</sup> Thus, the public is given a chance to participate in the process.

Noteworthy is the difference between information and communication. The provision of information ends with the receiver simply in possession of information but without any means to respond accordingly. Whereas effective communication is conceived as communication between the power holders and the citizenry, in terms of which one sends a message to the other through some medium such as television or radio. The message produces an effect on the receiver who in turn is able to send back his response to the sender who also receives it.<sup>261</sup> As noted earlier, the phrase 'increased participation' is not simply an issue of quantity, as defined by the number of individuals and civil society organisations that have participated in the process. Simple public participation morphs into meaningful and effective public participation when the power holders react accordingly to the feedback they have received from the public. Effective communication further means considering the needs of one's audience beforehand. For instance, the literacy rates of urban and rural areas may differ significantly and as such, power holders have to take cognisance of such differences and needs first to enable effective communication.

### 3.8.5 Political Equality

One of the foundational norms of deliberative democracy is political equality. Political equality envisages the inclusion of all affected individuals in the decision making process on equal terms. This entails 'having an opportunity to express one's interests and concerns and to question one another, respond to criticisms raised, and critique the arguments and proposals of others' without fear of victimisation.<sup>262</sup> This means that none of the participants should be in a position to coerce or threaten others into accepting certain proposals or outcomes.<sup>263</sup> Young postulates that, 'politically equal actors deliberating political matters in an environment free from coercion or domination can often develop a consensus.'<sup>264</sup>

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<sup>260</sup> Saati (note 233 *supra*) 11.

<sup>261</sup> *Ibid* 11.

<sup>262</sup> Banks (note 5 *supra*) 1049.

<sup>263</sup> *Ibid* 1050.

<sup>264</sup> *Ibid* 1048 - 1049.



However, political equality does not often exist. In Zimbabwe, for example, the prevailing legal and political environment is not conducive for deliberation on political issues without fear of political victimisation as a result of the government's use of several repressive legislation that curtail fundamental freedoms and rights in a bid to suppress dissent.

### 3.8.6 Civic Education

Civic education is of cardinal importance to the success of any constitution making process. Civic education is aimed at providing information to the public about the ongoing constitution making exercise so as to familiarise the public with the prevailing constitutional issues. It is therefore crucial to roll out extensive civic education programmes as soon as possible, preferably prior to the commencement of the constitution making process, to enable the public to make informed decisions. The public can be provided with such information at public forums, workshops and in the media. To that end, a comprehensive timeline should be developed for the constitution making process to enable citizens to know what to expect at each stage of the process. The civic education programmes should seek to sensitise the public on important questions such as: What is a constitution? What is the purpose of a constitution? What is the constitutional history of the country? What is the role of the public in constitution making?

In Rwanda, for instance, the civic education programme that preceded the final adoption of the constitution spanned a period of two years, with intensive efforts made to reach the marginalised groups and inform them about the content of the constitution so as to help them make informed decisions when they vote for the draft constitution in the referendum.<sup>265</sup> The South African constitution making exercise also sets a good example of the role of civic education. The South African Constituent Assembly ran an intensive civic education programme that targeted grassroots. Civic education programmes are essential especially in instances where the process is politicised and the people are susceptible to vote for a political party and not the substance of the constitution.<sup>266</sup> Such risk is particularly true in Zimbabwe which is largely polarised on the basis of political affiliation.

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<sup>265</sup> M Brandt, J Cottrell, Y Ghai & A Regan *Constitution-Making and Reform: Options for the Process* (2011) 87 – 90.

<sup>266</sup> Mulisa (note 61 *supra*) 29.



The provision of civic education should not be the sole responsibility of state actors. Widespread participation in the constitution making process will also depend to some extent on the efforts of non-state actors and interest groups such as political parties, women groups, religious groups, student movements, labour movements, business groups, NGOs and other community-based organisations. These non-state actors play a crucial role in raising awareness on key constitutional issues in their specific communities or organisations. In Kenya, for example, the civil society established a group comprised of 52 religious and secular organisations to traverse the length and breadth of the country to gather the views of the people. This proved critical to the success of the constitution making process.<sup>267</sup>

One of the barriers to effective civic education programmes is limited or lack of information on the part of the public. This could be attributed to a number of factors such as language barriers. Most national debates on constitutional issues are conducted in English which is the language of record of many countries, resulting in the disenfranchisement of local communities who do not have a good command of the language. This may also be the case when information is imparted in one dominant local language to the exclusion of other minority languages. The other contributing factor is physical inaccessibility of information, when the public hearings or forums are held in physically unreachable places for the general public such as Parliament. It is also important that the public receive balanced and impartial information in order for them to meaningfully participate in the constitution making process.

### **3.8.7 Public Consultation**

It is widely acknowledged that public consultation is the *sine qua non* for any intended participatory constitution making process. It is the norm in participatory constitution making that the process provides for formal and/or informal public input, either in the pre-draft stage or after the draft has been completed. Formally, this may be achieved through a series of workshops, public hearings, public forums, group discussions and conferences held around the country. Mere consultation is not adequate; there should be a guarantee that the drafters will consider the views of the public and incorporate them into the draft constitution. The above outlined forms of public consultation procedures are not comprehensive, different forms and platforms may be used. The most significant factor is

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<sup>267</sup> Abdelgabar (note 63 *supra*) 149.

that any form of public consultation be designed in such a manner that it can effectively capture the views of the public. For example, there is need to tailor the public consultations to suit the educational needs and experience of the rural populace.

The futile 1999-2000 Zimbabwean constitution making exercise is commended for its efforts on public consultation. The Constitutional Commission embarked on a broad and extensive public consultation process which was executed over a period of five months. Official figures indicate that this attracted quite a significant number of people.<sup>268</sup> Conversely, the 1979 constitution did not provide for public consultation. It was a purely elitist negotiated document between the Rhodesian government and the liberation war movements.

In most instances, the draft constitution is prepared by the legislature, subcommittee or a constituent assembly specifically elected for such purpose. If the deliberative process allows for it, political parties, media outlets and civic societies may also informally consult with the people, prepare and submit their own drafts. For example, after dissatisfaction with the government-led process, the NCA launched its own parallel consultation process in 2000 where it concentrated on providing civic education and gathering views from the Zimbabwean people on the Constitution. It developed an alternative draft constitution to the one developed by the Constitutional Commission.<sup>269</sup>

Despite the evident benefits of public consultations, extensive public consultation may pose significant logistical and administrative challenges. It may raise questions of how to read and distil the will of the people in the thousands of submissions received, as in the case of the 1999-2000 Zimbabwean constitution making process.

### **3.8.8 Reasonable Time-frame**

Meisburger posits that the required time to fully develop a constitution ranges from 12 to 14 months, and if public consultation will be incorporated into the process, the time may be extended. An example is given of the South Africa's consultative process which culminated

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<sup>268</sup> Figures reflect that 4,321 meetings were held nationwide. The meetings were attended by 556,276 people and 150,000 people attended special meetings. There were over 7,000 individual submissions. See *Mushayakarara v. Chidyausiku* 2001 (1) ZLR 248.

<sup>269</sup> Ndulo (note 60 *supra*) 186.

in the adoption of the 1996 Constitution,<sup>270</sup> the process spanned over a period of two years and, as a result, gained widespread acceptance.<sup>271</sup> On the contrary, the Nigerian Debate Coordinating Committee had two months with which to complete the 1999 constitution making process and this severely compromised the quality of the constitution.<sup>272</sup> The current researcher nonetheless believes that there should be no standard time-frame with which to draft a constitution since each society has a different economic, political, cultural and social context which needs to be taken into account when drafting a constitution. It is important that the process provides sufficient time which enables effective and meaningful public participation seeing that the time allocated for the constitution making process may impact on the quality of the constitution produced.

The reasons the power holders may adopt a shorter time to implement extensive public consultation procedures are varied. Constitutions have come to be recognised as implements for bridge-building and conciliation in conflict or post-conflict states. It is therefore common in countries undergoing a conflict to have insufficient time for extensive public consultation for the reason that the constitutional commissions are often under pressure to complete the constitution making exercise as speedily as possible so that the constitution can be used to resolve the conflict. The downside of such a hurried time-frame is that it will adversely impact on the quality of the constitution produced.

The adoption of a shorter time-frame may also be to further political interests. The Zimbabwean experience of the 2000 constitution making process provides an example of how this can ensue. The constitution making process was condemned for its very tight time-table which was imposed by the President for the Constitutional Commission to complete its work. The NCA accused the government of deliberately fast tracking the process and accused the President of trying to push through his own constitutional and political agenda. Public opinion was that the President wanted the Constitution completed before the pending elections to lure the rural voters with the compulsory land acquisition provisions in the constitution.<sup>273</sup>

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<sup>270</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>271</sup> TM Meisburger 'Best Practices in Constitutional Reform' *The Asia Foundation* 97.

<sup>272</sup> L Olivier 'Constitutional Review and Reform; and Adherence to the Democratic Principles in Constitutions in Southern African Countries' (2007) *Open Society Initiative for Southern Africa* 25.

<sup>273</sup> Hatchard (note 125 *supra*) 210.

### 3.8.9 Motives of the Power Holders

Constitutions may be made or reformed for a number of reasons ranging from ending a civil war to transforming the political and economic system of the country. Constitution making is a political process and where the process is used to protect or further political interests (for example, to amass power in the executive, especially in authoritarian or *de facto* authoritarian states), such ulterior motives may be a hindrance to public participation. This is because the constitution making process may largely be seen as a rubber-stamping exercise and where citizens perceive their participation as merely tokenistic or aimed solely at legitimising the process, it may result in citizen apathy. Genuine public participation requires the power holders to hear the views of the public and have those views influence the outcome of the process.

### 3.8.10 Credibility and Competence of Institutions

The perceived credibility, integrity and competence of the organs or institutions tasked with the constitution making process may impact on the outcome of the process. The legitimacy of the resulting constitution may be adversely affected where the composition of these institutions consist of political appointees. The composition of the institutions may lead the people to believe that the institutions will be susceptible to external influence and therefore not independent and impartial. With reference to the Zimbabwean 2000 constitution making process, Hatchard notes that the composition of the Constitutional Commission was predicated on the President's intent to control and manage the process. The President appointed a well-known ally of his to head the Constitutional Commission. Moreover, the Constitutional Commission was composed of 400 members and of the 150 Members of Parliament in the Constitutional Commission, only three had different political affiliations. This led the civil society to boycott the process on the grounds that the Constitutional Commission was partisan and lacking independence.<sup>274</sup> It was also argued that the Constitutional Commission's membership was purely elitist and not fully representative of the people of Zimbabwe.<sup>275</sup> The institutions that are mandated to carry out the constitution making process should be dissociated from politics and any political influence, and should seek to serve the interests of the people who own the process. It is therefore not a surprise that in light of these and other poor procedural choices undermined the legitimacy of the

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<sup>274</sup> *Ibid* 213.

<sup>275</sup> *Ibid* 212.

draft constitution which was subsequently rejected by the people of Zimbabwe in the referendum.

### 3.8.11 Enabling Political and Legal Environment

The right to public participation cannot be realised in isolation. A country's political and legal context defines the extent of public participation. The political and legal environment should enable the effective implementation of public participation procedures by recognising the interplay between the right to public participation and other rights or freedoms. There are several freedoms such as the freedom of opinion and expression and freedom of movement and assembly which when unreasonably restricted may hamper meaningful public participation.

To give an example, it is argued that the Government of Zimbabwe's use of draconian and repressive legislation such as the Public Order and Security Act (POSA),<sup>276</sup> which prevents public demonstrations and gatherings and the Access to Information and Protection of Privacy Act (AIPPA),<sup>277</sup> which criminalises certain acts related to the provision of information, hinders genuine public participation.<sup>278</sup> Politically, the country is deeply divided along political lines and characterised by political intolerance, violence and conflicts. Such a political environment hinders the unfettered flow and exchange of ideas which is critical to the effective realisation of the right to public participation.

### 3.8.12 Referendum

The other variable by means of which the degree of public participation in the constitution making process can be measured is the question of final authority.<sup>279</sup> It would be counterproductive to implement the above discussed public participation procedures when in the end the public does not have the final say on what should or should not be in the constitution. Saati is of the opinion that public participation is only effective and genuine to the extent that it influences the outcome of the process.<sup>280</sup> It then follows that where the rules of procedure in the constitution making process do not require the draft constitution to be subjected to a popular referendum, public participation is neither genuine nor meaningful. The same is also true where the final authority lies with the executive or legislature which

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<sup>276</sup> [Chapter 11:17].

<sup>277</sup> [Chapter 10:27].

<sup>278</sup> Zimbabwe Human Rights NGO Forum (note 9 *supra*) 3.

<sup>279</sup> Saati (note 233 *supra*) 5.

<sup>280</sup> *Ibid* 18.

may not be legally obligated to consider the views of the public, as is the case with the Zimbabwean constitution making exercise of 1999-2000.

A referendum is one of the most popular and effective ways in which the public can exercise their influence on the outcome of the constitution making process. Hart argues that public participation in developing nations in Africa has often been taken to mean voting, for example, ratifying a constitutional text by referendum.<sup>281</sup> It should be noted that voting in a referendum is only one of the many ways by which the public can participate in the constitution making process. There are several other different forms of public participation in the constitution making process; these will be outlined in the next section.

The downside of a referendum is that as a result of being restricted to either 'Yes' or 'No', the people are not able to exert influence on the provisions of the draft constitution and change the different provisions they may not agree with. The people are forced to either accept the draft constitution as it is or reject it as a whole. Notwithstanding the importance of influencing the outcome of the constitution making process through voting in a referendum, Moehler's study in Uganda has shown that where citizens have participated actively in the constitution making process, they generally become more conversant with the political system and develop a preference for tolerance and for individual rights.<sup>282</sup> The importance of public participation is therefore invaluable, even though the people may not have had the final say in the outcome of the process.

### 3.9 Forms of Public Participation

As noted previously, public participation has often been taken to exclusively mean voting, particularly, ratifying a draft constitution through a referendum.<sup>283</sup> However, public participation is more than merely voting in a referendum, it entails expressing one's views freely, without any fear of political repercussions, and have those views influence decision making. There are several and different ways in which the public can meaningfully participate in the constitution making process, besides voting in a popular referendum, and these include:

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<sup>281</sup> Hart (note 2 *supra*) 1.

<sup>282</sup> DC Moehler *Distrusting Democrats: Outcomes of Participatory Constitution Making* (2008) 183.

<sup>283</sup> Hart (note 2 *supra*) 1.

1. The public participates in the constitution making process when voting for the members of the organ responsible for preparing the draft constitution.
2. The public also participates in the constitution making process when it is involved in the civic education and awareness campaigns organised by the commissions or civil society organisations.
3. After preparing the initial draft constitution, the constitutional commission may invite the members of public to make written or oral submissions regarding the draft constitution. The public therefore participates when making these submissions.<sup>284</sup>
4. The public participates when seeking for information and opportunities for participation.
5. The public participates when demonstrating and boycotting, or utilising other forms of protest.
6. The public participates when contesting for offices in the organs responsible for facilitating the constitution making process.
7. The public participates when lobbying members of the constitutional commission or politicians.
8. The public participates when by attending political rallies organised in campaign for or against the adoption of the draft constitution.<sup>285</sup>
9. The public also participates when expressing opinions or preferences on constitutional issues on public informal forums such as the internet, newspapers, etc.
10. A referendum is one of the most popular and best ways to obtain public opinion on the draft constitution. Public ratification of the draft constitution is believed to contribute to constitutional longevity.<sup>286</sup> The public also participates when voting in a referendum.
11. The public participates indirectly when elected representatives, such as Members of Parliament or Councilors, represent its views in public debates, dialogues or in Parliament.

### **3.10 The Role of the International Community: A United Nations' Perspective**

The international community, comprised of international organisations such as the United Nations (UN) and foreign states, has a facilitative role to play in the design and

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<sup>284</sup> For example, section 328(4) of the current Zimbabwean Constitution provides that immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so.

<sup>285</sup> For example, In Zimbabwe, the ruling ZANU PF party and the opposition MDC party, held rallies countrywide to campaign for a 'Yes' and 'No' vote, respectively, in the 1999-2000 constitution making process.

<sup>286</sup> Meisburger (note 271 *supra*) 99.



implementation of constitution making processes. This involvement is usually stimulated by a country's need to ensure compliance with the international human rights norms and standards and also to benefit from international best practices in constitution making.<sup>287</sup> The UN's best practices are derived from its previous constitutional assistance experiences as it has been called upon a number of times to assist national actors in the constitution making processes of several countries across the globe, more particularly in conflict or post conflict states such as Cambodia, Afghanistan and Iraq, among others, to implement peace agreements or facilitate peace processes with possible constitutional implications.<sup>288</sup>

The Guidance Note of the Secretary-General: United Nations Assistance to Constitution making Processes sets out a policy framework for UN assistance to constitution making processes. The policy framework is derived from lessons learned from constitution making experiences and from UN engagement in these processes. The Guidance Note identifies and outlines several and different key components which need to be considered in the design of constitution making processes. Abdelgabar notes that the design of the process needs to take into cognisance the prevailing social, economic and political conditions of the country since these factors inspire the design of the constitution making process.<sup>289</sup> The norms identified in the Guidance Note of the Secretary-General are not intended to be exhaustive but rather serve as a guideline in constitution making processes. The norms are briefly discussed hereunder:<sup>290</sup>

1. Evaluation of the need for a new constitution or constitutional review.<sup>291</sup> For instance, the Zimbabwean 1979 Lancaster House Constitution was adopted primarily to end a civil war between the colonial regime and the liberation war movements and to usher Zimbabwe into an internationally and lawfully recognised independent nation.
2. Negotiation between key stakeholders on how the constitution making process is to proceed.<sup>292</sup>

<sup>287</sup> Abdelgabar (note 63 *supra*) 147.

<sup>288</sup> The Guidance Note of the Secretary-General: United Nations Assistance to Constitution making Processes, United Nations, 2009, 3. Available at [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitutionmaking\\_Processes\\_FINALE.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitutionmaking_Processes_FINALE.pdf) (accessed 26 December 2016).

<sup>289</sup> Abdelgabar (note 63 *supra*) 138.

<sup>290</sup> The Guidance Note provides guiding principles and framework for UN engagement in constitution making processes, covering the process of drafting and substance of a new constitution, or reforms of an existing constitution. This is based on the UN's belief that both process and substance are critical for the success of constitution making. See generally the UN Guidance Note (note 288 *supra*) 5.

<sup>291</sup> *Ibid* 5.

<sup>292</sup> *Ibid* 5.



3. Establishment of a representative body (e.g. constitutional commission) to lead public education and consultation campaigns, and to prepare the draft constitution. It is argued that membership to the body should be by election and not selection.<sup>293</sup>
4. Setting up of a secretariat or other body to support the functions of the constitutional commissions with the logistics involved in carrying out public education and outreach programmes.<sup>294</sup>
5. A public consultation process led by the drafting body to gather views and ensure input of the public on the draft constitution.<sup>295</sup>
6. Submission of the draft constitution to a representative forum (e.g. constituent assembly, constitutional convention and parliament) to debate it and make any amendments.<sup>296</sup>
7. Subjecting the draft constitution for approval through a popular referendum.<sup>297</sup>
8. Post constitution making education on the newly adopted constitution and development of a strategy for its implementation.<sup>298</sup>

The UN further outlines the forms of assistance it can provide in constitution making processes and these include technical legal expertise, facilitation of negotiations among stakeholders on the structure of the process and on key constitutional principles, setting up public education and consultation campaigns, administrative financial and legal support.<sup>299</sup>

Countries are usually wary of external influence on the drafting process of the constitution and despite such seemingly warranted fears, the international community's role in constitution making cannot be over emphasised. Its wealth of experience on comparative constitution making is indispensable, it provides an array of practical ideas, good practices and lessons learnt.<sup>300</sup> It is against such background that the UN recognises that constitution making is a sovereign national process to be led and owned by the people of the concerned state and therefore undertakes to be 'sensitive to the need to provide advice

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<sup>293</sup> *Ibid* 5.

<sup>294</sup> *Ibid* 5.

<sup>295</sup> *Ibid* 5.

<sup>296</sup> *Ibid* 5.

<sup>297</sup> *Ibid* 5.

<sup>298</sup> *Ibid* 5.

<sup>299</sup> *Ibid* 5.

<sup>300</sup> Ndulo (note 60 *supra*) 191.

and options without causing national actors to fear that UN or other international assistance could lead to a foreign imposed constitution'.<sup>301</sup>

### 3.11 The Benefits of Public Participation

#### 3.11.1 Legitimacy and Acceptability

Dann *et al* observe that a successful participatory constitution making process is a cornerstone for the legitimacy and acceptance of the constitution and hence stability of the entire constitutional order.<sup>302</sup> The authors argue that the lack of acceptance of a constitution and resistance of groups which claim that their interests have been neglected is minimised where the outcome reflect a broad consensus.<sup>303</sup> Legitimacy of a constitution is thought to be realised through a comprehensive consultative procedure which can evoke feelings of ownership, as people who fought and argued for their constitution often feel responsible to defend it and to advocate for its effective implementation.<sup>304</sup>

Participatory constitution making is predicated on the premise that legitimate legislative action must include those who will be affected by the action. Proponents of public participation point to the relationship between the legitimacy of government action with the participation of those affected by the decision. Public participation in constitution making is thought to offer the creation of a legitimate system of governance. Over the last few decades, interest in participatory constitution making has increased significantly as citizen involvement is thought to enhance constitutional legitimacy, making over 40 percent of the present constitutions worldwide requiring public approval through some form of a public referendum.<sup>305</sup>

The Zimbabwean government has long faced a legitimacy crisis and lack of acceptance of not only the 2013 Constitution and the previous draft constitutions, but also of the entire constitutional and legal order. This has been, in large part, because of the government's intent to own, manage and control the constitution making processes which led to the negation of the aspirations and wishes of the people. The processes by which these earlier drafts were negotiated and adopted denied the people of Zimbabwe the right to write a

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<sup>301</sup> UN Guidance Note (note 288 *supra*) 5.

<sup>302</sup> Dann *et al* (note 10 *supra*) 4.

<sup>303</sup> *Ibid* 4.

<sup>304</sup> *Ibid* 4.

<sup>305</sup> Moehler & Marchant (note 66 *supra*) 2 & 3.

constitution for themselves and by themselves. The ZESN reported that a large majority of Zimbabweans has never felt emotionally attached to the elite-negotiated Lancaster House Constitution.<sup>306</sup> *Afrobarometer's* survey revealed that 47% of Zimbabweans were of the opinion that the Lancaster House Constitution does not express their values and hopes, with 88% advocating for its reform.<sup>307</sup> These studies indicate that the Lancaster House Constitution did not foster a sense of nationhood and inspire a sense of loyalty among the citizens, hence the legitimate crisis the country found itself in. It is against this background that the NCA, an alliance of civil society organisations, was formed to advocate for far-reaching constitutional reforms and campaign for a people driven and democratic constitution as a solution to the political problems riddling the country.

Moehler and Marchant however offer a seemingly different understanding on the relationship between public participation in constitution making and legitimacy. The authors identify at least three key dimensions along which participatory constitutional making processes differ from one another, namely: i) the extent of mass citizen involvement in the process; ii) the extent of elite support for the constitution; and iii) the level of citizen access to information. Their multi-dimensional model describes how these three dimensions can affect public perceptions of constitutional legitimacy.<sup>308</sup> They used case studies of participatory constitution making processes in three East African countries, namely: Uganda, Kenya and Somalia. The model outlines the causes of public approval for a new constitution, with primary interest in the role of mass participation in constitution making process of countries emerging from conflict or the shadow of authoritarian rule.<sup>309</sup>

Moehler's initial study in Uganda had previously revealed that, contrary to international norm in favour of participation, there was no difference in terms of support of the Ugandan Constitution among participants and non-participants. Her study showed that while public participation does not automatically confer legitimacy, 'citizens who are involved in constitution making are more likely to know and care about the constitution' than non-participants.<sup>310</sup> Building from extensive research based on a survey and in-depth interviews in Uganda by Moehler and supplemented by other academic and practitioner literature, the

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<sup>306</sup> ZESN Referendum Report (note 101 *supra*) 4.

<sup>307</sup> *Ibid* 4.

<sup>308</sup> Moehler & Marchant (note 66 *supra*) 4.

<sup>309</sup> *Ibid* 5.

<sup>310</sup> *Ibid* 6.

authors argue that public acceptance or legitimacy of a new constitution depends on where the constitution making process falls along the three above-mentioned dimensions.<sup>311</sup> The authors point out that there is widespread unsubstantiated belief that a highly participatory process by design enhances citizen perception of constitutional legitimacy. While they concur that an increase in public participation can at times lead to an increase in public approval of the constitution, they however, drawing from their model, argue that this effect is contingent on where a constitution lies along the other two above-mentioned dimensions. Their dominant argument is that it is the interaction between these three dimensions that affects citizens' perception of constitutional legitimacy. In other words, effects of citizen participation cannot be studied in isolation.<sup>312</sup>

### **3.11.2 Conflict Resolution, Conciliation and Unity**

With the recent change of focus from constitutionality to constitutionalism, constitutions have come to be recognised as implements for bridge-building, especially in a deeply polarised and post-conflict state such as Zimbabwe. Participatory constitution making provides for peaceful social and political change in such states. Its proponents perceive it as a tool for implementing democracy where it has ceased to exist. It is as a result thereof that in countries with an on-going conflict, there is usually pressure on the constitutional bodies to complete the new constitution as speedily as possible and use the constitution to resolve the conflict and bring the warring parties to unity. For example, the decolonisation of Zimbabwe took the form of a negotiated settlement, the Lancaster House Agreement of 1979, where a 'ceasefire compromise' constitution was negotiated between the colonial Rhodesian government and the liberation war movements to put to an end a protracted liberation war that had raged for two decades.

Several writers are however against the use of a constitution to resolve a conflict. Ndulo believes the 1979 Zimbabwean constitution making process would have benefited more from separating the constitution making process from that of securing a cease-fire as this would have helped to create room for public participation.<sup>313</sup> Meisburger is similarly skeptical of the idea of using the constitution making process to end conflict. He reasons that while it should be recognised that using a constitution to end a conflict is clearly important, it is also important to note that ending a conflict and instituting democracy are

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<sup>311</sup> *Ibid* 34.

<sup>312</sup> *Ibid* 34.

<sup>313</sup> Ndulo (note 60 *supra*) 191.

two different things as establishing one does not necessarily ensure the other.<sup>314</sup> He concedes that although there is no clear procedure to reconcile these two equally important and differing objectives, enhanced public participation would likely be a key element to the solution.<sup>315</sup> He further argues that in instances where the constitution making process is used to resolve conflict, there is a possibility of overlooking participation as there is most often times not enough time to spare for public involvement as the constitutional bodies are under constant and immense political pressure to hurriedly complete the constitution making process.<sup>316</sup> The negotiation and adoption of the 1979 Zimbabwean Lancaster House Constitution illustrates this point.

The importance of public participation can also be observed in multi-ethnic societies. Historically, it has been assumed that constitutions are made for a people with a common history, religion or language.<sup>317</sup> Nowadays constitutions are conceived as tools for nation building and social cohesion in polarised and multi-ethnic societies. However, to achieve national unity, it is argued that the constitution making process must be inclusive of all the people of the different communities in the country. The constitution making process must engender trust between the leaders themselves, the different ethnic communities and between the leaders and their communities. The deeper the polarisation of the society, the more important trust is likely to be, and the harder it will be to attain.<sup>318</sup>

### **3.11.3A Well-informed and Active Citizenry**

Widespread public education during the constitution making process may offer long term benefits of a well-informed citizenry as people get to be educated on issues like democracy, human rights and the rule of law through civic education and awareness programmes.<sup>319</sup> In other words, the constitution making process is believed to be a step towards democratic empowerment. This view resonates with Moehler's study in Uganda

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<sup>314</sup> Meisburger (note 271 *supra*) 102.

<sup>315</sup> *Ibid* 102.

<sup>316</sup> *Ibid* 102.

<sup>317</sup> Saunders (note 227 *supra*) 2 & 3.

<sup>318</sup> *Ibid* 2 & 3.

<sup>319</sup> R Kant & E Rakuita 'Public Participation and Constitution-Making in Fiji: A Critique of the 2012 Constitution Making Process' (2014) Discussion Paper Series 2011-2014, *The State, Society & Governance in Melanesia* 2. Available at <http://www.ips.cap.anu.edu.au/ssgm> (accessed 25 October 2016).

which indicated that 'citizens who are involved in constitution making are more likely to know and care about the constitution' than non-participants.<sup>320</sup>

### 3.12 The Downside and Challenges of Public Participation

While participatory constitution making is considered a general international norm and best practice, Brandt *et al* caution against public participation in polarised societies (cultural or religious) as it may be counterproductive and divisive. He explains that in polarised societies, discussions tend to deviate from issues of national interest and revolve around sectional or ethnic interests.<sup>321</sup> Thus, instead of fostering unity and conciliation, the constitution making process may in fact cause further and deeper divisions.

It is most common in divided societies for the constitution making process to be unnecessarily lengthy as time and effort are spent on trying to reach sufficient consensus. This may heavily chew into the financial resources of the country, making participatory constitution making an unattractive option. In such instances, mass participation may overwhelm the institution's financial capacity to effectively implement public participation procedures thus compromising the quality of the constitution produced.

Furthermore, the very success of an extensive consultation process may undermine the overall integrity and success of the constitution making process as it poses new challenges on the constitutional commission on how to read and distil the will of the people in the submissions. A definitive case is the 1999-2000 Zimbabwe constitution making process where thousands of submissions were received. Hatchard argues that this made the draft susceptible to manipulation by a reasonably competent drafter and claims this is precisely what happened as regards the *Corrections and Clarifications* made to the original draft constitution.<sup>322</sup>

Kant and Rakuita warn of the dangers of public participation before questioning the motivations behind allowing people to participate in the constitution making process. Public participation may be used to further ulterior motives as in the case of the 2012 constitution making process of Fiji. The writers argue that the Fiji constitution making process was

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<sup>320</sup> Moehler & Marchant (note 66 *supra*) 6.

<sup>321</sup> Brandt *et al* (note 265 *supra*) 88.

<sup>322</sup> Hatchard (note 125 *supra*) 211.

merely tokenistic. To the people, participation meant inclusion whereas to the regime it meant legitimisation. The writers claim that the regime had predetermined the outcome of the constitution making process and public participation was simply meant to give credibility to their ambitions. The public's participation was therefore neither effective nor meaningful.<sup>323</sup>

One of the key arguments for participatory constitution making is that it offers legitimacy to the Constitution and the entire constitutional order. Certain case studies however downplay the importance of public participation in lending legitimacy to the Constitution. Examples are given of the constitution making processes of countries such as Germany, Japan and Spain which did not implement any public participation procedures and yet enjoy considerable legitimacy.<sup>324</sup> On the other hand, the Constitution of Eritrea was never implemented despite the process being participatory. The same applies for the Constitution of Thailand which had little impact on the political system, even though it had one of the most participatory processes in Asia.<sup>325</sup> Moehler similarly points out that there is little correlation between participation and legitimacy after her study revealed that the Ugandan Constitution enjoyed the same degree of legitimacy from those who participated and those who did not.<sup>326</sup>

Ghai argues that because of the complex nature of constitution making, the people are not always in the best position to make decisions on issues which require technical and comparative knowledge. He recommends that public participation be integrated with the contributions of experts and specialised groups, and he observes that this is rarely addressed in extensive participatory constitution making processes.<sup>327</sup>

Ghai also contends that most literature on public participation always assume direct participation of the people, to the exclusion of the other alternate forms of participation. He disputes the effectiveness of direct participation in countries with the least developed cultures of democracy. He notes that direct participation is more effective in countries that do not have effective civil society.<sup>328</sup> The author further observes that the drawback of direct participation is that the process does not generally lead to institutionalisation and

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<sup>323</sup> Kant & Rakuita (note 319 *supra*) 2.

<sup>324</sup> Ghai & Galli (note 253 *supra*) 242.

<sup>325</sup> *Ibid* 242.

<sup>326</sup> Moehler & Marchant (note 66 *supra*) 6.

<sup>327</sup> Ghai & Galli (note 253 *supra*) 243.

<sup>328</sup> *Ibid* 244.

may, as a consequence, fail to produce long term change, and after the dismantling of the formal structures, the people become marginalised as before. He suggests that countries should adopt other more enduring forms of participation. He gives an example of South Africa where direct participation was substituted for representative participation as the civil society and political parties became genuine and effective vehicles for the representation of societal interests.<sup>329</sup>

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<sup>329</sup> *Ibid* 244.



## PART II

### THE INTERNATIONAL, REGIONAL AND NATIONAL LEGISLATIVE FRAMEWORK FOR PUBLIC PARTICIPATION IN CONSTITUTION MAKING

#### 3.13 Introduction

The second part of the chapter identifies the international and regional human rights treaties which establish minimum obligations for participation in public affairs that are also applicable to constitution making processes and to which Zimbabwe is a party. Additionally, the section discusses Zimbabwe's domestication of these human rights treaties, the national legislative framework for public participation in constitution making and the legal and political environment that prevailed in the country during the adoption of the new constitution. The chapter concludes with a brief reference to South Africa's constitution making process and its current legislative framework for participatory constitution making for purposes of drawing lessons.

##### 3.13.1 Meaning of Human Rights

Participatory constitution making is not only considered a desirable normative standard, it is also emerging as an international and regional norm, and has found legal basis in international, regional and domestic laws. While most writers generally concur on the existence of the right to public participation in constitution making under international law, there are few other writers who are of the opinion that despite the fact that public participation in constitution making is desirable, it still remains a matter of preference and not a right, and therefore not enforceable. Renowned international law author, Professor Franck, considers the right to democratic participation to be 'an emerging right' at its best.<sup>330</sup>

Despite their extensive reference, human rights are not easy to define. There is lack of consensus on what exactly they are. As such, in most instances they are defined in terms of what they intend to achieve rather than what they really are.<sup>331</sup> Regardless, it is generally accepted that human rights are those inherent, fundamental and inalienable rights which are essential for human life.<sup>332</sup> The concept of human rights recognises that every single human being is entitled to his or her human rights without distinction as to sex, race, colour,

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<sup>330</sup> Franck (note 65 *supra*) 46-91.

<sup>331</sup> T Mude 'The History of International Human Rights Law in Zimbabwe' (2014) Vol. 2(1), *Journal of Social Welfare and Human Rights* 58.

<sup>332</sup> *Ibid* 58.

language, religion, national or social origin, property, political or other opinion, birth or other status.<sup>333</sup> Human rights are legally guaranteed by human rights law, as expressed in treaties, customary international law, bodies of principles and other sources of law.<sup>334</sup> International human rights law sets out obligations of states to act or refrain from acting in certain ways, in order to protect and promote human rights and fundamental freedoms of people in their respective countries.<sup>335</sup>

There is debate however amongst developed and developing nations over the interpretation, application and implementation of human rights law. Developing nations argue international human rights law is western-centric and is used to further the interests of the West. Mude argues that it is as a direct consequence of these differences in ideology that have made it difficult to produce a single multilateral treaty giving legal effect to the Universal Declaration of Human Rights (Universal Declaration).<sup>336</sup> He further argues that the UN which has the mandate of enforcing international human rights law is largely perceived by African countries as an instrument of the west countries. He provides an example of Israel, which he argues has consistently violated international human rights law but no action has been taken against it because it is aligned to the western countries. On the other hand, in nations like Libya sanctions were imposed and had military interventions because they are not aligned to the western countries.<sup>337</sup>

According to Article 38(1) of the statute of the International Court of Justice, the sources of international human rights law are international treaties, international customs, general principles of law recognised by civilised nations and judicial decisions and teachings of highly qualified publicists. This section shall primarily discuss selected international and regional treaties as a source of the right to public participation in the constitution making process.

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<sup>333</sup> Office of the High Commissioner for Human Rights, Human Rights: A Basic Handbook for UN Staff, 2.

<sup>334</sup> *Ibid* 3.

<sup>335</sup> See generally the United Nations Office of the High Commissioner for Human Rights website <http://www.ohchr.org> (accessed 15 October 2016).

<sup>336</sup> Mude (note 331 *supra*) 65.

<sup>337</sup> *Ibid* 65.

### 3.13.2 International Human Rights Instruments

#### 3.13.2.1 The International Covenant on Civil and Political Rights

There are several treaty sources of the right to public participation in constitution making, as identified by the International Court of Justice, but perhaps the most unequivocal legal basis for public participation in constitution making is found in the form of the right to participate in the conduct of public affairs as articulated in Article 25 of the Covenant on CPR which provides for the citizens' right to participate in the conduct of public affairs.<sup>338</sup> The right to participate in the conduct of public affairs entails an entitlement to participate in the state's decision making processes regarding its political status and its economic, social and cultural development. Article 25 of the Covenant on CPR provides that:

Every citizen shall have the right and opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

In its interpretation of Article 25, the Human Rights Committee in *Marshall v. Canada*, a case which involved a Canadian tribal society's claim of exclusion from the State's constitution making processes, held that the right to participate in the conduct of public affairs extends to constitution making.<sup>339</sup> The Mikmaq tribal society in Canada had argued that Canada's refusal to allow it to attend a constitutional conference violated its right to self-determination and to take part in the conduct of public affairs. In addressing the alleged violation of Article 25 (a), the Human Rights Committee concluded that constitutional conferences constitute a conduct of public affairs in the spirit of Article 25 (a) of the Covenant on CPR.<sup>340</sup> The Human Rights Committee confirmed this position in Concluding Observations to the 2005 State Report on Bosnia and Herzegovina, where it recommended Bosnia to reopen talks on the constitutional reform in a transparent process and on a wide participatory basis.<sup>341</sup>

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<sup>338</sup> The covenant was adopted in 1966 and entered into force in 1976.

<sup>339</sup> *Marshall v. Canada*, para 5.3.

<sup>340</sup> *Ibid* para 5.3.

<sup>341</sup> Human Rights Committee 'Concluding Observations of the Human Rights Committee: Bosnia and Herzegovina' (2006) *CCPR/C/BIH/CO/1*, para 8.

However, although Article 25 (a) provides for the protection of citizen's rights to participate in the conduct of public affairs either directly or indirectly through freely chosen representatives, the Human Rights Committee rejected the presumption that the right entails that the citizens have a right to decide whether to participate directly or indirectly. The Human Rights Committee ruled that in determining the scope of citizen's right to participate in such activities, it is 'for the legal and constitutional system of the State party to provide for the modalities of such participation.'<sup>342</sup> Article 25 (a) does not therefore provide an unconditional right to citizens to choose the method of participation but rather allows states to choose between direct or representative modalities, in so far as the chosen modality of participation does not discriminate or place unreasonable restrictions on participation.<sup>343</sup> To that end, no distinctions are permitted between citizens in the enjoyment of the right public participation in constitution making on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>344</sup>

The Human Rights Committee reflected these conclusions in the General Comment on Article 25 when it stated that the people have the right to freely 'choose the form of their own constitution'.<sup>345</sup> The General Comment further provided that citizens participate in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in terms of paragraph b) which guarantees the right to vote and the free expression of the will of the voters.<sup>346</sup> The Human Rights Committee did not however stipulate what public participation should be but rather discussed a variety of modalities which, if employed, would amount to public participation. These include: holding office, taking part in popular assemblies, consultative bodies, freely chosen representatives, referenda, elections, other electoral processes, public debate and dialogue.<sup>347</sup> In view of the fact that states have the right to choose on the modalities to be employed in the constitution making process, it should be noted that the UN Secretary General and other commentators favour more direct participation in

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<sup>342</sup> *Marshall v. Canada* (note 8 *supra*) para 5.4.

<sup>343</sup> *Ibid* para 6.

<sup>344</sup> Human Rights Committee General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, para 3.

<sup>345</sup> *Ibid* para 2.

<sup>346</sup> *Ibid* para 6.

<sup>347</sup> *Ibid* paras 6 & 8.

constitution making in order to allow citizens to effectively influence the thinking of others.<sup>348</sup> Hart notes that though the General Comment lacks any specification of what a participatory constitution making process would look like, the General Comment expands the scope of democratic participation beyond the mere act of voting, contrary to most of the international conventions that preceded it.<sup>349</sup> Noteworthy is that the General Comment also provides for other fundamental rights and freedoms which must be necessarily present to ensure a meaningful realisation of the right to public participation in constitution making.<sup>350</sup> These rights and freedoms include, the freedom of expression, assembly and association, which are guaranteed in terms of Articles 19, 21 and 22, respectively.<sup>351</sup>

Zimbabwe is a State Party to the Covenant on CPR having acceded to it in 1991. The country has therefore an obligation in terms of the treaty to ensure the progressive realisation of the right to public participation in constitution making, as provided in terms of Article 25.

### **3.13.2.2 The Universal Declaration of Human Rights**

The right to public participation in constitution making can also be logically derived from the general meaning of 'democratic participation' in Article 21 of the United Nations Declaration

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<sup>348</sup> Banks (note 5 *supra*) 1055.

<sup>349</sup> Hart (note 2 *supra*) 6.

<sup>350</sup> General Comment No. 25 (note 344 *supra*) para 12.

<sup>351</sup> Article 19 provides that: 1. Everyone shall have the right to hold opinions without interference; 2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice; 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputation of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21 provides that: The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 provides that: 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests; 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right; 3. Nothing in this article shall authorize State Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

of Human Rights (Universal Declaration).<sup>352</sup> Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Universal Declaration is not a treaty but rather a declaration adopted by the United Nations General Assembly on 10 December 1948. It sets out fundamental human rights to be universally recognised and protected. It contains a total of 30 articles which have found expression in subsequent international and regional human rights instruments and have also influenced most national constitutions.<sup>353</sup>

Since its adoption, the Universal Declaration still remains the primary source of global human rights standards with almost every treaty incorporating a preamble referring to it. The Universal Declaration may be used to inform or interpret domestic law which pertains to human rights in the national courts as is the case of Sri Lanka.<sup>354</sup> The approach of the Sri Lankan courts is that the courts will observe the Universal Declaration but with restriction to only in the field of interpretation of their national laws.<sup>355</sup> Other African states such as Algeria (1963), Cameroon (1960), Ivory Coast (1960), Madagascar (1959), Mali (1960) and Senegal (1963), among others, have made express reference to the Universal Declaration in their constitutions.<sup>356</sup> Several decisions of the Zimbabwe Supreme Court reflect an extensive usage of international law to interpret the provisions of the Zimbabwe Constitution.<sup>357</sup> In particular, the Lancaster House Constitution's Declaration of Rights is modeled on the Universal Declaration.<sup>358</sup>

When it was adopted, the Universal Declaration was conceived as 'a manifesto with primarily moral authority.'<sup>359</sup> In the words of Eleanor Roosevelt, the then Chairman of the U.N Commission on Human Rights during the drafting of the Universal Declaration:

It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human

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<sup>352</sup> Hart (note 2 *supra*) 1.

<sup>353</sup> The Universal Declaration has served as the foundation for the Covenant on CPR and Covenant on ESCR, among other international human rights instruments. See generally the UN website <http://www.un.org> (accessed 27 July 2015).

<sup>354</sup> See *W.M.K Silva v. Piyasena Senaratne* S.C. App. No. 7 of 1988.

<sup>355</sup> *Visvalingan v. Liyange* (1982) F.R.D. (2) 529.

<sup>356</sup> United Nations *United Nations Action in the Field of Human Rights* (1974) 17.

<sup>357</sup> See for example, *Catholic Comm'n for Justice and Peace in Zimb. v. Attorney-General* 1993 (4) SA 239 (ZS); *State v. A Juvenile* 1990 (4) SA 151 (ZS); *State v. Ncube* 1987 Zimb. L. Rep. 246, [1988] L.R.C (Const) 442.

<sup>358</sup> W Ncube 'The Constitutional Recognition and Popular Enjoyment of Human Rights in Zimbabwe' (1987) Vol. 5, *Zimbabwe L. Rev* 88.

<sup>359</sup> United Nations *The International Bill of Human Rights* (1988) 1.

rights and freedoms...to serve as a common standard of achievement for all peoples of all nations.<sup>360</sup>

However, with time, the Universal Declaration has acquired significant legal status.<sup>361</sup> Several internationally acclaimed writers believe that despite whatever the drafters had in mind when they drafted it, the Universal Declaration in its entirety now represents customary international law and therefore a binding instrument to every member state of the UN General Assembly.<sup>362</sup> Zimbabwe, as a member state of the UN General Assembly would therefore be bound by the obligations imposed by it.<sup>363</sup> Some writers however argue that it is only a selected number of the provisions of the Universal Declaration which have acquired the status of customary international law.<sup>364</sup> The writers believe that only specific norms which, through the practice of states, have come to be recognised as legally binding. An example of such norms is the ban on torture.<sup>365</sup> Nonetheless, regardless of lack of global consensus on the legal status of the Universal Declaration, it is difficult to ignore its legal, political and moral impact on the conduct of international relations even if it is deemed to not have risen to the level of customary international law.

### 3.13.3 Regional Human Rights Instruments

#### 3.13.3.1 African (Banjul) Charter on Human and Peoples' Rights

Strongly inspired by the Universal Declaration, Article 13 of the African (Banjul) Charter on Human and Peoples' Rights (African Charter) provides for the freedom to participate in the government of a country, either directly or through freely chosen representatives.<sup>366</sup> To ensure a meaningful realisation of the right to public participation in constitution making, Article 9 of the Charter provides for the freedom of expression and information. Article 25 further places an obligation on the states to promote and ensure respect of the rights enshrined in the Charter. In the South African case of *Doctors for Life International v. The Speaker of the National Assembly*, the Constitutional Court observed that Article 25 is more

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<sup>360</sup> M Whiteman *Digest of International Law* (1965) 243.

<sup>361</sup> T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) 108.

<sup>362</sup> H Hannum 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) Vol. 25:287, GA. J. INT'L & COMPL. 306

<sup>363</sup> Zimbabwe became a member of the UN on 25 August 1980.

<sup>364</sup> L Henkin *The Age of Rights* (1990) 19.

<sup>365</sup> Office of the High Commissioner for Human Rights 'The United Nations Human Rights Treaty System' Fact Sheet No. 30/Rev.1, 2012, 3.

<sup>366</sup> Article 13 provides: 1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law; 2. Every citizen shall have the right of equal access to the public service of his country; 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.



explicit than the Covenant on CPR in obligating the state parties to ensure that its citizenry are aware and well-informed of their political rights.<sup>367</sup>

Zimbabwe ratified the African Charter in 1986. It thus has assumed an international obligation to recognise and protect the right to public participation in constitution making. The country is however yet to ratify the African Charter on Democracy, Elections and Governance (African Charter on DEG) which has even far reaching implications on the realisation of the right to public participation in the constitution making process. Article 3(7) of the African Charter on DEG requires states to 'implement effective participation of citizens in democratic and development processes and in the governance of public affairs'.

### **3.14 Monitoring and Enforcement of Human Rights Treaties**

Now that several human rights sources have unequivocally established the legal status of the right to public participation in constitution making, this section shall proceed to discuss the monitoring and enforcement mechanisms of international and regional human rights treaties and the efficacy of such measures, with specific reference to the Covenant on CPR and the African Charter. Saunders comments that the enforcement of human rights treaties is complicated because the mechanisms that are employed in other areas of international law do not necessarily work in the context of human rights treaties which pose challenges in designing effective enforcement mechanisms in the field of human rights treaties.<sup>368</sup>

When a state becomes a party to an international human rights treaty, it assumes the responsibility to promote and protect and fulfill the human rights obligations imposed by the treaty. Since the ratification of the Universal Declaration, the UN has created several mechanisms to ensure compliance with the obligations imposed by international human rights treaties. These are mechanisms by which the aggrieved party may seek redress against the State Party for failure to uphold its obligations in terms of the treaty. One of the theories advanced to explain why states voluntarily ratify treaties whose obligations they have no intention of fulfilling is that most treaties have non-existent or weak enforcement mechanisms. As such, commitment to a treaty with weak or non-existing enforcement

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<sup>367</sup> *Doctors for Life International v. The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 93.

<sup>368</sup> P Saunders 'The Integrated Enforcement of Human Rights' (2012) *Vol. 45:97, International Law and Politics* 108.



mechanism becomes 'costless'.<sup>369</sup> Other reasons can be attributed to external pressure, where a state would want to be viewed as a 'legitimate player on the world stage' and possibly, obtain aid and trade.<sup>370</sup>

The monitoring and implementation of treaties is carried out by a body established by that treaty. Ban Ki-moon (the UN Secretary-General) comments that the treaty body system 'stand at the heart of international human rights protection system as engines translating universal norms into social justice and individual well-being'.<sup>371</sup> The UN Secretariat observes however that the very success of the international human rights system has been one of the reasons the system faces several challenges, in particular, the growth in human rights instruments and the increase of states formally assuming international obligations.<sup>372</sup> The number of human rights treaty bodies is currently at seven and as an effect of this proliferation of treaty bodies, their provisions and competencies sometimes overlap, compromising the system's coherence.<sup>373</sup>

### **3.14.1 Monitoring and Implementation of the International Covenant on Civil and Political Rights**

#### **3.14.1.1 Human Rights Committee**

The Human Rights Committee is the body established, pursuant to Article 28 of the Covenant on CPR, to monitor its implementation and compliance. It has a self-contained procedure provided in terms of Article 40 for the monitoring and enforcement of human rights violations in terms of which State Parties are required to regularly submit reports on 'the measures they have adopted which give effect to the rights' recognised under the Covenant on CPR and 'on the progress made in the enjoyment of those rights.' The Human Right Committee examines the report and submits its concerns and recommendations in 'Concluding Observations'.<sup>374</sup> According to the UN Secretariat, the reporting procedure provides an opportunity for individual states to report on 'measures it has taken to bring its

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<sup>369</sup> Y Dutton 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) Vol 34:1, *U. Pa. J. Int'l L.* 5.

<sup>370</sup> *Ibid* 15.

<sup>371</sup> N Pillay 'Strengthening the United Nations Human Rights Treaty Body System' A Report by the United Nations High Commissioner for Human Rights, June 2012, 7.

<sup>372</sup> Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body: Report by the Secretariat HRI/MC/2006/2, 22 March 2006, 6.

<sup>373</sup> *Ibid* 6.

<sup>374</sup> See generally the United Nations Office of the High Commissioner for Human Rights' website <http://www.ohchr.org> (accessed 15 October 2016).

national law and policy into line with the provisions of the treaties to which it is a party' and further provides for 'national dialogue on human rights amongst the various stakeholders in a State party'.<sup>375</sup> The UN Secretariat further notes that the self-reporting procedure 'allows for international scrutiny, which underlines State's responsibility and accountability for human rights protection'.<sup>376</sup>

One of the most familiar arguments on the efficacy of the enforcement mechanisms of the Covenant on CPR concerns its self-reporting system. The criticism leveled against the self-reporting procedure stems from the fact that the Human Rights Committee is not empowered to sanction a State Party for non-compliance with its reporting obligations.<sup>377</sup> More pertinently, because the Human Rights Committee's recommendations are not legally binding, it cannot compel a state to implement the recommendations in its domestic human rights practices.<sup>378</sup> In view of that, it has been submitted that the self-report system merely serves as a reminder for State Parties to review and improve their human rights practices in so far as it cannot compel such review.<sup>379</sup>

The UN Secretariat also notes that the self-reporting procedure often fails to succeed in its objective of providing prospects for State Parties to periodically perform a wide-ranging appraisal of the measures they have taken to bring their domestic legislation in conformity with treaties to which they are party because of the quality of the reports submitted by the State Parties.<sup>380</sup> This is exemplified in the reports that were submitted to the Human Rights Committee between 2004 and 2005. Of these reports, only 39% were at par with the reporting guidelines and in other cases, State Parties did not provide a candid and self-critical report.<sup>381</sup> The UN Secretariat further notes with concern that the self-reporting mechanism is undermined when State Parties submit insufficient information, adversely impacting on the quality of recommendations by the treaty bodies.<sup>382</sup>

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<sup>375</sup> Concept Paper on the High Commissioner's Proposal (note 372 *supra*) 5.

<sup>376</sup> *Ibid* 5.

<sup>377</sup> *Ibid* 6.

<sup>378</sup> Dutton (note 369 *supra*) 28.

<sup>379</sup> *Ibid* 28.

<sup>380</sup> Concept Paper on the High Commissioner's Proposal (note 372 *supra*) 10.

<sup>381</sup> *Ibid* 10.

<sup>382</sup> *Ibid* 10.

It is however worthy to note that the Covenant on CPR also offers relatively stronger monitoring, implementation and enforcement mechanisms to complement the self-reporting procedure. Firstly, Article 41 provides that State Parties can recognise the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations. However, the weakness of inter-State communications is that they are only valid as between State Parties that have made an express declaration to that effect. Moreover, the Human Rights Committee is not empowered to make an order for remedies in case it finds a State Party guilty of any violations,<sup>383</sup> and where a solution cannot be found, the Human Rights Committee is simply confined to writing a report to that effect.<sup>384</sup> Secondly, Article 1 of the First Optional Protocol to the Covenant on CPR widens the *locus standi* of parties who may approach the Human Rights Committee alleging a violation of their human rights under the Covenant to include an individual or someone acting on his or her behalf. It is however disheartening to note that Zimbabwe has not thus far accepted the individual complaints procedure under the First Optional Protocol to the Covenant on CPR.

### **3.14.2 Monitoring and Implementation of the African Charter on Human and Peoples' Rights**

#### **3.14.2.1 African Commission of Human and Peoples' Rights**

The body that is tasked with the monitoring and implementation of the African Charter is the African Commission on Human and Peoples' Rights (African Commission) which was established in terms of Article 30 of the African Charter in 1987.<sup>385</sup> Based in Banjul, The Gambia, the African Commission is comprised of 11 commissioners, with the 'highest reputation and integrity' who act as a quasi-judicial body, reviewing complaints lodged by states, individuals and non-governmental organisations regarding violations of the African Charter.<sup>386</sup> The African Commission is responsible for the interpretation of the provisions of the African Charter, taking into account the Universal Declaration, the Constitutive Act of the African Union, Charter of the United Nations and other United Nations and African

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<sup>383</sup> Dutton (note 369 *supra*) 29.

<sup>384</sup> Article 41(h) (ii) of the First Optional Protocol to the Covenant on CPR.

<sup>385</sup> Article 30 provides that: An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa. See C Heyns & M Killander (eds.) *Compendium of Key Human Rights Documents of the African Union* (2010) 34.

<sup>386</sup> GM Wachira 'African Court on Human and Peoples' Rights: Ten Years on and Still No Justice' (2008) *Minority Rights Group International* 2 & 8.

Instruments in the field of human and peoples' rights.<sup>387</sup> As a signatory to the African Charter, Zimbabwe undertakes to recognise the competence of the African Commission to respond to allegations of human rights abuses perpetrated in the country.

The African Commission receives complaints (or 'communications') from ordinary citizens, groups or NGOs, alleging that a state has violated the African Charter, pursuant to Articles 55 & 56 of the African Charter. For instance, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*,<sup>388</sup> the Zimbabwe Human Rights NGO Forum<sup>389</sup> filed a complaint to the African Commission alleging a violation of the rights of opposition parties' supporters by ZANU PF supporters. *In casu*, the African Commission had to decide whether an amnesty for violators of human rights is in violation of the African Charter and also whether the state was responsible for the acts of non-state actors in the period before and after the June 2000 parliamentary elections.<sup>390</sup> Commendably, the African Commission also permits other State Parties to the African Charter to file a complaint against a State Party. This capacity to receive complaints from various and diverse parties has made the African Commission one of the most flexible human rights bodies. As such, the African Commission is made aware of human rights issues which it would otherwise not have known had it relied solely on self-reports since State Parties are not likely to include allegations of human rights violations in their reports and this is especially critical when the victims of the violations cannot access the African Commission because of limited resources or awareness of such procedures.

One of the mandates of the African Commission is the fact-finding missions in response to allegations of violations of human rights in terms of Article 45 of the African Charter. The provision empowers the African Commission to 'resort to any appropriate method of investigation' in fulfilling its supervisory, monitoring and protection mandate. The African Commission undertook such a fact-finding mission in Zimbabwe in June 2002 after 'statements from NGOs pointed to reports of widespread human rights violations' in a move aimed to gather firsthand information on the state of human rights in Zimbabwe.<sup>391</sup> This is

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<sup>387</sup> Article 60 & 61 of the African Charter.

<sup>388</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2005) AHRLR 128 (ACHPR 2005).

<sup>389</sup> The Zimbabwe Human Rights NGO Forum is a coordinating body and a coalition of 12 Zimbabwean human rights NGOs based in Zimbabwe. See generally the organisation's website, [www.hrforumzim.com](http://www.hrforumzim.com).

<sup>390</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 3-14.

<sup>391</sup> J Johm & NB Pityana 'Zimbabwe: Report of the Fact Finding Mission' African Commission on Human and Peoples' Rights, DOC/OS(XXXIV)/346a, June 2002, 2.

helpful and informative as the African Commission gets to meet up with some of the victims of the human rights abuses, political parties and the civil society.

The African Commission however faces many challenges which restrict its capacity to effectively carry out its mandate. Pursuant to Article 62 of the African Charter and Rule 81 (1) of the Rules of Procedure of the African Commission (1995), State Parties to the African Charter are required to submit periodic reports to the African Commission on measures they have taken to give effect to the rights recognised by the African Charter and on the progress made with regard to the enjoyment of these rights.<sup>392</sup> However, the African Commission is not adequately empowered to ensure that State Parties timely submit reports on human rights issues in their country. For example, the African Commission noted that Zimbabwe had three overdue reports in violation of its obligations in terms of Article 62 of the African Charter during its fact-finding mission in 2002.<sup>393</sup> The enforcement mechanism of the self-reporting procedure of the African Charter is thus weak in so far as the African Commission cannot compel a State Party to submit a self-report.

The African Commission's effectiveness to independently carry out its mandate has been questioned in light of the fact that it has over the years depended on extra-budgetary funding from donors because of insufficient budget allocation from the African Union (AU), formerly the Organization of African Unity (OAU). It is against this background that some states have criticised the African Commission of bias as a result of the overbearing influence of the donors.<sup>394</sup> The African Commission's membership is also a cause for concern with regard to its independence. The Commissioners are identified as eligible by their respective governments and as such, some of them are possibly working in government, casting doubt on their ability to function independently.

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<sup>392</sup> Article 62 provides that: Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

Rule 81 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (1995) provides that: 1. State Parties to the Charter shall submit reports in the form required by the Commission on measures they have taken to give effect to the rights recognised by the Charter and on the progress made with regard to the enjoyment of these rights. The reports should indicate, where possible, the factors and difficulties impeding the implementation of the provisions of the Charter

<sup>393</sup> Johm & Pityana (note 391 *supra*) 32.

<sup>394</sup> Wachira (note 386 *supra*) 11.

A further challenge which hinders the African Commission from effectively discharging its duties is what has been termed the 'clawback' clauses in the African Charter. The clauses qualify or limit the provision of basic human rights to the extent that it is in accordance with the national laws. It has been argued that these clauses 'permit African states to restrict basic human rights to the maximum extent allowed by domestic law'.<sup>395</sup> The clawback clauses have serious adverse impact in that most African states still use repressive laws which date back from the colonial period.<sup>396</sup>

The effectiveness of the African Commission to carry out its work is also being held back by the lack of awareness regarding its work amongst the African people. It has therefore been recommended that the African Commission publicise and create awareness on its functions and build partnerships with research and printing institutions to publish its annual activity reports and other documents.<sup>397</sup>

The African Commission examines the substantive issues of a case and after interpretation of the African Charter; it makes its final decisions which are called 'recommendations'. If the African Commission has found a violation of the provisions of the African Charter, the decision will contain recommendations for actions to be taken by the State Party to provide remedy. The shortcomings of these recommendations are that, firstly, the African Commission is not empowered to follow up on states to ensure that the recommendations are implemented. Secondly, the recommendations merely serve to raise consciousness of human rights issues internationally and regionally, and possibly exert pressure on the State Party concerned to address the violations. The African Commission does not possess mechanisms with which to compel a State Party to implement its recommendations. One State Party has even challenged the African Commission's judicial capacity to make such recommendations.<sup>398</sup>

It has also been argued that the lengthy period it takes for cases before the African Commission to be resolved can discourage potential litigants and witnesses. Most often

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<sup>395</sup> M Mutua 'The African Human Rights System: A Critical Evaluation' (2000) (Lecture, University for Peace, Costa Rica) 6. Available at [http://www.hdr.undp.org/docs/publications/background\\_papers/MUTUA.pdf](http://www.hdr.undp.org/docs/publications/background_papers/MUTUA.pdf) (accessed 14 October 2016).

<sup>396</sup> *Ibid* 6.

<sup>397</sup> Wachira (note 386 *supra*) 10.

<sup>398</sup> After the African Commission found that Nigeria had violated its human rights obligations, Nigeria argued in turn that the African Commission lacked the capacity to make recommendations. *Ibid* 11.

times, these cases take years to be resolved because of the limited number of times the African Commission sits per year to hear the cases and this may have a profound adverse impact on the capacity of the indigent to take cases before the African Commission.<sup>399</sup> It is therefore against this background that it is hereby recommended that the African Commission increase the number of times it sits per year to clear the backlog of cases awaiting its attention.

### **3.14.2.2 African Court on Human and Peoples' Rights**

In cases where a State Party is unwilling or fails to comply with the recommendations in its communications, the African Commission can refer the case to the African Court on Human and Peoples' Rights (African Court).<sup>400</sup> The African Court was established in terms of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the African Charter), to complement the protective mandate of the African Commission.<sup>401</sup> On paper, the Court of Justice of the African Union, established in terms of the Constitutive Act of the African Union is the principal judicial organ of Africa, although in practice it is the responsibility of the African Court.<sup>402</sup>

Laudably, unlike the African Commission, the African Court is empowered to issue specific orders and its decisions are legally binding.<sup>403</sup> In instances where a State Party fails to comply with the decisions of the African Court, the AU may impose sanctions on the state. The sanctions may include denial of transport and communications links with other member states and 'other measures of a political and economic nature to be determined by the Assembly'.<sup>404</sup> The establishment of a Council of Ministers which is tasked with the monitoring of the execution of the judgements of the African Court is a welcome development in that regard.<sup>405</sup>

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<sup>399</sup> The African Commission sits only twice a year. *Ibid* 11.

<sup>400</sup> See generally the African Court's website, <http://www.african-court.org> (accessed 22 March 2016).

<sup>401</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ouagadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2. See generally the African Court's website <http://www.african-court.org> (accessed 23 March 2016).

<sup>402</sup> M Du Plessis 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' (2012) *Paper 235, Institute for Security Studies* 3.

<sup>403</sup> Article 27 & 30 of the Protocol to the African Charter.

<sup>404</sup> Article 23 of the Constitutive Act of the African Union.

<sup>405</sup> Article 29(2) of the Protocol to the African Charter.



The African Court's mandate is however undermined by the fact that, as at March 2017, only 30 countries out of a possible 54 member states of the AU had ratified the Protocol to the African Charter which established the African Court.<sup>406</sup> Zimbabwe is also one of the countries which have not yet ratified the Protocol to the African Charter.<sup>407</sup> This reluctance to ratify the Protocol to the African Charter informs on the states' unwillingness to be held accountable to the African Court for human rights violations. The reluctance to ratify the Protocol to the African Charter is explained by one delegate whose state was also still to ratify the protocol:

Why would we want to subject ourselves to additional embarrassment from a regional court? As it is we are still battling to fight negative information and numerous cases at the African Commission on Human and Peoples' Rights from NGOs.<sup>408</sup>

There is further concern on the possibility of conflict and overlap of functions and jurisdiction between the African Court and other sub-regional courts of justice and tribunals such as the Court of Justice of the Economic Community of West African States, the East African Court of Justice and the Tribunal of the Southern African Development Community which are also empowered to pronounce on human rights violations.<sup>409</sup> The proliferation of these courts and tribunals presents a likelihood of cases with contradictory judgements. Moreover, some courts will be overwhelmed with cases while others will be under-utilised when states selectively approach courts which are more likely to give a favourable judgement.

Similarly with the African Commission, the independence and impartiality of the African Court has also been questioned with regard to the manner in which the judges to the Court are appointed. It is the duty of member states to nominate judges to the African Court. However, states are more inclined to nominate judges who are less likely to be hostile to their governments. For example, when Uganda blocked the nomination of Justice Kanyeihamba, civil society perception was that the government of Uganda was afraid that the judge would 'embarrass the state at the African Court'.<sup>410</sup>

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<sup>406</sup> See generally the African Court's website <http://www.african-court.org> (accessed 22 March 2016).

<sup>407</sup> *Ibid.*

<sup>408</sup> Wachira (note 386 *supra*) 14.

<sup>409</sup> *Ibid* 15.

<sup>410</sup> *Ibid* 17.



Though the current composition of the African Court reflects gender balance, with five of the 11 judges being female, the African Court has previously been castigated for the absence of gender equality in its composition. In 2006, the Court had only two female judges and the increase of this number was therefore a welcome development to 'ensure the promotion of women's rights, peace and development' since having more women on the bench will 'contribute to the progressive interpretation of African Women's Protocol'.<sup>411</sup>

The Protocol to the African Charter provides for compulsory and optional personal jurisdiction.<sup>412</sup> The following are entitled to submit cases to the African Court under compulsory jurisdiction: (i) the African Commission, (ii) the State Party which has lodged a complaint to the African Commission, (iii) the State Party against which the complaint has been lodged at the African Commission and, (iv) the State Party whose citizen is a victim of human rights violation. Under the optional jurisdiction, the African Court does not permit direct access by NGOs and individuals, unless their respective countries have made declarations granting such access.<sup>413</sup> However, it is argued that this restriction of direct of access to the African Court impacts on the number of cases it receives as states are reluctant to take cases to the African Court and eventually, the African Court will have to rely exclusively on referrals from the African Commission.<sup>414</sup> To date, only seven of the 30 State Parties to the Protocol to the African Charter have made the declaration recognising the competence of the African Court to receive cases from NGOs and individuals.<sup>415</sup> Permitting NGOs and individuals direct access to the African Court will greatly enhance its protection mechanism.

### **3.14.2.3 African Court of Justice and Human Rights**

Concerned with pertinent and burning issues on the continent, such as genocide, crimes against humanity and terrorism, the AU merged<sup>416</sup> the African Court and the African Court of Justice of the African Union (African Court of Justice) in order to deal with those issues

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<sup>411</sup> C Butegwa 'Election of Women Judges to the African Human Rights Court' (2006) *Issue 4, African Court Coalition Newsletter* 7.

<sup>412</sup> Compulsory jurisdiction is provided in terms of Article 5 (1) and (2), whereas optional personal jurisdiction is provided in terms of Article 5(3), read together with Article 34(6), of the Protocol to the African Charter.

<sup>413</sup> Article 34(6) of the Protocol to the African Charter.

<sup>414</sup> Wachira (note 386 *supra*) 20.

<sup>415</sup> See generally the African Court's website, [www.african-court.org](http://www.african-court.org) (accessed 22 March 2016).

<sup>416</sup> The merger was effected in terms of the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol to the Statute).

before a single court, the African Court of Justice and Human Rights.<sup>417</sup> The African Court of Justice and Human Rights was conceived to be the main judicial organ of the AU.<sup>418</sup> It has jurisdiction over all cases and legal disputes which regard, among others: (i) the interpretation and application of the Constitutive Act, (ii) the interpretation, application or validity of other Union treaties and all subsidiary legal instruments adopted within the framework of the AU or the OAU, (iii) the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the State Parties concerned, and (iv) any question of international law'.<sup>419</sup>

The newly formed African Court of Justice and Human Rights is however criticised on one of the grounds that the main purpose for its establishment was the protection of the African heads of state from prosecution. The argument is that the court was created primarily to serve the interests of politicians, heads of state and state officials by providing them with immunity from the reach of the International Criminal Court, rather than protecting the ordinary African people from human rights violations.<sup>420</sup> The argument stems from Article 46A which provides that:

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.<sup>421</sup>

Moreover, the Protocol to the Statute removed a clause that protected the right of legitimate public protest against incumbent governments, further giving credence to the claim that the body is meant to protect elite political interests.<sup>422</sup> Zimbabwe is one of the states which advocated for the removal of the clause and to permit the African Court of Justice and Human Rights to 'act harshly against those who try to "overthrow" a government'.<sup>423</sup> It is in the light of the above that Amnesty International Africa's director, Netsanet Belay,

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<sup>417</sup> A Thomas 'The African Court for Justice and Human Rights: Protecting Africans, or Just Africa's Leaders?' (2014) *Briefing Paper 359, Southern African Bishops' Conference, Parliamentary Liaison Office* 1.

<sup>418</sup> *Ibid* 1.

<sup>419</sup> Article 28 [Jurisdiction of the Court] of the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>420</sup> Thomas (note 417 *supra*) 1.

<sup>421</sup> Article 46A of the Draft Protocol On Amendments to the Protocol On The Statute of the African Court Of Justice And Human Rights, African Union, May 2014.

<sup>422</sup> Thomas (note 417 *supra*) 1.

<sup>423</sup> *Ibid* 3.

described it as ‘a backward step in the fight against impunity and a betrayal of victims of serious human rights violations’.<sup>424</sup>

The African Court of Justice and Human Rights has not however come into force because it is still to be ratified by 15 member states, as required by the Protocol to the Statute. Zimbabwe is also among the states which have not yet ratified the Protocol to the Statute.

### **3.15 The Recognition and Impact of International Human Rights Law in the Zimbabwean Constitution**

In Zimbabwe, the executive powers lie with the President of the Republic and in exercising his executive functions, the President is empowered to conclude or execute conventions, treaties and agreements with foreign states, governments and organisations.<sup>425</sup> The existing Zimbabwean Constitution places an obligation on the judiciary to keep themselves well-informed of developments in international law<sup>426</sup> and when interpreting legislation, to ‘adopt any reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.’<sup>427</sup> Section 46 (1) (c) of the same Constitution also requires the judiciary to take into account international law, all treaties and conventions to which Zimbabwe is a party when interpreting the rights in Chapter IV. It is evident from the above that international law has greatly influenced the interpretation of the provisions of the new Constitution. It is worthy to note however that the replaced Lancaster House Constitution does not place an obligation on the judiciary to take into account international law or treaties when interpreting any of the provisions of that Constitution.

The country has also made efforts to incorporate some of its international human rights obligations into both the previous and current constitutions. For instance, chapter III [Declaration of Rights] of the 1979 Lancaster House Constitution sets out the fundamental rights and freedoms to which persons in Zimbabwe are entitled.<sup>428</sup> The chapter provides for

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<sup>424</sup> *Ibid* 3.

<sup>425</sup> See section 31H (4) (b) of the old Constitution of Zimbabwe, as published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom), as amended at 1<sup>st</sup> February, 2007. See also section 110 (4) of the current Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>426</sup> Section 165 (7) of Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>427</sup> Section 327 (6) of Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>428</sup> The preamble of the Declaration of Rights reads: Whereas persons in Zimbabwe are entitled , subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter,

the following rights and freedoms, the protection of the right to life, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment, protection from deprivation of property, protection of freedom of conscience, protection of freedom of expression, protection of freedom of assembly and association, and protection of freedom of movement, among others. These rights are also found in various international and regional human rights treaties such as the Covenant on CPR and African Charter, among other treaties.

Chapter IV [Declaration of Rights] of the 2013 Constitution also provides for the above rights and more others. The Chapter further guarantees the protection of rights and freedoms such as the right to human dignity, right to equality, freedom from cruel, inhuman or degrading treatment or punishment, freedom to demonstrate and petition, freedom of expression of freedom of the media, right of access to information, right to language and culture, labour rights, freedom of profession, trade or occupation, right to administrative justice, rights of accused persons, environmental rights, right to health care, right to education, right to food and water and marriage rights, among others. The above rights also trace their origins to the above discussed international and regional human rights instruments.

### **3.16 Zimbabwe's Domestication of International Human Rights Treaties**

Section 34 of the current Constitution of Zimbabwe specifically requires the State to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. On the other hand, the Lancaster House Constitution does not expressly provide for the domestication of treaties. The implied meaning is found in section 111B [Effects of International Conventions, etc.] which merely provides for a dualistic approach. Section 111B requires the incorporation of international law into national law by or under an Act of Parliament for international law to have an effect in the domestic legal system.

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and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons.

Ugandan judge at the International Court of Justice, Justice Julia Sebutinde, once remarked that if one were to liken an international treaty to a girl, signing the treaty would be putting the ring on her finger, whilst ratifying the treaty would be marrying her and domesticating the treaty would be taking the new wife home.<sup>429</sup> International human rights treaties require states to respect, protect and fulfill the enjoyment of rights in their jurisdictions and to take all necessary measures to enable such enjoyment. One of such measures that a State Party may take to enable the realisation of the individual human rights may be through legislative measures, when a State Party domesticates the provisions of the treaty into its national legal system. The United Nations Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body observes that:

The objective of the human rights treaty system is to ensure human rights protection at the national level through the implementation of the human rights obligations contained in the treaties. Accordingly, the effectiveness of the treaty system must be assessed by the extent of the national implementation of the recommendations resulting from constructive dialogue under reporting procedures, decisions under the four individual complaints procedures currently in operation and the outcome of inquiries. It must also be assessed by how successful the system has been in providing States with authoritative guidance on the meaning of treaty provisions, preventing human rights violations, and ensuring prompt and effective action in cases where such violations occur. The system's effectiveness should also be assessed by how far the output of these procedures has been integrated into all national, regional and international efforts to protect human rights.<sup>430</sup>

There are two notable schools of thought on the relationship between national and international law, the monist and dualist approach. The monist approach has a unitary perception of law. It views international and municipal law as an integral part of the same legal system. International law has a direct application in the national legal system. In case of a conflict between the two, monists argue that international law takes precedence. Contrastingly, dualists view international and national law as entirely separate from each other and mutually exclusive. To the dualists, international law is only applicable in country's domestic legal system to the extent that it has been incorporated therein. Dualism does not accept that the two systems can conflict.<sup>431</sup>

Since the adoption of its first Constitution, Zimbabwe has followed the dualistic approach. International human rights law only becomes part of its national laws after it has been

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<sup>429</sup> The Crisis Report 'Zimbabwe's Slow Domestication of International Treaties Criticized' (2013) *Issue 243, Crisis in Zimbabwe Coalition* 1.

<sup>430</sup> Concept Paper on the High Commissioner's Proposal (note 372 *supra*) 4.

<sup>431</sup> Mude (note 331 *supra*) 82 & 83.

expressly adopted legislatively. It should be borne in mind that there are no rules which obligate a country to incorporate international human rights law into its legal system, and neither are there universal and uniform practices which govern how a country should incorporate international law into its national legal system if it decides to. In light of the above, the question of whether Zimbabwe decides to incorporate international human rights to be part of its domestic law and how it does so is a matter of choice. Section 111B of the 1979 Lancaster House Constitution provides for the dualistic approach. The section provides that:

1. Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under authority of the President with one or more foreign states or governments or international organisations –
  - a) Shall be subject to approval by Parliament; and
  - b) Shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament

Section 327 [International conventions, treaties and agreements] of the current Constitution of Zimbabwe similarly provides, almost *verbatim* to the Lancaster House Constitution, for the dualistic approach. The section provides that:

2. An international treaty which has been concluded or executed by the President or under the President's authority –
  - a) Does not bind Zimbabwe until it has been approved by Parliament; and
  - b) Does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament

In terms of the dualistic approach to which the country subscribes, Zimbabwe is not bound by the obligations of international human rights law unless such laws have been enacted by the Parliament. What this means is that the several treaties and agreements that Zimbabwe has ratified are not legally binding on Zimbabwe unless the Parliament has incorporated them into the national legal system. Zimbabwe has however shown little enthusiasm to sign and ratify several regional and international human rights charters and treaties. Mugabe, a lawyer and academic, during Justice Sebutinde's visit to Zimbabwe to mark the centenary of the International Court of Justice, claimed that there are '100 instruments that have been signed by government which have not made any significant strides beyond making their way to cabinet'.<sup>432</sup> In responding to the question as to why it had taken long for Zimbabwe to domesticate international human rights treaties, Justice Moses Chinhengo, former High

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<sup>432</sup> The Crisis Report (note 429 *supra*) 1.

Court judge and one of the drafters of the 2013 Constitution, cited the arduous task of changing policies and the conflict between international law and parts of customary law as contributory.<sup>433</sup> Mrs. Msika, representing the Permanent Secretary in the Ministry of Justice, Legal and Parliamentary Affairs, bemoaned the lack of capacity in government to speedily domesticate international treaties.<sup>434</sup>

With the exception of the ratification and/or incorporation of the Universal Declaration, Covenant on CPR, African Charter and a few other human rights treaties in its constitutions, the country has failed to meet its legal obligations to respond to human rights violations under the national legal framework.<sup>435</sup> This half-hearted commitment to domesticate the provisions of international human rights law is found in the above discussed chapter III of the Lancaster House Constitution and chapter IV of the existing Constitution which borrow heavily from the Universal Declaration, which arguably now forms part of customary international law.<sup>436</sup>

### **3.17 The Legislative Framework for Public Participation in Constitution Making in Zimbabwe**

#### **3.17.1 Constitution of the Republic of Zimbabwe**

The right to public participation in constitution making is currently provided for in terms of section 328 [Amendment of Constitution] of the existing Constitution. Section 328 (3) provides that a Constitutional Bill<sup>437</sup> can only be presented in the Senate or the National Assembly after the Speaker has given at least 90 days' notice in the *Government Gazette* of the precise terms of the Bill. The purpose of the time-frame is to, arguably, give sufficient time to members of the public to debate on the Bill. Section 328 (4) gives effect to the provisions of Section 328 (3), it requires the Parliament to invite members of the public to 'express their views on the proposed Bill' immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection 3. The section further gives modalities on how

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<sup>433</sup> *Ibid* 1.

<sup>434</sup> *Ibid* 2.

<sup>435</sup> Mude (note 331 *supra*) 85.

<sup>436</sup> Section 326 (1) of the 2013 Constitution recognises customary international law as part of the law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament. Furthermore, section 326 (2) obligates the judiciary, when interpreting legislation, to 'adopt any reasonable interpretation' of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.'

<sup>437</sup> A Constitutional Bill is a Bill that seeks to amend the Constitution. See section 328 (1) of the Constitution of Zimbabwe Amendment Act 20 of 2013.



the public may express their views, in public meetings and through written submissions. To that end, the same section requires the Parliament to convene meetings and provide facilities to enable the public to do so. Read together with the provisions of section 58 [Freedom Assembly and Association], section 59 [Freedom to Demonstrate and Petition], section 60 [Freedom of Conscience], section 61 [Freedom of Expression and Freedom of the Media], section 62 [Right of Access to Information] and section 67 [Political Rights], these provisions speak to meaningful public participation procedures and an enabling legal and political environment that makes it conducive for the public to participate in the constitution making process without any unreasonable restrictions.

Where the Constitutional Bill specifically seeks to amend any provision of chapter IV [Declaration of Rights] and chapter XVI [Agricultural Land], subsection 16 requires that the Bill be put for a popular referendum within three months after it has been passed by the Senate and the National Assembly, upon which it must be approved by a majority of the voters voting at the referendum. Of note is that by providing for the Bill to be put before a popular referendum, subsection 16 ensures that the can effectively influence the outcome of the process. This is a welcome departure from the Lancaster House Constitution which had 19 amendments, none of which were adopted through a referendum or popular participation.

So far, the current Constitution is yet to be amended, with the exception of a Bill<sup>438</sup> that is currently being drafted. The Bill seeks to give the President the prerogative of appointing the Chief Justice, Deputy Chief Justice and Judge president of the High Court. The proposed amendments seek to alter the provisions of section 180 of the Constitution which requires the President to appoint the office bearers from a list given to him by the Judicial Service Commission. The Speaker recently gave notice of the Government's intention to amend the Bill in the Gazette and has, in terms of section 328 (4), invited the members of the public to express their views on the proposed Bill.<sup>439</sup> Since the Bill does not seek to amend the provisions of either chapter IV or Chapter XVI, it will not be put up for a popular referendum. The Bill will be adopted in terms of section 328 (5) which simply requires an

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<sup>438</sup> Constitution of Zimbabwe Amendment Number 1 Bill, HB1, 2007.

<sup>439</sup> V Langa 'Munangagwa Amendment Bill Suffers Another Blow' *NewsDay* (online) 22 February 2017. Available at <https://www.newsday.co.zw/2017/02/22/mnangagwa-amendment-bill-suffers-another-blow/> (accessed 15 August 2016).



approval, at its last reading in the Senate and the National Assembly, of two-thirds of the membership of each house.

Prior to the adoption of the 2013 Constitution, the legislative framework for public participation in the constitution making process was provided in terms of sections 23A [Political Rights] and 52 [Alteration to the Constitution] of the Lancaster House Constitution. Section 23 provides for the right to participate in a referendum while section 52 provides for amending the Constitution. Remarkably, the provisions of section 52 do not provide for meaningful public participation. The Constitution requires the text Bill to be published in the *Government Gazette* for a minimum period of only one month before its introduction to Parliament and the Constitutional Bill would be passed after obtaining a simple two-thirds majority vote in both houses. Evidently, the time-frame was not adequate for any meaningful public involvement in the process. Also noteworthy is the fact that the Lancaster House Constitution does not require the Parliament to invite members of the public to express their views on the proposed Bill nor does it also obligate the Parliament to convene meetings and provide facilities to enable the public participate. Furthermore, no mention is made for the adoption of a Constitutional Bill through a popular referendum.

### **3.18 Zimbabwe's Legal and Political Environment for the Recognition and Protection of International Human Rights**

The ZANU PF-led government has a shameful history of disregard for human rights which can perhaps be traced back to its 'attempt at genocide' which occurred between 1983 and 1985 when the government led an offensive against its erstwhile liberation war ally, the ZIPRA (the military wing of ZAPU) ex-combatants, referred to by the government as 'dissidents'.<sup>440</sup> The raging war between these parties culminated in a government-sanctioned military crackdown, commonly known as *gukurahundi*, against the unarmed civilians of Matebeleland and parts of Midlands by the notoriously ruthless, North Korean-trained 5<sup>th</sup> brigade, for 'to support ZAPU was the same as to support dissidents'.<sup>441</sup> The carnage only ceased following the signing of the Unity Accord by the warring parties in 1987.<sup>442</sup> In 1986, the World Guide to Human Rights placed Zimbabwe's human rights rating

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<sup>440</sup> 'Gukurahundi Massacres: How It All Began (Part 1)' *Nehanda Radio* 18 November 2012. Available at <http://www.nehandaradio.com/2012/11/18/gukurahundi-massacres-how-it-all-began-part-1> (accessed 23 December 2016).

<sup>441</sup> 'Report on the 1980's Disturbances in Matebeleland and the Midlands' A Report by the Catholic Commission for Justice and Peace in Zimbabwe, March 1997, 15.

<sup>442</sup> *Ibid* 13.

at 45% against a world average of 55%.<sup>443</sup> The death toll during this period is estimated at over 20 000.<sup>444</sup> Other figures estimate the death toll at over 30 000.<sup>445</sup> President Mugabe once described the *gukurahundi* period as ‘a moment of madness’.<sup>446</sup> Since the early 1980s, Zimbabwe has been ruled as a *de facto* one party state.<sup>447</sup>

The formation of MDC in 1999, the first and ever strong opposition political party in Zimbabwe since 1980, and the emergence of a powerful civil society which incidentally gave birth to the MDC seem to have ruffled ZANU PF’s feathers when the country embarked on a constitutional reform effort in 2000. During this constitution making exercise in which the MDC campaigned for a ‘No’ vote and ZANU PF campaigned for a ‘Yes’ vote, the ruling ZANU PF government was accused of unleashing a campaign of terror intimidation against the opposition parties.<sup>448</sup> The draft constitution was rejected in the referendum in which public opinion was that the draft constitution conferred unrestricted power on the President.<sup>449</sup> The victory stamped MDC’s place in the Zimbabwean political landscape and the opposition party was impressive in the following 2000 general elections, garnering 57 seats while ZANU PF won 62 seats.<sup>450</sup> The government began to see the MDC and its supporters or sympathisers, civil society and the white commercial farmers as ‘enemies of the state’. The government became vindictive and shortly after the referendum, veterans of the liberation war and ZANU PF supporters violently and illegally occupied white commercial farms.<sup>451</sup>

It is against this backdrop that the ruling party’s bid to clamp down on dissent through the use of repressive legislation such as POSA and AIPPA, which restrict the freedom of movement and the right to unfettered flow and exchange of ideas and information, respectively, has made the country’s legal and political environment less conducive for the

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<sup>443</sup> See generally Ncube (note 358 *supra*) 76-78.

<sup>444</sup> B Magwizi ‘Who Was Mad During Gukurahundi?’ *NewsDay* (online) 8 August 2011. Available at <http://www.newsday.co.zw> (accessed 25 January 2016).

<sup>445</sup> Catholic Commission Report (note 441 *supra*) 13.

<sup>446</sup> Magwizi (note 444 *supra*).

<sup>447</sup> Since the early 1980s, President Mugabe has shown disdain for political plurality. It is that he has since realised how to achieve a one-party state without having to declare it first. See C Makunike ‘One-party State the “Democratic” Way’ *Zimbabwean Independent* (online) 23 December 2004. Available at <http://www.theindependent.co.zw/2004/12/23/one-party-state-the-democratic-way/> (accessed 12 January 2015).

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

<sup>450</sup> <http://www.eisa.org.za/wep/zim2000election.htm> (accessed 4 March 2015).

<sup>451</sup> Zimbabwe Human Rights NGO Forum (note 151 *supra*).

public to meaningfully participate in the political discourse.<sup>452</sup> Mapuva and Muyengwa-Mapuva are of the opinion that these and other similar laws were specifically created to deal with the perceived 'enemies of the state' and agents of 'regime change'.<sup>453</sup> The writers make reference to the Constitution of Zimbabwe Amendment Act 17 of 2005 which regularised the appropriation of white-owned farms in violation of property rights the farmers had over their property as an example of the government's vindictiveness.<sup>454</sup> Mapuva and Muyengwa-Mapuva provide further examples of legislation which were tailor made to fulfill 'specific political ambitions', among which are:

1. Private and Voluntary Organizations Act [Chapter 17:05] – the legislation requires all organisations to register with the government which reserves the right to register or refuse such registration. The latest amendment to the Act banned all foreign funding to civil organisations, which inevitably limit their capacity to effectively execute their mandates.<sup>455</sup>
2. NGO Bill of 2004 – this was possibly one of the most drastic measures by the government in an attempt to restrict the influence of civil society organisations. The bill sought to ban foreign NGOs which were concerned primarily with 'issues of governance' and NGOs receiving foreign funding for 'promotion and protection of human rights and political governance issues' would not be registered. The bill was deferred indeterminately.<sup>456</sup>
3. The Public Order and Security Act [Chapter 11:17] – this Act is perceived by the civil society to be the rebirth of the colonial Law and Order Maintenance Act of the 1960s which was meant to restrict the movement of black people. The Act criminalises various actions such as holding a public gathering, whether political, religious or social, without police clearance and insulting the President, among others.<sup>457</sup>
4. Access to Information and Protection of Privacy Act [Chapter 10:27] – access to information is one of the fundamental human rights recognised by international human rights treaties that enable public participation. AIPPA, on the contrary, authorises the de-registration of journalists or deny them a license to practice,

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<sup>452</sup> 'Rights under Siege' A Report by Amnesty International, May 2003, 2. Available at [http://www.zimbabwesituation.com/old/may2c\\_2003.html#top](http://www.zimbabwesituation.com/old/may2c_2003.html#top) (accessed 22 November 2016).

<sup>453</sup> J Mapuva & L Muyengwa-Mapuva 'Arnstein's Ladder of Participation and Citizen Participation in Zimbabwe' (2015) Vol. 11, *International Journal of African and Asian Studies* 4.

<sup>454</sup> *Ibid* 4

<sup>455</sup> *Ibid* 4 & 5.

<sup>456</sup> *Ibid* 6.

<sup>457</sup> *Ibid* 6.

without giving reasons. The writers provide an example of the *Daily News*, an independent daily paper, which was closed down in 2004 for being critical of the government. Several radio stations and independent newspapers have also in recent years been denied practicing licenses, in contravention of the right to access and impart information enshrined in international human rights treaties that Zimbabwe has ratified.<sup>458</sup>

5. Interception of Communications Act [Chapter 11:20] – this legislation authorises the government to monitor and intercept private communications between individuals, in violation of section 57 of the current Constitution which provides for the right to privacy. Section 57(a) of the same Constitution specifically provides the right not to have the privacy of their communications infringed, while section 51 provides that every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.

The Zimbabwean government has also enacted several other pieces of legislation such as the Broadcasting Services Act [Chapter 12:06], Zimbabwe Electoral Act [Chapter 2:13], Zimbabwe Electoral Commission Act [Chapter 2:12] and Urban Councils Act [Chapter 29:15] which are all perceived as instruments of political oppression by the civil rights movements, enacted to serve and further specific political interests.<sup>459</sup>

The ruling party ZANU PF culture of violence appears more pronounced towards, during and after elections perhaps in a bid to strengthen its grip on power. The 2009-13 constitution making process came in the aftermath of violence-wracked and highly disputed presidential elections of 2008 which were characterised by intimidation, abductions, inter-party violence, murder and torture.<sup>460</sup> The MDC-T presidential candidate, Tsvangirai, alleged that there was a repressive campaign by security forces and government-controlled youth militia against his supporters and later withdrew from the subsequent run-off elections after he had arguably failed to garner the required 50%+1 vote to secure an outright victory.<sup>461</sup> This was followed by a political stalemate and degeneration of the political, social and economic situation in Zimbabwe which prompted the formation of the

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<sup>458</sup> *Ibid* 7.

<sup>459</sup> *Ibid* 4-10.

<sup>460</sup> The Pan-African Parliament: Election Observer Mission to the Presidential Run-off and By-Elections in Zimbabwe Interim Statement 1 & 3.

<sup>461</sup> Bertelsmann Stiftung (note 164 *supra*) 2.

GNU.<sup>462</sup> Similarly, the 2000 parliamentary elections were marred by political violence with reports of killings, beatings and intimidation of the opposition supporters in the period leading to the elections.<sup>463</sup> The Political Violence Monitoring Subcommittee of the ZESN noted at least 500 cases of severe injuries, 31 deaths and 71 abductions in the 2000 elections.<sup>464</sup> Over 10 000 farm workers and rural-based professionals fled from their villages as the violence intensified.<sup>465</sup> It is in the light of the above legal and political environment that the current Constitution of Zimbabwe was adopted.

Despite the above observations on systematic and institutionalised human rights violations in Zimbabwe, mention must be made that the country has made strides to at least establish 'independent' institutions that support democracy in its constitutional provisions. One of the several institutions that support democracy that were established by the current Constitution is the Zimbabwe Human Rights Commission, an independent body tasked with investigations of human rights violations and to secure redress against such violations.<sup>466</sup> The Constitution tasks the Human Rights Commission with these specific functions: to promote awareness of and respect of human rights and freedoms, to promote the protection, development and attainment of human rights and to monitor, assess and ensure observance of human rights and freedoms, among others.<sup>467</sup> The Human Rights Commission is also empowered to direct the Commissioner-General of Police to investigate suspected criminal human rights violations and to make recommendations to Parliament effective measures to promote human rights.<sup>468</sup> The effectiveness of these institutions to perform their functions independently and impartially, against the above-discussed legal and political environment is doubtful.

### **3.19 A Case Study of South Africa**

#### **3.19.1 Public Participation in the Constitution Making Process of South Africa**

The procedures adopted in the making of the South African Constitution provide guiding principles for constitutional reform based on the practical experiences of the country. The constitution making process which culminated in the adoption of the Constitution in 1996 is

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<sup>462</sup> *Ibid* 2.

<sup>463</sup> ZESN, 2000 Parliamentary Elections Report, 24-25 June 2000, 27.

<sup>464</sup> *Ibid* 27.

<sup>465</sup> *Ibid* 28.

<sup>466</sup> Section 243 (1) (a) – (k) of the Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>467</sup> *Ibid*.

<sup>468</sup> *Ibid*.

widely hailed as the hallmark of broad based public participation. The case of South Africa has put paid to the theoretical underpinning that participatory design processes engender constitutions with greater levels of legitimacy and endurance.<sup>469</sup>

The South African experience demonstrates the importance of the role of the civil society in constitution making process. The South African populace is well above 40 million people and the Constituent Assembly could not practically reach such a large populace alone. As Mulisa describes, the approach adopted by the Assembly was to reach 'people who reach people'.<sup>470</sup> Since the South African society, like many other African countries, was divided along ethnic lines, this worked exceptionally well. The civil society organisations and interest groups were able to reach deep within their communities more effectively than if it had been the government's sole effort. The civil society organisations also worked together in lobbying for a comprehensive Bill of Rights in the Constitution, which is at present hailed as the cornerstone of democracy in the country.<sup>471</sup> At least 600 civil society organisations participated in the process.<sup>472</sup>

The constitution making process is also remarkable for its effort at inclusivity. South Africa is a multi-ethnic society. It has 11 official languages, a reflection of the diverse ethnic societies within the country.<sup>473</sup> It is also home to other nationals from within the region and beyond, hence the term 'rainbow' nation.<sup>474</sup> Owing to its former apartheid system, the country was largely polarised at the time the 1996 Constitution was negotiated and adopted. The constitution making process made unprecedented efforts to include the minorities, historically marginalised groups such as women and other national actors such as the civil society organisations and religious leaders, among others.<sup>475</sup> It is as a result of the protracted dialogue between the different and several stakeholders that the constitution making process took six years to complete.<sup>476</sup> As noted previously, the importance of participatory constitution making is accentuated in multi-ethnic and post-conflict societies

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<sup>469</sup> To date, the constitution has already lived past the historical mean for constitutions on the continent. See Ginsburg *et al* (note 222 *supra*) 217.

<sup>470</sup> Mulisa (note 61 *supra*) 25.

<sup>471</sup> *Ibid* 25.

<sup>472</sup> Dann *et al* (note 10 *supra*) 6.

<sup>473</sup> Section 6 of the South African Constitution Act 108 of 1996.

<sup>474</sup> The term was coined by Archbishop Desmond Tutu in reference to South Africa as a 'melting pot' of various races and cultures. See <http://www.quora.com/Why-is-South-Africa-called-rainbow-nation> (accessed 29 August 2016).

<sup>475</sup> Mulisa (note 61 *supra*) 25-27.

<sup>476</sup> *Ibid* 32.

and as such, to achieve conciliation, peace and nation building, the constitution making process must be inclusive of all the people of that society as the deeper the divisions in that particular society, the more inclusive the process ought to be.

The Constituent Assembly rolled out an extensive civic education programme which was directed at both urban and rural communities.<sup>477</sup> The purpose of this widespread campaign was to conscientise the people on constitutional issues in general, fundamental rights and their right to participate. Information was disseminated through various mediums such as newspapers, radio, television, telephone hotline, the internet, billboards and a biweekly assembly newspaper.<sup>478</sup> Also critical to the success of the campaign was the Constituent Assembly's radio programme which broadcasted in eight languages. The radio programme reached around 10 million people per week. A poll revealed that the Constituent Assembly's civic education campaign reached 73% of all adult South Africans.<sup>479</sup>

Even though it was the political elites who were ostensibly in control of the agenda, the process gave room for effective public participation.<sup>480</sup> The public consultation programme adopted was extensive. The citizens were invited to present submissions, and for a period of 12 months the Constituent Assembly held more than 1000 educational workshops.<sup>481</sup> The Constituent Assembly received 13,443 substantive submissions, with 90% of the submissions coming from individuals.<sup>482</sup> More than 2 million people signed petitions on several issues.<sup>483</sup> After publication of the draft constitution, the public was further invited to make submissions regarding the draft document.<sup>484</sup> The draft constitution was put to a referendum and was voted for by 85% of South Africans.<sup>485</sup> A survey indicated a strong sense of ownership of the South African Constitution.<sup>486</sup>

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<sup>477</sup> Olivier (note 272 *supra*) 30.

<sup>478</sup> Dann *et al* (note 10 *supra*) 6.

<sup>479</sup> *Ibid* 6.

<sup>480</sup> Mulisa (note 61 *supra*) 28.

<sup>481</sup> Dann *et al* (note 10 *supra*) 6.

<sup>482</sup> *Ibid* 6.

<sup>483</sup> *Ibid* 6.

<sup>484</sup> *Ibid* 6.

<sup>485</sup> *Ibid* 6.

<sup>486</sup> *Ibid* 6.



### 3.19.2 The Legislative Framework for Public Participation in Constitution Making in South Africa

In South Africa, the national legislative authority is vested in the Parliament which consists of two houses: the National Assembly and the National Council of Provinces. The Constitution further provides the national Parliament, provincial legislatures and local government structures with varying degrees of legislative powers in sections 59(1) (a), 72(1) and 118(1) (a), respectively. In the landmark judgment in *Doctors for Life International*,<sup>487</sup> Ngcobo J, in majority judgement, held that these provisions provide a right to public participation and give a constitutional duty on the National Assembly, the National Council of Provinces and provincial legislatures to facilitate public participation when executing their legislative functions.<sup>488</sup> Ngcobo J further held that constitutional duty to facilitate public involvement in the legislative process is an aspect of the right to political participation set out in a number of international and regional human rights instruments, and in terms of the international human rights instruments, specifically the right to political participation, as enshrined in Article 25 of the Covenant on CPR, the state has an obligation to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.<sup>489</sup>

Notwithstanding that these legislative bodies have a wide discretion on determining the appropriate processes and procedures that should be adopted to facilitate public participation in the legislative process, in responding to issues before it, the Constitutional Court, set out a test. The test is whether the legislature acted reasonably in discharging the duty to facilitate public participation.<sup>490</sup> To determine reasonableness, the following factors will be taken into account: (i) the nature of the legislation concerned; (ii) the importance of the legislation; (iii) intensity of the impact on the public; and other relevant factors which will depend on the circumstances of each case.<sup>491</sup>

Ngcobo J comments that public participation in law making ensures that the legislators are aware of the concerns of the people, and where the legislators are aware of such concerns, it improves on the quality of the legislation, and also the general populace would be more

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<sup>487</sup> *Doctors for Life International v. The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

<sup>488</sup> *Ibid* para 221.

<sup>489</sup> *Ibid* paras 90 & 91.

<sup>490</sup> *Ibid* paras 126 & 127.

<sup>491</sup> *Ibid* para 128.



accepting of such legislation.<sup>492</sup> The judgment *in casu* effectively set a standard of the constitutional obligation to facilitate public participation, breaking away from the history that witnessed arbitrary law making in apartheid South Africa.

In explaining the meaning of public participation within the context of South African democracy, Sachs J, in *Doctors for Life International*, comments that the effect of public participation should be that:

All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.<sup>493</sup>

The fact however that the test for reasonableness in the duty to facilitate public involvement has no procedural safeguards has been argued that it provides the legislature with discretion to meet only the minimum rather than the optimum standards, allowing a piece of legislation which has significant implications on the public to pass as reasonable.<sup>494</sup>

### 3.20 Conclusion

In recent years, constitution making has evolved. It is now generally accepted that democratic constitution making entails the involvement of the public at each and every stage of the process. Public participation in constitution making is thought to offer several benefits if genuinely and meaningfully implemented. Proponents of participatory constitution making believe that increased popular participation ensures fairness and guarantees the legitimacy and acceptability of both the resultant constitution and entire constitutional and legal order. As noted in the preceding sections, increased popular participation is not simply an issue of quantity, as defined by the number of individuals and civil society organisations that have participated in the process, neither the number of public hearings that have been held nor the number of submissions received. Public participation considers the efficacy of the public participation procedures implemented in the process and the impact of the opinions in the outcome of the process.

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<sup>492</sup> *Ibid* para 205.

<sup>493</sup> *Ibid* para 235.

<sup>494</sup> L Nyati 'Public Participation: What Has the Constitutional Court Given the Public?' (2008) Vol. 12 (2), *Law, Democracy & Development* 109.

In addition to constituting a fundamental human right in itself, public participation is also generally recognised as a prerequisite for the meaningful realisation of all other human rights in the UN General Assembly resolutions and in the general comments of the UN treaty bodies.<sup>495</sup> It is worthy to note that most of the norms of international law do not expressly provide rules to govern the process of constitution making and it is through purposive interpretation of the object and purpose of the international law provisions related to governance or by reference to customary international law that these norms may be extended to the constitution making process. Zimbabwe ratified the Covenant on CPR, African Charter and other similar treaties. The country is thus obligated in terms of international human rights law to ensure the genuine and meaningful realisation of the rights contained in these treaties.

The country subscribes to the dualist approach which means that the several international human rights treaties to which Zimbabwe is a party are not legally binding on Zimbabwe unless and until they have been domesticated into its national laws. Though the country has incorporated some of the rights enshrined in the international human rights treaties into its constitutional laws, the Government of Zimbabwe has however not done enough to ensure the progressive realisation of these rights, specifically the right to public participation in constitution making. Several repressive pieces of legislation in Zimbabwe actually informs on the government's intent to curtail the full realisation and enjoyment of this right, in violation of its international obligations, as expressed in the international and regional human rights treaties to which Zimbabwe is a party.

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<sup>495</sup> NS Munyinda & LM Habasonda *Public Participation in Zambia: The Case of Natural Resources Management* (2013) ii.

## CHAPTER FOUR

*'People must write their own constitution directly, not through politicians, parliamentarians or government. The surest way to make sure that a constitution is respected is if it is written by the people themselves and carries their word.'* – **Lovemore Madhuku**<sup>496</sup>

### AN EVALUATION OF THE RURAL POPULACE'S PARTICIPATION IN THE DRAFTING OF THE 2013 ZIMBABWEAN CONSTITUTION

#### 4.1 Introduction

This chapter analyses and interprets the data obtained in interviews conducted in Bulilima, Mutasa and Makonde, Zimbabwe. The first category of participants<sup>497</sup> comprises of ordinary members of the rural populace (villagers) selected for their experiences in the 2009-13 constitution making process. The second category of participants was drawn from key institutions such as political parties, educational and professional bodies, government entities and local NGOs. This latter type of participants is known as key informants. They were interviewed specifically for their appropriate and specialist knowledge or opinion of the 2009-13 constitution making process. The researcher selected 20 villagers and three key informants from each area under the study. The confidentiality of participants' details shall be ensured throughout to avoid any form of exposure to threats from political sources. To that end, the rural populace will be referred to as 'respondents' or simply 'villagers' while the key informants will be referred to as 'service providers'.

Firstly, villagers were asked identical, broad and open-ended questions (using semi-structured questionnaires) with the aim of eliciting as much detailed information as possible. Key informants were thereafter asked to comment, expand and explain further basing on the themes extracted from the interviews of the villagers. The villagers were asked the following questions:

1. What do you understand to be a 'constitution' and its purpose?
2. Can you describe the constitutional history of Zimbabwe?

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<sup>496</sup> Msipa L 'What is a People-driven Constitution?' *Zimbabwe Daily* (online) 29 March 2009. Available at <http://www.thezimbabwedaily.com/news/2008-what-is-a-people-driven-constitution-by-lloyd-msipa.html> (accessed 17 October 2016).

<sup>497</sup> Note that, unless the context clearly indicates otherwise, the term 'participant(s)' is used to denote participants (respondents) of the interview, and not participation in the constitution making process.

3. According to your understanding, who should take charge and control of the constitution making process?
4. Could you describe your participation in the 2013 constitution making process?
5. What was your primary source of information during the constitution making process and how reliable was it?
6. How free and secure did you feel in terms of expressing your views and participating in the constitution making process with regard to the political, legal and policy environment?
7. What is your view on the competence and credibility of the state institutions responsible for and supporting the constitution making process?
8. To what extent do you think the resultant constitution reflected your will and aspirations?

Probing questions (prompts) and cues were also used as a follow up measure of the preceding questions to encourage expansion of most important ideas and ensure optimal responses from participants. Where necessary, the researcher also considered subjective factors in the form of nonverbal messages.

To minimise flaws, limitations or other weaknesses within the interview design, a pilot test was conducted prior to the actual interviews with at least ten volunteers from the first area of study, Mutasa district. This helped the researcher to refine the research questions, data gathering technique and make any other necessary revisions prior to the implementation of the study.

An audio recorder was used to record the interviews as they were being conducted. The recorder was however used after the participant had consented to its use. The data collected was coded and compiled into themes identified in the previous chapter as normative standards for constitution making.

Although the data collected was both qualitative and quantitative, emphasis is on the qualitative data. Quantitative data will only be used where it is relevant and for the purpose of explaining qualitative data, and where it used, it is expressed in percentages. The study's primary interest is to understand the research problem from the perspectives of individuals in their natural settings, hence the emphasis on qualitative data. The data from the interviews will also be supplemented with secondary data sources, where applicable.

## 4.2 Meaning and Purpose of a Constitution

Most participants interviewed showed a basic understanding of what a constitution is. Participants identified a constitution as the law of the country which binds everyone in it. They also seemed to know the difference between general statutes and the constitution and further recognised its supremacy over legislation, custom or conduct, in a constitutional democracy. None of the participants could however differentiate between the two basic types of constitutions, written and unwritten. Participants assumed that only the written constitution exists. This is understandable as most countries are in favour of and use the written constitution, with a few exceptions of countries such as Britain, making the written constitution the more prominent of the two. It was sad to note that only a smaller number of respondents had actually seen a constitution, and of those who had, most of them found it difficult to understand as it was not provided in simplified language.

It was important to establish the villagers' understanding of the purpose of a constitution as one cannot be expected to meaningfully participate in a constitution making process when one does not understand its purpose. When asked to explain the purpose of a constitution, the responses were several and varied. The most common of the responses concerned the establishment and protection of human rights and limitation of state power. This is probably owing to the government's history of consistent violation of human rights that people have come to associate the constitution solely with human rights protection. In the past, the Constitution has been called upon a number of times to enforce the protection of human rights. Other fewer responses concerned the governing of relations among the people and the institutions. Despite the restrictive purpose of a constitution provided by the villagers, their responses were generally encouraging as they showed a fair understanding of the principles of constitutionalism.

As indicated above, participants were aware of the supremacy of the Constitution over every legislation, conduct or institution. Most respondents felt however that the ZANU PF government considers itself to be above the Constitution, evidenced by its consistent and willful violation of human rights without being held accountable. One service provider pointed out that the Constitution has actually been used to amass state power in contrast to its function of limiting it. The service provider mentioned the rejected 2000 Constitutional Commission draft constitution as one example in which the state intended to use the constitution to confer extensive presidential powers. Another service provider cited

Constitutional Amendment No. 7 of 1987 which she argued was enacted to accumulate power in the executive.<sup>498</sup>

### 4.3 Constitutional History of Zimbabwe

The majority of participants were relatively aware of Zimbabwe's constitutional history and development, specifically the Lancaster House Constitution's negotiations and the futile 2000 Constitutional Commission-led constitution making process. Knowledge of the Kariba draft constitution was understandably minimal.

The number of people aware of the Lancaster House Constitution was significantly high. However, it should not be taken to mean that the people were in approval of it. Studies indicate that most people did not feel that the Lancaster House Constitution was an expression of their wishes and aspirations.<sup>499</sup> The process was well-known, possibly because the process is widely celebrated for culminating in the independence of Zimbabwe.

Awareness of the 2000 Constitutional Commission constitution making process was also comparatively high, possibly owing to two reasons: firstly, the emergence of the MDC in 1999 which extensively and successfully campaigned for a 'No' vote in the 2000 referendum and secondly, the wide-spread public education and participation in the constitution making process. Official figures reflect that prior to the adoption of the draft constitution, 4,321 meetings had been held nationwide. The meetings were attended by 556,276 people while 150,000 people attended special meetings. There were over 7,000 individual submissions.<sup>500</sup> Interestingly, the public consultation process of the 2000 constitution making process was so successful that it even undermined the overall success and integrity of the constitution making process by raising questions on how to read and distil the will of the people in the thousands of submissions that were received.<sup>501</sup> Kant and Rakuita note that public participation in the constitution making process may offer the long-term benefits of a well-informed populace.<sup>502</sup> Moehler's study similarly concurs that that while public participation may not necessarily confer legitimacy on the constitution, 'citizens

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<sup>498</sup> Constitutional Amendment No. 7 of 1987 created a powerful executive president by fusing the offices of Prime Minister and that of a President.

<sup>499</sup> ZESN Referendum Report (note 101 *supra*) 4.

<sup>500</sup> See *Mushayakarara v. Chidyausiku* 2001 (1) ZLR 248.

<sup>501</sup> Hatchard (note 125 *supra*) 211.

<sup>502</sup> Kant and Rakuita (note 319 *supra*) 2.

who are involved in constitution making are more likely to know and care about the constitution' compared to non-participants.<sup>503</sup> The high level of awareness of the 2000 constitution making process may therefore be possibly credited to the extensive public participation in that process.

The number of respondents who were aware of the 2007 Kariba draft constitution was infinitesimal. This was not surprising. The Kariba draft constitution was a highly secretive document negotiated behind closed doors by ZANU PF, MDC-T and MDC-N as part of the SADC-brokered inter-party dialogue. For this reason, not much is known about how the draft constitution was crafted.<sup>504</sup> The respondents were further asked if they were aware of any of the subsequent amendments to the Lancaster House Constitution. It was appalling to discover that only a few participants were aware of any specific amendments to the Lancaster House Constitution considering that it had already been amended 19 times prior to the 2009-13 constitution making process. However the respondents' unawareness of the amendments is justifiable as all 19 amendments had not been adopted through a referendum or popular participation.

#### 4.4 Inclusivity

Public participation in constitution making is premised on the assumption that the best constitution is the one that reflects the country's political, cultural, religious and social diversity. The inclusion of the rural populace in the constitution making process is a necessary step towards genuine and meaningful public participation and its importance is accentuated by the fact that the rural populace has specific constitutional needs and interests which are very different from those of the urban dwellers. The rural populace offers a different and diverse perspective on constitutional issues and denying them opportunities to be heard means that their views on such constitutional matters cannot be adequately represented and protected by those who govern. For example, there was need to consult the rural populace extensively on the proposed constitutional provisions on the land reform, official languages, traditional leadership and customary law, among others. Dearth of opportunities for public participation may eventually end with frustration with the government's decisions and policies. A case in point is the unconstitutional and violent land

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<sup>503</sup> Moehler & Marchant (note 66 *supra*) 6.

<sup>504</sup> NCA Report on Kariba Draft (note 157 *supra*) 1.

grabs of white commercial farms that were initiated by the war veterans in the late 1990s.<sup>505</sup> If the government had consulted the rural populace on the land question it would have realised the need to formally redistribute the land prior to the disturbances.

One of the objectives of the research was to establish the extent to which the rural populace participated (or was involved) in the 2009-13 constitution making process. The majority of respondents interviewed from all areas indicated that they had participated in the 2009-13 constitution making process, in one way or another. The process can thus be hailed for its efforts at inclusivity. Noteworthy is that the respondents were both males and females and from all legal voting age groups. However, the study also showed that more men participated than women. Participation was mostly in the form of attendance of formal group discussions, political rallies, civic education campaigns, public outreach programmes and voting in the referendum. Of these, the major form of participation was voting in the referendum, giving credence to Hart's theory that the right to public participation in developing nations in Africa has often been taken to mean voting in a referendum.<sup>506</sup>

The following are reasons the respondents could not utilise other forms of participation in the 2009-13 constitution making process. None of the participants participated in a demonstration or petitioned the government. It was discovered during the interviews that some of the respondents were in fact not aware of such other forms of participation. A different reason which was offered by both the villagers and service providers was the legal and political environment in Zimbabwe. The participants opined the restrictive legal and political environment in the country in terms of which almost every opposition political parties' demonstration or petition is considered illegal. In terms of POSA, political parties have to seek police clearance first before they can demonstrate. According to a service provider, the police clearance is always denied and at many times, these 'illegal' demonstrations have been violently dispersed by the police. As one villager puts it, one participates in opposition political parties' demonstrations or rallies at his/her own peril.

The majority of the rural populace could not utilise social media such as Facebook and WhatsApp due to electrical power or technological constraints and political reasons. In an example of the former, most of the villagers did not have access to electricity or did not

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<sup>505</sup> Zimbabwe Human Rights NGO Forum (note 151 *supra*).

<sup>506</sup> Hart (note 2 *supra*) 1.



have web enabled devices. The villager's freedom of expression was also restricted as they could not freely air views that were contrary to those of the government for fear of political victimisation. Other respondents felt they were not adequately formally educated to participate by contesting for offices in the organs responsible for facilitating the constitution making process. A significant number of participants were not formally educated.

Moehler's study shows that people who participate in the constitution making process are more likely to care about democracy and constitutional issues, even though such participation may not necessarily legitimise the constitution making process and the constitution.<sup>507</sup> The participation of the rural populace in the constitution making processes ensures an increased awareness on crucial constitutional rights and freedoms such as freedom from forced or compulsory labour, marriage rights, environmental rights, rights to agricultural land, the right to language and culture, as well as the right to education. These and other rights are all very relevant in the rural context. The long-term benefits of public participation cannot therefore be ignored, and this is more critical in the rural communities which have long been generally indifferent to politics.

#### **4.5 Ownership and Control of the Process**

The participants were firstly asked to identify the different role players involved in the making of a constitution and they identified several players such as the government, political parties, 'the people', as well as international and local NGOs. On the follow up question of who, among the identified role players, should the constitution emanate from, the majority of the participants seemed to be in agreement that it is 'the people' who are the source of the constitution. In other words, the constitution is a creature of the people. On the question of who exactly constitutes 'the people', one respondent, in probable reference to the common people, simply responded with 'Tisu vanhu vacho' (We are the people).

The participants were then asked whether it was 'the people', as they had defined, who had owned and controlled the 2009-13 constitution making process. Most of the participants shared the view that the three political parties to the GPA had usurped the people's role. This further buttressed the perception by the civil society that the political parties captured the constitutional making project and narrowed it to a struggle over party-political interests

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<sup>507</sup> Moehler & Marchant (note 66 *supra*) 6.

at the expense of the will of the people.<sup>508</sup> The constitution making process therefore did not conform to the true definition of local ownership. The agenda for the constitution making process was largely defined and formulated by the political elites who were parties to the GPA. The insiders thus became outsiders in their own constitution making process. Madhuku unequivocally states:

The content of a constitution must be determined by the political experience of that country. People must have a sense of the meaning of what they are putting in there. So you can't just get a constitution from the library. The constitution must come from the spirit and the hearts of the people.<sup>509</sup>

It is in that light that the NCA criticised the COPAC constitution making process and commenced its own parallel process in 2010 termed 'Take Charge'. Take Charge campaign was an initiative which sought to give civic education to the people and to informally redraft the constitution taking into consideration the will of the people. The NCA's president, Madhuku, explained his organisation's denunciation of the constitution making process as follows:

The NCA has consistently and unapologetically reiterated its position that any draft constitution which is a product of a flawed process, as the current COPAC process...will be rejected by the people of Zimbabwe.<sup>510</sup>

One service provider however noted that whereas, ideally, it is the people who should take charge and control of the constitution making process to produce a democratic and people-driven constitution, the critical role of other entities such as political parties and civil society organisations should be recognised if a successful participatory process is to be achieved. The service provider mentioned specifically the role of the civil society in civic education and that of opposition political parties in providing a different perspective from that of the government, thus assisting the people to make informed decisions when voting in a referendum. Another service provider pointed out the technical nature of constitution drafting and argued that 'the people' are poorly equipped to take a front role in the drafting of constitutions and as such, there is need to enlist the services of politicians and technical experts to manage and control the process. The people may then take an active role in the public consultations and constitutional debates, the service provider suggested. Therefore,

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<sup>508</sup> Dzinesu (note 33 *supra*) 2.

<sup>509</sup> A Nhemachena & M Mawere (eds.) *Africa at the Crossroads: Theorising Fundamentalisms in the 21st Century* (2017) 293.

<sup>510</sup> NCA Press Release, 23rd July, 2010.

whereas there is consensus on the need to involve the people in the process, there are contentious views on what role the public should play in drafting the constitution.

#### **4.6 Reasonable Time-frame**

Article VI of the GPA stipulated a time-frame of one and half years for the completion of the draft constitution. Whereas this was already presumably insufficient time to enable effective and meaningful public participation, a service provider noted that a significant amount of that time was wasted on political bickering and resolving stalemates on contentious constitutional issues such as the reform of the security sector and presidential term limits, among others, and this had negative implications as it shortened the time for public consultation. In the end, it took COPAC five years to complete the constitution making process.

#### **4.7 Forms of Communication**

One of the reasons offered by several respondents for non-participation is that the rural populace has since been historically marginalised economically, socially and politically by the Government of Zimbabwe. As one respondent claimed, the rural populace is rarely consulted in matters likely to affect them before the government decides to implement decisions. To the villagers, there is in fact no difference between participation and non-participation. In few cases where they are consulted, several respondents were of the view that the government's decisions do not seriously consider their opinions, hence their indifference to politics. The general sentiment amongst the villagers is therefore that the government neither cares about their opinions nor well-being. With reference to Arnstein's ladder of citizen participation, the rural populace's participation in matters of governance is on the lowest rung, non-participation. Communication is one way, from the power-holders to the people. The power holders merely inform the citizens on the decisions taken.<sup>511</sup> The researcher however argues that genuine public participation requires the power holders to be guided in decision making by the feedback they receive from the public. Public participation should impact on the outcome of the process. It is only when the public can effectively influence decision making that genuine and meaningful public participation ensues.

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<sup>511</sup> Arnstein (note 236 *supra*) 217.

The study showed a correlation between the extent of participation of the rural populace and their level of education. The more educated the respondents were, the more they participated one way or another in the constitution making process and, furthermore, the more they showed concern about the constitution making process and other several governance, democracy and constitutional issues. The majority of respondents who participated in the constitution making process had either a primary or secondary education. A few others were trained in various self-help trades such as agriculture, poultry and carpentry. The study further showed that those who never attended school were more indifferent about politics and the 2009-13 constitution making process than those who had attended. While the study shows that a significant number of respondents never attended school, it was noted that in some cases, the constitution making process was not tailor-made to suit the educational needs of such people. For example, being illiterate and uneducated, some respondents disclosed that they were terrified to approach their Members of Parliament (MP) or contribute to the constitutional debate in the outreach programmes. These respondents described the environment during the outreach programmes as 'intimidating' or 'too formal'. Effective communication entails taking into account the educational needs and experience of the rural populace beforehand. Others also mentioned that because of illiteracy, they could not read the COPAC leaflets or newspapers which limited their access to the available sources of information.

#### **4.8 Political Equality**

Political equality is at the core of a deliberative democracy. Its norms envision the inclusion of all affected citizens in the decision making process on equal terms. This necessitates 'having an opportunity to express one's interests and concerns and to question one another, respond to criticisms raised, and critique the arguments and proposals of others' without fear of victimisation.<sup>512</sup> This was not the case in the areas under the study as some respondents revealed that they only participated because they were forced or felt coerced to participate in the constitution making process by the political elites. However, differences should be noted between coercion and canvassing. Respondents implicated the government-sanctioned youth militia commonly known as the 'green bombers', war veterans and ZANU PF supporters as the principal orchestrators of the threats and violence. This was more prevalent in MDC-T strongholds such as Bulilima where the

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<sup>512</sup> Banks (note 5 supra) 1049.

government possibly wanted to create a perception of rural support in Matebeleland.<sup>513</sup> The political environment, in these areas was not conducive for political equality, the respondents deliberated on constitutional matters from an inferior position, under the threat of political victimisation for non-participation.

#### 4.9 Civic Education

Citizens' access and exposure to reliable and balanced information about the constitution making process has far reaching implications on citizens' participation in the constitution making process. The importance of citizens' access to reliable and balanced information is premised on the understanding that informed citizens make informed decisions. One of the objectives of the interviews was to identify the rural population's sources of information during the 2009-13 constitution making process. The service providers were additionally asked to comment on the reliability of the sources of information identified.

The participants were asked to list their primary sources of information during the constitution making process. The following sources were identified; radio, television, print media, local NGOs, Agricultural Extension Officers (*madhumeni*), local village leaders and MPs. A few others indicated a minimal usage of the internet such as Facebook, WhatsApp, Google and the COPAC website to access information. Minimal usage of the internet was largely attributed to lack of electricity and/or lack of web enabled devices. Other participants, especially the elderly, lacked the technical knowhow to use the internet and social media platforms. Internet users were thus mostly found amongst the more educated and rural youth populace. Some participants who listed the radio, newspapers and television as their sources of information bemoaned the lack of balanced reporting by the national media especially on contentious issues between the political parties to the GPA.

According service providers, Agricultural Extension Officers proved to be a useful and reliable source of information. Most of them were relatively educated owing to the educational requirements of their profession and had access to different sources of information. The same cannot however be said of the local leaders and councilors. The

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<sup>513</sup> Though ZANU PF generally enjoys support in most rural areas, the entire Matebeleland region has long been perceived as an MDC-T stronghold. The region's bitterness with ZANU PF perhaps emanates from the Matebeleland atrocities (*gukurahundi*) which were sanctioned by the ZANU PF-led government in the early 1980's. See generally, F Zaba 'Inside Zanu PF's Mash Central stronghold' *Zimbabwe Independent* (online), 19 July 2013. Available at [www.theindependent.co.zw/2013/07/19/inside-zanu-pfs-mash-central-stronghold/](http://www.theindependent.co.zw/2013/07/19/inside-zanu-pfs-mash-central-stronghold/) (accessed 3 November 2016).

majority of these local leaders were aligned to the government and working in cahoots with the government to suppress unfavourable information to the government or were too afraid to speak out on 'real issues affecting the villagers' during constitutional debates. Their reliability as sources of information was questionable as most of them would, not surprisingly, advance party interests at the expense of reliable information.<sup>514</sup>

The civil society such as local NGOs also played a critical role in providing reliable and balanced information and opinion on the constitution making process. However, one service provider remarked that their perceived alignment with or sympathy for the opposition political parties made their work of educating the public on constitutional matters difficult as they were constantly under surveillance from the government. The service provider further stated that despite enjoying a cordial relationship with the government in the 1980s and early 1990s; the relationship immediately turned sour following the entry of the MDC-T into politics in the late 1990s. The service provider mentioned the Private Voluntary Organisations Act which governs the registration, finances and operations of the civil society organisations as one example of the many legislation which curtail the effectiveness of NGOs' work.

#### **4.10 Public Consultation**

There is considerable global debate on how long a participatory constitution making process should take. The outreach programme in the 2009-13 constitution making process took five months to complete, from June 2010 to October 2010. The time period is however a far cry from the one suggested by Meisburger. The writer posits that the required time to fully develop a constitution ranges from 12 to 14 months, and if public consultation will be incorporated into the process, the time may be extended.<sup>515</sup> One service provider remarked that one of the reasons for a shorter public consultation time-period may have been as a consequence of the pressure from the opposition political parties who were bent on having the constitution adopted before the 2013 presidential elections. The opposition political parties envisaged a constitution which would reform the legal and political environment and

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<sup>514</sup> As noted in the preceding sections, the rural communities have long been known to be ZANU PF's stronghold. See F Zaba 'Inside Zanu PF's Mash Central stronghold' *Zimbabwe Independent* (online) 19 July 2013. Available at [www.theindependent.co.zw/2013/07/19/inside-zanu-pfs-mash-central-stronghold/](http://www.theindependent.co.zw/2013/07/19/inside-zanu-pfs-mash-central-stronghold/) (accessed 3 November 2016).

<sup>515</sup> Olivier (note 272 *supra*) 25.

'level the political field' prior to the elections through the alignment of the country's electoral laws with the new constitution.

Even though the public consultations were seemingly wide-spread and extensive, with 4943 meetings held throughout the country, reaching an approximately 1.2 million people,<sup>516</sup> the outreach programmes were undermined by the occurrence of violence in the areas under study. Several respondents reported frequent interruption of the outreach programmes as a result of the clashes between ZANU PF and MDC-T supporters. Some respondents revealed that they stayed away from the outreach programmes for fear of being caught up between these clashes.

The current research was conducted in three predominantly shona and ndebele-speaking communities. The researcher noted however that people of other minority ethnic origins were also living in these areas and exclusion of ethnic minorities through language was reportedly common during the outreach programme. To give an example, it is claimed that Chief Nondo (Mbembesi, Matebeleland North) issued a directive to his subjects to boycott the outreach meetings if there were no Xhosa speaking officials. The Chief stated that the failure to recognise minority languages amounted to an infringement of their rights.<sup>517</sup> In other cases, there were disagreements over which language to use during the outreach meetings. It was also reported that two members of COPAC walked away due to one of such disagreements.<sup>518</sup>

The study showed that on average, more men participated than women participated in the constitution making process. One of the most frequent reasons for non-participation in the outreach programmes amongst the rural women was predominantly owing to the patriarchal nature of the Zimbabwean rural populace. Most of the women who did not participate cited reasons such as ploughing the fields and looking after the children, and it was their husbands, as head of the families, who attended the outreach meetings.

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<sup>516</sup> 'The Road to a New Constitution' United Nations Development Programme in Zimbabwe. Available at <http://www.zw.undp.org/content/zimbabwe/en/home/ourwork/democraticgovernance/successstories/the-road-to-a-new-constitution.html> (accessed on 7 March 2016).

<sup>517</sup> 'Zimbabwe Xhosas to Boycott Constitutional Process If Not in Their Language' *The ZIMDIASPORA* 28 July 2010. Available at [http://www.zimdiaspora.com/index.php?option=com\\_content&id=3687:zimbabwe-xhosas-to-boycott-constitutional-process-if-not-conducted-in-their-language&Itemid=18html](http://www.zimdiaspora.com/index.php?option=com_content&id=3687:zimbabwe-xhosas-to-boycott-constitutional-process-if-not-conducted-in-their-language&Itemid=18html) (accessed 30 June 2015)

<sup>518</sup> 'COPAC Members Quit Outreach Meeting over Language' *NewsDay* (online) 3 September 2010. Available at <https://www.newsday.co.zw/2010/09/03/2010-09-03-copac-members-quit-outreach-meeting-over-language/> (accessed 12 June 2015).



The formal unemployment rate in Zimbabwe has reached unprecedented levels, with current figures estimating it at over 97%.<sup>519</sup> Most of those unemployed have resorted to vending and farming to make a living. The majority of respondents interviewed were farmers. As such, other reasons that were common for non-participation in all three areas under study were economical. Several non-participants explained that they could not afford to leave their jobs or work to participate in the public consultations. In the words of one respondent, 'Politics haina sadza' (Politics does not put food on my table).

It is therefore not a surprise that some respondents, when asked whether they thought Zimbabweans needed a new constitution, were of the view that instead of implementing a costly constitutional reform process, the government should rather address 'bread and butter' issues such as rampant corruption in state departments, salaries for civil servants and employment creation. In the context of rural areas, the respondents largely felt the money could have been put to 'better use' to develop the rural communities by addressing critical issues such as the deplorable state of roads, construction of bridges and funding for farming activities. According to one service provider, 'the constitutional reform was a waste of people's taxes; there is no use in enacting a constitution which the ZANU PF government will flagrantly disregard whenever it conflicts with its policies'.

Other respondents reported that only those who had been handpicked prior to the outreach programmes would be given the opportunity to speak. According to service providers, the ruling party implemented operation *Vhara Muromo* (Shut Your Mouth) to suppress dissenting voices. This was corroborated by several respondents who also claimed that they were coached on what to say during the public debates. It is against this background that the NCA accused the political parties of manipulating the constitution making process to guarantee the absorption of their elite interests at the expense of the will of the people. On the other hand, ZANU PF accused the drafters of siding with the opposition political parties by 'smuggling' into the draft constitution issues not raised during the public consultations.<sup>520</sup> In light of these accusations, the civic society questioned the significance of consulting the masses on the draft constitution when the parliamentarians would in the

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<sup>519</sup> R Anand 'Unemployment: Serious political Will Now Needed' *Zimbabwe Independent* (online) 6 May 2016. Available at <https://www.theindependent.co.zw/2016/05/06/unemployment-serious-political-will-now-needed/> (accessed 9 November 2015).

<sup>520</sup> Magaya (note 19 *supra*) 7.



end manipulate the views of the public and have the final say on the contents of the constitution.<sup>521</sup>

Service providers also noted that during the public consultations, politicians were forced to align their views and opinions over certain constitutional matters with those of their respective political parties in order to serve their political parties' interests. The argument is therefore that the draft constitution was indicative of the motivation and partisan views of the political parties and not of the people. Vava (NCA) describes the above sentiment as follows:

It was common cause that public forums hardly present individuals adequate freedom to make their own views known on particular sensitive topics, especially when they may affect their respective parties. As a result, participants ended up adopting party positions on certain matters for fear of facing backlash from their respective parties.<sup>522</sup>

Similarly, the Independent Constitution Monitoring Project (ZZZICOMP)'s findings of the public consultation process indicate that the political atmosphere that prevailed during the outreach programmes did not provide for meaningful public debate due to the heavy domination of political parties in the public consultation programmes. The report indicates that:

The operational framework for constitutional outreach consultations was inhospitable to open debate. At most meetings in both rural and urban areas, debate was generally subdued, with the outreach process under the control of various political parties. Although MDC-T presence was visible at most venues, overall, ZANU PF appeared to be more dominant and even dictated the content of most proposals. The likelihood of producing a constitutional draft that primarily reflects ZANU PF proposals, as enunciated in its fliers, remain high, if not certain.<sup>523</sup>

In view of the above, conclusions can be made that the public consultations were merely a formality, for the purposes of legitimising the constitution making process, and not gathering the views of the people.

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<sup>521</sup> *Ibid* 8.

<sup>522</sup> Interview with Mr. Blessing Vava: NCA Secretary for information and Publicity. See Magaya (note 19 *supra*) 9.

<sup>523</sup> ZZZICOMP Final Report: Shadowing the Constitution Outreach Process, 58. Available at [http://archive.kubatana.net/docs/demgg/sokw\\_reflect\\_constitution\\_making\\_120808.pdf](http://archive.kubatana.net/docs/demgg/sokw_reflect_constitution_making_120808.pdf) (accessed 17 January 2015).

#### 4.11 Referendum

As noted in chapter 3 above, it would be counter-productive to implement costly public participation procedures when the public does not have the final say over the contents of the constitution. It is therefore a necessary prerequisite that the draft constitution be approved through a popular referendum to provide the people the opportunity to influence the outcome of the process. The majority of respondents who participated through other forms of public participation indicated that they had voted in the referendum as well. Although most people were not willing to divulge how they had voted in the referendum, it can be assumed that most voted for the adoption of the constitution draft since all the major political parties to the GPA were campaigning for its adoption. The nationwide endorsement of the draft constitution was a staggering 93%.<sup>524</sup>

Of the total number of respondents who participated in the 2009-13 constitution making process, nearly half of the respondents revealed that the new Constitution was not an expression of their wishes and aspirations. The relative lack of feelings of ownership of the Constitution may be attributed to the domination of political parties in the constitution making process, as noted in the above sections. As such, the villagers felt left out.

It is interesting to note that studies show that, 'a constitution is less likely to garner public approval when it is seen as being imposed on the people'.<sup>525</sup> According to the model developed by Moehler and Marchant, perceived legitimacy of a new constitution is to a certain extent dependent on the degree of citizen influence during the constitution making process.<sup>526</sup> The Zimbabwean case however conflicts with the above model in that even though the villagers felt left out of the constitution making process, most of them still went on to vote in favour of the draft constitution. One service provider credited this to the support base and campaign efforts of the political parties to GPA that held intensive nationwide rallies and campaigns in support of the draft constitution. It can be assumed therefore that the political parties persuaded their supporters to vote for the adoption of the draft constitution despite being excluded in its drafting.

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<sup>524</sup> ZESN Referendum report (note 101 *supra*) 6.

<sup>525</sup> Moehler & Marchant (note 66 *supra*) 7.

<sup>526</sup> *Ibid* 8.

In support of the above assertion, Moehler's 2008 study in Uganda proves that the views of the leaders, to a great extent, shape the views of the citizens rather than actual participation. Her study showed that where local leaders were opposed to the constitution, so were the local populations, and where the local leaders were in favour of the constitution the same was also true. Her study further reveals that this influence is more pronounced in areas (such as rural areas) where the locals have limited or no access to information and knowledge of constitutional issues.<sup>527</sup> It can thus be argued that the constitution enjoyed a greater degree of support among the villagers because the local village leaders were in support of the draft constitution. The local village leaders influenced the views of the local populace. The local villager leaders supported the draft constitution because it represented the interests of ZANU PF, which interests also coincide with the local village leaders'. It can therefore be assumed that the affirmative vote was largely a direct consequence of the wide support of the draft constitution by the political parties to the GPA and not necessarily the approval of the draft constitution itself.

One other theory that can explain the overwhelming support of the constitution in the referendum is that some of the villagers who voted for the adoption of the draft constitution may have done so out of fear of political victimisation. The prevailing notion during the referendum was that the government would somehow know how one has voted. These rumours were fueled by the hiring of a shadowy Israeli company, Nikuv Project International, prior to the 2008 harmonised elections to 'upgrade the computers for the purposes of computerising the central registry, birth certificates, passports and national identity documents'.<sup>528</sup> In the elections that followed, Tsvangirai, who had been tipped to cruise to victory, failed to garner the required 50% + 1 votes, ensuing in the run-off elections which were subsequently won by the incumbent, President Mugabe. Tsvangirai accused the government of rigging through manipulation of the voters roll and the ballot papers.<sup>529</sup>

The country underwent a tumultuous period following the near defeat of Mugabe in this election. According to service providers, the ruling party adopted several ways, sometimes fatal, of dealing with those believed to have voted for MDC-T. Tsvangirai later withdrew

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<sup>527</sup> Moehler & Marchant (note 66 *supra*) 9.

<sup>528</sup> 'Election Rigging Scandal Deepens' *Zimbabwe Independent* (online) 9 August 2013. Available at <https://www.theindependent.co.zw/2013/08/09/election-rigging-scandal-deepens/> (accessed 10 August 2015)

<sup>529</sup> 'Zim Elections: 'Nikuv Paid \$10 Million to Rig' *NewsDay* (online) 10 August 2013. Available at <https://www.newsday.co.zw/2013/08/10/zim-elections-nikuv-paid-10-million-to-rig/> (accessed 11 August 2015).

from the necessary run-off citing a repressive campaign by security forces and government-controlled youth militia against his supporters.<sup>530</sup> It is therefore against such background that the people feared a repeat of the 2008 elections and either abstained or voted in support of the constitution, in the overpowering belief that the ballot was not secret.

#### **4.12 Motive of the Power Holders**

The motives of the power holders, which were the three political parties to the GNU, are best understood against a brief expose of the political atmosphere that prevailed prior to the adoption of the Constitution. The Constitution was adopted in the aftermath of the violent and disputed harmonised elections of 2008. Thereafter, the three major political parties of Zimbabwe entered into a tripartite power sharing agreement. Article VI of the GPA recognised the inadequacies of the Lancaster House Constitution and the need for the Zimbabwean people to make a constitution by and for themselves. To that end, the GNU was tasked to set up COPAC and establish a new constitution.

However, one service provider remarked that ZANU PF never wanted a new constitution and the only reason it agreed to go through with constitutional reform was to possibly lend legitimacy to the government, following Tsvangirai's withdrawal from the presidential run-off elections and the political impasse that ensued thereafter. ZANU PF therefore meant to appease the GNU opposition political parties and civil society who were agitating for constitutional reform. On the contrary however, *NewsDay* observes that the new constitution is designed in such a way that the President is empowered to appoint persons in all strategic government positions such as commissions, vice-presidents, Chief Justice, Deputy Chief Justice and Judge President. As such, the newspaper claims, ZANU PF needed the new constitution to win elections and rule forever.<sup>531</sup>

Other service providers also noted that the Constitution was adopted in the shadow of the country's major political event, the 2013 presidential elections and Tsvangirai had during the subsistence of the GNU repeatedly insisted on constitutional reforms to 'level the political field' before the next elections. For the opposition political parties to the GNU, the

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<sup>530</sup> Bertelsmann Stiftung (note 164 *supra*) 8.

<sup>531</sup> 'ZANU PF Wants Elections Only To Gain Some Legitimacy' *NewsDay* (online) 31 March 2017. Available at <https://www.theindependent.co.zw/2016/05/06/unemployment-serious-political-will-now-needed/> (accessed 1 April 2017).

constitution was meant to pave way for the presidential elections, particularly through the reform of the security sector and the alignment of the country's electoral laws with the new constitution, which was considered the *sine qua non* for free and fair elections.

It can be argued therefore that the new constitution was a means to an end for the three political parties. The constitution was adopted primarily to serve the political interests of the parties to the GNU and was on no account meant for the benefit of the common populace. It is against this background that Gwisai describes the document as a 'peace pact' between the three political parties to the GNU.<sup>532</sup>

#### **4.13 Credibility and Competence of Institutions**

The competence and credibility of institutions responsible for regulating and supporting the constitution making process may impact on the legitimacy of the process and resultant constitution. Most service providers did not feel the composition of COPAC provided for adequate representation of the views of the rural populace in the constitution making process. This stemmed from the membership of the COPAC. COPAC consisted of 25 parliamentarians who were selected specifically to reflect the 7<sup>th</sup> Parliament of Zimbabwe's gender balance and the relative strengths of the three parties in both the Senate and the House of Assembly. Of the 25 members of COPAC, MDC-T had 11 representatives, MDC-N had three representatives, ZANU PF had ten representatives and the traditional leaders had only one representative.<sup>533</sup> The concern raised was that despite the rural populace being the majority of the total population of Zimbabwe, it had the fewest representatives. COPAC's membership was therefore clearly not representative of the Zimbabwean populace. More representatives would have helped to adequately represent the diverse and specific interests and aspirations of the rural populace.

In view of the exclusively elite membership of COPAC, other smaller political parties such as the MDC99 and Mavambo Kusile/Dawn, who had been excluded from the GPA, advised against the use of parliamentarians as representatives of the people citing the previous constitutional history of the country, in particular the 2000 Constitutional Commission, in which the said political parties allege that the politicians attempted to unduly influence the

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<sup>532</sup> Dzinesu (note 33 *supra*) 2.

<sup>533</sup> Magaya (note 19 *supra*) 7.

people.<sup>534</sup> Such influence is often more pronounced in the rural areas where there is limited access to a variety of information sources, hence there was need to sincerely consider these political parties' suggestions. It can however be argued that these smaller political parties' arguments follow from the bitterness of being excluded from the GPA.

Service providers also expressed concern on the independence of COPAC in light of the overbearing influence of the three Principals<sup>535</sup> and the Committee of Seven.<sup>536</sup> The membership of the Committee of Seven was drawn from senior politicians from the three political parties to the GPA and Cabinet Ministers while the Principals were the leaders of their respective political parties. To illustrate the point, after an impasse due to conflicting interests on the provisions of land tenure, among others provisions, the Principals convened in January 2013 and resolved the deadlock without consulting the public (or specifically, the rural populace which was more likely to be affected by the contentious provisions). It is therefore not a surprise that the point of view was that the final outcome of the draft constitution was a reflection of the interests of the political parties and not the masses as expressed through the outreach programme.<sup>537</sup>

The Zimbabwe Electoral Commission (ZEC)<sup>538</sup> is a constitutionally independent commission which is responsible for the regulation of elections in the country. Its parent ministry is the Ministry of Justice. Of concern is that it gets its budgetary allocation from the Ministry of Justice rather than from the Consolidated Revenue Fund. Furthermore, any donation to ZEC must be approved by the Minister of Justice and Minister of Finance. The two MDC parties and the civil society therefore disputed the impartiality and independence of the ZEC Secretariat which is responsible for policy implementation, in light of the fact that ZEC is treated more as a parastatal. This was further compounded by the allegations that the Secretariat is staffed by predominantly serving and former security personnel, contrary to its mandate which is to recruit temporary workers from the various departments of government.<sup>539</sup>

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<sup>534</sup> *Ibid* 8.

<sup>535</sup> President RG Mugabe (ZANU PF), Dr. MR Tsvangirai (MDC-T) and Prof. A Mutambara (MDC-N).

<sup>536</sup> The Committee of Seven was responsible for managing impasses.

<sup>537</sup> Magaya (note 19 *supra*) 9.

<sup>538</sup> The Zimbabwe Electoral Commission (ZEC) is an independent organisation responsible for the administration of all election processes in Zimbabwe. See generally the organisation's website, [www.zec.gov.zw](http://www.zec.gov.zw) (accessed 14 July 2016).

<sup>539</sup> ZESN Referendum Report (note 101 *supra*) 8-9.

The competence of ZEC to carry out its constitutional mandate of administering the referendum was severely undermined by the shortage of financial and human resources. ZESN noted that during the time of the constitution making process, the electoral agency was understaffed, operating with less than half of the staff and as the Minister of Justice further revealed, the electoral commission did not even have vehicles for its staff.<sup>540</sup> The *Daily Agenda* reported on outreach teams stranded in Hwange with no food and accommodation allowances. The outreach teams were also reported to lack the basic equipment necessary for the outreach meetings such as cameras and voice-recorders and in other instances, outreach meetings were cancelled due to fuel shortages.<sup>541</sup> Some of the challenges encountered by ZEC ranged from shortages of materials such as stamps and ink to lack of privacy in the poll booth as a result of the setup of the booth.<sup>542</sup> The ZESN further reported that owing to financial and logistical constraints, the voter educators were hastily trained and deployed, with the result that some of the educators could not competently respond to queries from the public.<sup>543</sup> To worsen matters, ZEC chair, Justice Simpson Mutambanengwe resigned a few months before the referendum, throwing the electoral agency into disarray.<sup>544</sup> One service provider implicated the new regulations introduced by ZEC prior to the referendum which restricted the number of local observers at a polling station at any given time as one of the many ways which disabled the civic society from effectively carrying out their work. Other ways included the refusal of access to the polling stations on the referendum day.

#### 4.14 Enabling Legal and Political Environment

##### 4.14.1 Political Environment

As noted in the above sections, the GNU was formed primarily to resolve the political impasse that followed after the disputed and violent ridden elections of 2008. It was the same political environment which pervaded the 2009-13 constitution making process. Several participants attested to witnessing acts of violence by and between the political

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<sup>540</sup> *Ibid* 10.

<sup>541</sup> 'More Logistical Problems in Zimbabwe Constitutional Revision Outreach Process' VOA 19 August 2010. Available at <http://www.voazimbabwe.com/a/zimbabwe-chipinge-east-outreach-meetings-canceled-101094364/1469113.html> -Canceled101094364.html (accessed 23 June 2016).

<sup>542</sup> ZESN Referendum Report (note 101 *supra*) 13.

<sup>543</sup> *Ibid* 11.

<sup>544</sup> P Zulu 'ZANU PF Pushes out ZEC Boss' *Zimbabwe Independent* (online) 15 February 2013. Available at <https://www.theindependent.co.zw/2013/02/15/zanu-pf-pushes-out-zec-boss/> (accessed 23 January 2016).



parties. According to the majority of respondents, the violence was mostly perpetrated by the ruling party supporters or the ZANU PF youth militia against the opposition political parties. The fear of potential violence was thus one of the causes of non-participation among the respondents, especially in MDC-T strongholds such as Bulilima. It is perhaps one of the primary reasons the district recorded the lowest rate of participation among the three areas under study.

As further noted, some participants revealed that they were coerced into attending political rallies and constitutional debates out of fear of being beaten up or have their crops destroyed. The fear of violence was further exacerbated by the presence of the army and police in the vicinity of where the constitutional discussions and referendum were being held. This was not an unwarranted fear as the uniformed forces have been known to indiscriminately and ruthlessly beat up people in a bid to thwart civil unrest or opposition political rallies.

The fear of violence or victimisation was still evident even during the time of the research. As if to perhaps demonstrate the fear, when asked to identify the people who were chiefly responsible for the perpetration of violence in her area, one respondent refused to respond to the question and simply requested for the next question. Though most respondents mentioned that they did not directly experience violence, they also said that they did not feel secure and free to express their views and opinions or participate in the outreach programs or referendum because they felt threatened or intimidated by the presence of the uniformed forces in sight. The presence of the uniformed forces on polling stations was in violation of section 19 of the Electoral Act read together with Schedule 2 of the Electoral Regulations of 2005, as amended by Statutory Instrument 32 of 2008. These laws provide that only the members of the ZEC, electoral officers on duty, election agents and accredited observers are allowed within the polling station. This seems to give substance to the views of some of the respondents that the ZANU PF government considers itself to be above the law.

One respondent alleged that he was verbally threatened by ZANU PF supporters for refusing to attend a meeting organised by a local village head. As it later turned out, the meeting was used to indoctrinate the villagers on what to say to COPAC officials during the outreach programme. Other respondents similarly attested to suffering verbal abuse at the



hands of ZANU PF's supporters for either expressing views contrary to the government or for refusing to attend ZANU PF-organised meetings. Another respondent alleged that she had her market stall destroyed by the youth militia for conducting business when others were attending a meeting. In worst case scenarios, as one service provider claimed, people were beaten up by the youth militia for publicly denouncing the ruling party or its government.

The political environment in Zimbabwe is best illustrated in the time it took COPAC to complete the draft constitution. It was because of the animosity, mistrust and the deeply polarised views between the ruling party and the opposition political parties on issues such as the reform of the security sector that, though Article VI had stipulated a time-frame of one and half years for the completion of the draft constitution, the process took significantly longer than expected.<sup>545</sup>

#### **4.14.2 Legal and Policy Environment**

The right to public participation in constitution making in Zimbabwe is presently provided for in terms of section 328 (3) of the current Constitution which requires the Speaker of Parliament to give at least 90 days' notice in the *Government Gazette* before a Constitutional Bill can be tabled before the Senate or National Assembly. The 90-day period is ostensibly to give sufficient time to the public to debate on the Bill. Section 328 (4) requires the Parliament to invite members of the public to express their views on the proposed draft immediately after the Speaker has given notice of the Bill in terms of subsection 3. The negotiation and adoption of the current Constitution however occurred in terms of Article VI of the GPA which recognised the 'fundamental right and duty of Zimbabwean people to make a constitution by and for themselves', read together with the Government of Zimbabwe and the United Nations Development Programme Project Document which noted that for Zimbabwe to develop a democratic constitution, it was crucial that public participation in the process be as broad and inclusive as possible.

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<sup>545</sup> See 'COPAC Blasts Government, Donors over Funds' *Zimbabwe Independent*, 14–20 January 2013 4; See The Government of Zimbabwe and the United Nations Development Programme Project Document (note 144 *supra*) 7; 'UNDP Receives Additional Funding from Development Partners for COPAC to Support Constitution Making in Zimbabwe' *UNDP Press Release* 24 November 2011.

Most international human rights treaties recognise that the right to public participation in constitution making cannot be meaningfully realised against a background of restrictive media laws and policies. In that regard, human rights instruments such as the Covenant on CPR and the African Charter provide for other rights and fundamental freedoms which must be necessarily present for the meaningful realisation of the right to public participation. Fundamental rights and freedoms such as the freedom of expression and information, freedom of movement and other similar rights are a prerequisite to the genuine realisation of the right to public participation in constitution making. Zimbabwe is a signatory to these two human rights instruments which establish minimum obligations for participation in public affairs that are also applicable to constitution making processes. The country has incorporated in its constitutional provisions some of the rights and freedoms enshrined in these treaties.

However, despite such a seemingly conducive legal and policy framework for public participation in the constitution making process, the majority of service providers noted that the legal environment in Zimbabwe during the constitution making process did not allow for the unfettered flow and exchange of ideas and information as a result of repressive laws. There are several pieces of legislation, previously discussed, such as the Access to Information and Protection and Privacy Act, Public Order and Security Act, Private and Voluntary Organizations Act, Interception of Communications Act, Broadcasting Services Act, Referendums Act, Zimbabwe Electoral Act, Zimbabwe Electoral Commission Act, Criminal Law (Codification and Reform) Act and Urban Councils Act, which collectively define the country's legal framework for elections and have either a direct or indirect impact on the full realisation and enjoyment of the right to public participation in constitution making.

According to the service providers, the most infamous of these suppressive laws, POSA and AIPPA have since 2002 been systematically used by the ruling party to clamp down on opposition parties. The service providers noted that the government has used POSA to close down MDC's rallies, sometimes even after the party had first obtained clearance from the police, as required by POSA. To support this claim, reports indicate that during the 2009-13 constitution making process, the police disrupted several MDC-T-organised constitutional reform meetings, beat up participants and indiscriminately arrested 43 MDC-T

supporters in Binga, 48 in Masvingo and 52 in Mount Darwin.<sup>546</sup> As a result, most respondents indicated that they were afraid to attend MDC-T's rallies for fear of potential violence given the well-known ugly history between the police and MDC-T supporters.

Access to reliable and impartial information is critical to the meaningful realisation of the right to public participation in constitution making, especially in the marginalised communities such as the rural communities which in most cases have limited access to a variety of sources of information. AIPPA restricts access to and dissemination of information by providing for the de-registration of journalists and refusal of licenses to practice. Several independent television, radio and print media outlets such as *Daily News* have since the adoption of the AIPPA in 2002 been de-registered for being 'too critical of the government'.<sup>547</sup> The state's monopoly on information has thus severely impacted on the public's perception on the reliability and impartiality of any information emanating from the state broadcaster, Zimbabwe Broadcasting Corporation (ZBC) and the state newspaper, *The Herald*. A quick survey on the online state broadcaster's Facebook page, *ZBC News Online* illustrated the point. Most comments on the page confirmed that the public had lost faith in the state broadcaster as a reliable and impartial source of information. The broadcaster is thought, fittingly so, to be a mouth-piece of the ZANU PF government. Media Monitoring Project in Zimbabwe assessed how the national broadcaster adhered to the GPA which in Article 19(d) requires the public media to provide 'balanced and fair coverage to all political parties for their legitimate political activities'. The Media Monitoring Project's findings shows that after the political parties to the GPA had resolved all outstanding issues which had stalled the constitution making process, ZBC reported the news from a ZANU PF perspective. 95 out of the 126 reports carried on the constitutional reform process reflected the views of the ruling party, 31 reports were on the COPAC activities and a measly three reports were on MDC-T's campaign for support of the draft constitution.<sup>548</sup>

As intimated earlier, even when they had the technological means and technical know-how to do so, most respondents were skeptical of the use of social media platforms such as Facebook and WhatsApp to express opinions on constitutional issues. When prompted on the reasons for such reluctance, most respondents expressed that they were afraid that the

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<sup>546</sup> Magaya (note 19 *supra*) 7.

<sup>547</sup> Mapuva & Muyengwa-Mapuva (note 453 *supra*) 7.

<sup>548</sup> 'Eye on ZBC' Media Monitoring Project Zimbabwe, 2013, 4.

dreaded and infamously ruthless Central Intelligence Organisation (CIO)<sup>549</sup> would be following closely on their comments. The government is authorised in terms of the Interception of Communications Act to monitor and intercept the private communications of its citizenry, in contravention of the constitutionally guaranteed right to privacy and freedom of expression.

#### **4.15 Conclusion**

A people-driven and democratic constitution making process entails the ownership and control of the process by the people. However there were 'no people' to talk about in the 2009-13 constitution making process beyond those active in MDC or ZANU PF politics. Despite the provisions of Article VI providing for the right of Zimbabweans to make a constitution by themselves and for themselves, the political parties to the GPA usurped this right and disenfranchised the people in the process. The process was heavily dominated by the political parties to the GPA and all the parties wanted to ensure the adoption of a Constitution that best reflected their preferences and partisan views, rather than the will of the masses. Furthermore, the legal and political environment that subsisted during the constitution making process did not provide for any meaningful public participation. The public did not feel free or secure to express their views on the draft constitution as a consequence of various pieces of legislation which curtailed their right to public participation.

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<sup>549</sup> The CIO is the national intelligence agency of Zimbabwe.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The main purpose of this study was to evaluate the participation, role and significance of the rural populace in the drafting of the 2013 Constitution. This chapter concludes the study and gives recommendations based on the study's findings from the interviews conducted in Bulilima, Makonde and Mutasa. The researcher identified several problems or challenges which impacted on the effective realisation and full enjoyment of the right to public participation in the drafting of the 2013 Zimbabwean Constitution.

An overview of the problem is given, followed by the recommendations.

#### 5.2 Awareness of the Constitution

The study showed that participants had a minimal understanding of what a constitution is. Most responses also indicated that participants had a narrow view of the purpose of a constitution. The responses given on the purpose of a constitution were limited to the protection of human rights and limitation of state power (constitutionalism). The responses ignored some of the functions of the constitution such as defining the structure of government, the roles and functions of various state departments, governing the relationships between the state departments and setting the founding principles and values of the nation, among other functions. The study further showed that only a few respondents had actually seen a constitution. Of the few respondents who had seen it, some indicated that they could not understand its contents because its language is too legalese and further that it was not provided in their local languages.

The researcher recommends that the state takes all practical measures to promote public awareness of the constitution, translate the document into all officially recognised languages and distribute it as extensively as possible, particularly in the rural populace where there is limited or no access to information or constitutional documents. The researcher further proposes the simplification of the legal and complex language of the drafters, taking into consideration the educational needs of the rural populace where some of the villagers do not have a basic education.

However, promoting public awareness of the constitution should not be the sole responsibility of the government. To borrow from the South African approach, the government should reach people who can reach people. The government should engage the civil society in that respect. The civic society can play a significant role in creating awareness of the constitution in schools, workplaces and public forums.

### **5.3 Inclusivity**

The study has established that the Zimbabwean rural populace is seldomly included in decision making or consulted by its government in matters which are likely to affect the rural populace. The rural communities are merely informed of the proposed decisions, without being given an opportunity to debate or engage the government on the proposed decisions. This has further been exacerbated by the inadequate representation of the rural populace in the decision making bodies such as the 2000 Constitutional Commission and 2009-13 COPAC. The interests of the rural dwellers are not given the same consideration as those of their urban counterparts.

Given that the rural populace constitutes the majority of the total population of Zimbabwe, there is need to seriously and effectively engage and consult the rural populace in the formulation, development and implementation of policies before such decisions which possibly affect them are made. The adequate representation in decision making bodies and genuine consultation of the rural populace in the constitution making process ensures a constitution that reflects the broad, unique and diverse interests of the rural populace, and in turn, offers legitimacy to such constitution. Furthermore, public participation in the constitution making process is believed to strengthen national unity if is inclusive. This is more relevant in a post-conflict like Zimbabwe, which is deeply polarised along political and sometimes ethnic lines.

To achieve genuine and meaningful public participation, public consultation should not merely be a formality. It is important for the government to guarantee that such views will be considered and will influence the outcome of the process, otherwise public participation will be perceived as a mere rubber-stamping exercise. Genuine public participation creates feelings of ownership, legitimation and respect for the constitution.

#### **5.4 Ownership and Control of the Constitution Making Process**

Most respondents interviewed were of the opinion that the heavy domination of the political parties to the GPA in the 2009-13 constitution making process had impeded on public participation and thus usurped their right to make a constitution by themselves and for themselves. The COPAC membership was dominated by political parties. The same goes for other institutions responsible for the administration and support of the constitution making process. Moreover, the GPA Principals had veto over any constitutional conflicts arising between the political parties to the GNU. The people, who are the authors of the constitution, were thus reduced to mere observers in their own constitution making process.

It is recommended that for any constitution making process to achieve legitimacy the people must own, control and manage the process and be involved at each and every stage of the process. Any given constitutional reform process is comprised of several and different actors, some with over-lapping and conflicting interests. As such, it is critical to clearly define the roles of these various players. International actors must restrict their role to that of supporting the national actors who must take charge of the process. The external actors must perform their roles without being intrusive in the political issues which are the prerogative of the concerned state. Differentiation must however be made between the roles of the various national actors. The constitution making process must be predicated on the understanding that the people are the owners of the process. The 'people' concept thus entails the local ownership of the constitution making process by the common populace and not the political elites. The people must feel that they own the process, and only then can the resultant constitution foster feelings of ownership.

Despite the majority opinion of the service providers being that the people should take charge and control of the constitution making process, it was also argued by some service providers that because of the technical nature of drafting a constitution, the people should take a back seat and allow the political elites to take charge and control of the process. In an effort to reconcile these two conflicting but equally reasonable arguments, the researcher suggests that whatever method or modalities of constitution making that a country may adopt, the method must guarantee the involvement of the people at each and every stage of the constitution making process for the resulting constitution to achieve legitimacy.

## 5.5 Legal and Political Environment

### 5.5.1 Legal Environment

It is worthy to note that the 2013 Constitution of Zimbabwe and other domestic pieces of legislation recognise the right of the public to participate in the constitution making process. The country is also a signatory to several human rights instruments which recognise, promote and protect the right to public participation in constitution making. However the right to public participation in constitution making can only be meaningfully realised in the presence of other rights. The Human Rights Committee General Comment No. 25 provides for other fundamental freedoms and rights which must be necessarily present to ensure a meaningful realisation of the right to public participation in constitution making. These include, but not limited to, the freedom of opinion, freedom of assembly and association, and freedom of expression.<sup>550</sup>

According to several international and regional human rights instruments such as the Universal Declaration, Covenant on CPR and African Charter, among others, State Parties must take all legislative measures to ensure the recognition and protection of the right to public participation in constitution making and to promote its genuine and meaningful realisation. In a bid to clamp down on dissent, the Government of Zimbabwe, instead of implementing legislative measures to ensure the recognition and protection of the right to public participation, has enacted legislation which seem to curtail such rights. The legal environment in Zimbabwe has made it less conducive to effectively exercise the right to public participation as a direct result of a number of repressive legislation which curtail fundamental rights and freedoms which have either direct or indirect implications on the full enjoyment and realisation of the right to public participation in constitution making.

The Constitution is the supreme law of Zimbabwe and in terms of the doctrine of the supremacy of the Constitution, to which the country subscribes, every law that is inconsistent with the Constitution is invalid to the extent of that inconsistency. In that regard, the researcher recommends the alignment of the country's laws with the new Constitution to allow the unrestricted flow and exchange of information in order to realise genuine and meaningful public participation in future. To that end, repressive legislation

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<sup>550</sup> General Comment No. 25 (note 344 *supra*) para 12.



which place unreasonable restrictions on the effective and meaningful realisation on the right to public participation should be repealed.

The study has shown that the country is reluctant to ratify and domesticate some of the international human rights treaties. The researcher recommends that the government ratifies and domesticates all the international and regional human rights treaties that promote and protect the right to public participation in constitution making and fulfill the obligations imposed by such instruments. In light of some of the responses given by the government on why it has taken long for Zimbabwe to domestic these treaties which cited lack of capacity in government and the conflict between international law and parts of customary law, the researcher suggests that the country adopts a monist approach and do away with the dualistic approach which requires the express domestication for international law to apply in the country's legal system. The monist approach entails a direct application of international law in the national legal system.

#### **5.5.2 Political Environment**

One of the most recurring themes in the interviews concerned the deeply polarised political environment of the country. The political scene is heavily dominated by the ruling ZANU PF and the opposition MDC-T parties. There are 'no people' beyond those active in these two political parties. The animosity between the two parties has, to a greater extent, directly contributed to the polarised political environment in the country. The opposition parties and the civic society have been tagged as 'enemies of the state', as a consequence of MDC-T's relative success in the Zimbabwean political landscape. The ZANU PF government has implemented several malevolent tactics to deal with its perceived enemies mostly through the instrumentality of suppressive legislation, a ruthless police force and military, and a biased state media, which has resulted in a political environment that is not conducive for public participation.

The security sector has been accused of being partisan through the selective application of the law in favour of ZANU PF. The researcher advocates a political environment that recognises and protects human rights enshrined in the country's Constitution. To that end, there is need to depoliticise the intelligence services, police and the military which have been implicated in most atrocious acts of infringement of the fundamental human rights and freedoms through intimidation, violence, torture and abductions of opposition political

parties' supporters. There is also need for supporters of all political parties to learn to tolerate each other and co-exist in tranquility.

The researcher further proposes the depoliticisation of the state media which has long been used by ZANU PF as an apparatus of propaganda. The state media should be impartial and give balanced and fair coverage to all political parties, taking into account the importance of unbiased and adequate information in the effective exercise of the right to public participation. In that regard, the Postal and Telecommunications Regulatory Authority of Zimbabwe (Potraz) must license more independent radio and television stations to 'free the airwaves' and promote media freedom and access to information. As the old adage goes, a well-informed citizen makes informed decisions.

### **5.6 Credibility and Competence of Institutions**

It has been noted that inadequate human and financial resources negatively impacted on the capacity of the institutions responsible for administering and supporting the constitution making process to effectively perform their duties. It was observed that some of these institutions lacked the basic materials such as ink and stamps and were understaffed. Reports also showed that some institutions were predominantly staffed with political appointees, raising questions on the ability of such institutions to function independently and impartially. It was further noted that, in some cases, the institutions' membership was clearly not representative of the population of Zimbabwe due to the heavy domination of the political elites in such institutions.

In the light of the above discoveries, the researcher submits that particular efforts should be made to increase the number of rural participation in these institutions to increase their representativeness, given that the rural populace constitutes the majority of the total population of the country. Additionally, the membership of such institutions should not be partisan or filled with political appointees. The researcher proposes that members of these institutions be voted into office by the public who are the owners of the constitution making process. The institutions should also be dissociated from politics and political influence and strive to serve the interests of the people and not political elites. The organs responsible for drafting constitution should therefore be impartial, independent and professional in the execution of its mandate.

It is also recommended that the government be financially capacitated before embarking on constitutional reform since it is usually the traditionally marginalised communities such as the rural populace which often suffers the most as the government opts to meet only the minimum requirements of public participation procedures. Where the government is financially incapacitated to run effective public participation procedures, it may acquire such financial resources from the international donor community. This may however pose significant challenges in the context of Zimbabwe due to the strained relationship between Zimbabwe and the western countries. As such, it is advisable for the government to mend its relations with the western countries, which form the bulk of the international donor community.

### **5.7 Forms of Participation**

The research established that some participants were not aware of other forms of participation in the constitution making process such as demonstrations and petitions. Most of the participants took participation to exclusively mean voting in the referendum. It is thus suggested that the government and civic society should extensively educate and familiarise the rural populace on other forms of participation prior to the commencement of every constitution making process.

Other respondents revealed that while they were aware of other forms of public participation such as internet-based participation, it was not feasible because of electrical power and technological constraints, and the political environment that subsisted during the constitution making process. It is hereby suggested that the government considers rural electrification to augment the traditional approach of constitution making with social media and web technology. Mobile technology in the form of a simple Short Messaging Services (SMS) could be used in less internet-connected rural communities. Such new technologies will greatly enhance the capacity of the government to reach the remote rural areas.

There was however considerable skepticism among the respondents regarding the use of new technologies. Respondents were suspicious of the government eaves-dropping on their private communications on constitutional matters with friends or families. The respondents were also fearful of expressing views contrary to the government on social media for fear of political and legal repercussions. Against this background, it is therefore suggested by the researcher that, to enable meaningful and constructive debate on

constitutional issues, legislation such as the Interception of Communications Act [Chapter 11:20] (the Act authorises the government to monitor and intercept private communications between individuals) and the Criminal Law (Codification and Reform) [Chapter 9:23] (the Act criminalises the making of certain statements about or concerning the President or his office) should be repealed. Such laws are inconsistent with the Constitution in so far as they place unreasonable restrictions on the right to freedom of expression, which is a prerequisite for meaningful public participation. The government should further tolerate criticism and allow debate on its policies and decisions, in light of the constitutionally guaranteed right to form an opinion and freedom of expression.

## 5.8 Summary

The right to public participation in constitution making is a fundamental human right, which is set out in a number of regional and international human rights instruments, as well as provided for by the supreme law of the country and other several pieces of legislation which together, collectively define the country's legislative framework for public participation in constitution making. The Universal Declaration is one of the primary sources of human rights standards that are also applicable to constitution making. The Universal Declaration is used by several countries to inform or interpret domestic law which pertains to human rights. It sets out the fundamental human rights to be universally recognised and protected. Scholars agree that the right to public participation in constitution making can be logically derived from the meaning of 'democratic participation' in Article 21 of the Universal Declaration, and regardless of the absence of global consensus on the legal status of the Universal Declaration, it is difficult to ignore its legal, political and moral impact. The Human Rights Committee, in *Marshall v. Canada*, held that the right to participate in the conduct of public affairs enshrined in Article 25 of the Covenant on CPR extends to constitution making.<sup>551</sup> Strongly inspired by the Universal Declaration, Article 13 of the African Charter also provides for the freedom to participate in the government of a country. Article 4 of the Harare Commonwealth Declaration further re-affirms the 'individual's inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives.'<sup>552</sup> Similarly, Article VI of the GPA, within which framework the 2013 COPAC Constitution was adopted, recognised the 'fundamental right and duty of Zimbabwean

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<sup>551</sup> *Marshall v. Canada*, Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991, para 5.3.

<sup>552</sup> Harare Commonwealth Declaration of 1991, issued by Heads of Government in Harare, Zimbabwe, 20 October 1991.

people to make a constitution by and for themselves'. Public participation is a fundamental human right in itself and it is also generally recognised as a prerequisite for the meaningful realisation of all other human rights.<sup>553</sup>

The new Constitution of Zimbabwe Amendment Act 20 of 2013 presupposes the people of Zimbabwe as the authors of that Constitution in its preamble which provides that:

*We the people of Zimbabwe, United in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression... Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work, And, imploring the guidance and support of Almighty God hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land.*<sup>554</sup>

This study has however exposed that it is a misnomer to call the 2013 Constitution 'democratic and people-driven', in view of the fact that the constitution making process was heavily dominated by the three political parties to the GPA. As such, the civil society were right to suggest that these parties captured the constitutional project and narrowed it to a struggle over party-political interests at the expense of the will of the people, making the 2013 Constitution an elitist peace charter. The people are the authors of a constitution and no one must be allowed to usurp such right. A people-driven and democratic constitution making process entails the ownership and control of the process by the people. The people must take charge and be involved at every stage of the process. There were however no people to talk about beyond those active in MDC or ZANU PF politics.

Furthermore, the research has uncovered that the country's legal and political environment was not conducive for any meaningful public participation. International human rights treaties recognise that the right to public participation cannot be realised in isolation. The political and legal environment of a country should enable the effective implementation of public participation procedures by recognising the interplay between the right to public participation and other rights or freedoms. The right to public participation in constitution making can only be meaningfully realised when supported by other internationally recognised rights and freedoms such as the freedom of opinion, expression and information, and freedom of movement, assembly and association. The Government of

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<sup>553</sup> Munyinda & Habasonda (note 495 *supra*) ii.

<sup>554</sup> Emphasis supplied.

Zimbabwe's use of repressive legislation such as AIPPA, POSA, Interception of Communications Act and Criminal Law (Codification and Reform) Act, among many such legislation, place unreasonable restrictions and limitations on the full enjoyment and realisation of the right to public participation. Moreover, the deeply polarised political environment of the country that stems from the animosity between the ruling ZANU PF party and the opposition political parties hinders the unfettered flow and exchange of ideas and information, which is one of the prerequisites for a genuine and meaningful participatory constitution making process and has informed on the *modus operandi* for constitution making in Zimbabwe. As Austin explains:

These violent contexts have given Zimbabwe constitution-making and reform processes a particular quality: violence became the repeated 'body language' in the design and practice of the reform processes and thus, together with the substantive documents, part of the country's 'autobiography'.<sup>555</sup>

In the presence of the above discussed legal and political environment in the country, the people cannot meaningfully engage in debate over constitutional matters for fear of political and legal ramifications.

It is therefore against such background that the researcher concludes that despite overwhelming public approval in the referendum, the 2009-13 constitution making process did not create room for genuine and meaningful rural participation. The constitution making process was rather a sad case of 'a constitution to the people', in contravention of Article VI of the GPA which provided for the 'fundamental right and duty of Zimbabwean people to make a constitution by and for themselves.'

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<sup>555</sup> R Austin 'The Zimbabwean Constitutional Reform Process: The History of Zimbabwe's Constitution-making Process 1888 to 2008' in A Sachs *et al* 'Writing Autobiographies of Nations' (2009) *NIMD*, 73.

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## **APPENDIX A: INFORMED CONSENT FORM**

### **Research Topic: 'Public Participation in the Drafting of the 2013 Zimbabwean Constitution: The Role and Significance of the Rural Populace'**

#### **Introduction**

Thank you very much for your time. My name is Musindo Tariro. I am a Master of Laws (LL.M) student (11585467) at the University of Venda, South Africa and I am conducting this research for academic purposes. This document serves to provide you with all the relevant information that you might need in order for you to make an informed decision on whether you would want to participate in the study or not.

#### **Purpose of the Study**

Zimbabwe has over the years failed to institute constitutional reform, and after such several futile efforts a constitution was adopted in 2013. It was however argued by some segments of the civil society that the resultant Constitution was defective in regard to the process by which it was negotiated and adopted. The purpose of this study is therefore to evaluate the procedural aspects of public participation in the constitution making process which resulted in the adoption of the Constitution of Zimbabwe Amendment Act 20 of 2013. Emphasis is given on the participation of the rural populace in that process.

#### **Type of Research Intervention**

The interview will be a face-to-face individual interview which will be conducted in a setting meant to ensure your privacy and confidentiality. The approximate duration of the interview is 45 minutes.

#### **Participant Selection**

The purpose of the study is to determine the participation, role and significance of the rural populace in the 2009-13 constitution making process. As a result of your relevant experiences in the 2009-13 constitution making process, you have been purposively selected to provide an in-depth understanding on this phenomena being studied.

## **Interview Procedures**

The researcher will employ the use of in-depth semi-structured interviews to get the information relating to your knowledge of and/or participation or lack thereof in the 2009-13 constitution making process.

You will decide the place where you are most comfortable and secure to have the interview conducted. During the interview, you will be asked a series of questions on the topic. No one else may be present for the interview except in instances where you are in need of moral support. Such person may however not answer any question or disrupt the interview proceedings in any way. An interpreter will be provided, in case you have difficulties with the language used in the interview.

If you have any queries or questions on whatsoever subject you may raise those questions at any stage of the interview. If you also do not feel particularly comfortable with any question or for any reason you do not wish to answer a specific question you may also object to answer such question.

Notes will be taken during the interview. An audio recorder will also be used, however with your consent. To prevent the possibility of exposing your identity, the audio tapes will be discarded soon after the information you provide has been captured.

## **Potential Risks**

There are no evident underlying risks to you which may be occasioned by your direct participation in the study. Regardless, the researcher undertakes to not put you in situations where you might be at risk of harm, physical or psychological.

## **Confidentiality**

All data and confidential communications between us will be protected. To that end, you will be allocated either a coded name or a number so as to ensure your anonymity. If ever there is need to reveal identifying information, such information will not be made available to anyone not directly involved in the study.

### **Compensation for Participation**

The research is being undertaken for academic purposes, for the fulfillment of an LL.M degree and therefore there will be no compensation and/or incentive for your participation in this research. Your participation in this study is however greatly appreciated as it will help offer a better understanding on the participation, role and significance of the rural populace in the 2009-13 constitution making process.

### **Participation and Withdrawal**

While your full participation is highly valuable and appreciated, please note that you need not provide any information that you do not want to and you should feel free to withdraw your participation at any point in the interview without any adverse consequences. Also note that you will not be required to furnish reasons for your withdrawal

If this information and consent form contains any words or phrases that you do not understand please feel free to stop me at any stage of the process and I will provide you with the meanings of such words or phrases. In addition, I will also provide you, upon request, with any other information about my research and answer any questions about my studies, my research methods and myself.

### **Further Questions and Concerns**

Should you have any questions after the interviews you can contact me by phone on +263 772 973 267 (Zimbabwe) or +27 073 480 9060 (South Africa), or e-mail tariromusindo@gmail.com. You can also contact my supervisors, Professor AO Nwafor and Advocate HJ Choma, should you have any further questions regarding the approval of this research dissertation, at:

#### **Prof. AO Nwafor**

Head of Department (Private Law)  
School of Law  
University of Venda

#### **Adv. HJ Choma**

Head of Department (Public Law)  
School of Law  
University of Venda

*I, \_\_\_\_\_ the undersigned, understand the nature and objectives of the research project of Musindo Tariro, as well as my potential role in it and my right to withdraw from it at any stage. I voluntarily consent to participate in this study.*

Signature \_\_\_\_\_

(Researcher: Musindo Tariro)

Date \_\_\_\_\_

Signature \_\_\_\_\_

(Participant)

Date \_\_\_\_\_

## APPENDIX B: INTERVIEW QUESTIONNAIRE

**Research Topic: 'Public Participation in the Drafting of the 2013 Zimbabwean Constitution: The Role and Significance of the Rural Populace'**

### DEMOGRAPHIC INFORMATION

**Gender:** Male ☐ Female ☐

**Age:** 18 - 30 ☐ 31 - 50 ☐

51 - 65 ☐ 66+ ☐

**Education:** Never attended ☐ Primary ☐

Secondary ☐ Tertiary ☐

Other ☐

**Employment:** Not Employed ☐ How Respondent Makes a Living: \_\_\_\_\_

Employed ☐ Position: \_\_\_\_\_



## **INTERVIEW QUESTIONS**

1. What do you understand to be a 'constitution' and its purpose?
2. Can you describe the constitutional history of Zimbabwe?
3. According to your understanding, who should take charge and control of the constitution making process?
4. Could you describe your participation in the 2013 constitution making process?
5. What was your primary source of information during the constitution making process and how reliable was it?
6. How free and secure did you feel in terms of expressing your views and participation in the process?
  - Did you in any way feel threatened or intimidated by the presence of the army, police or any other uniformed authorities/officials?
  - Were you coerced or did you feel coerced in any way into participating or withdrawing your participation from the constitution making process?
  - Did you experience any harm, physical or psychological, as a result of your direct or indirect participation or lack thereof, in the constitution making process?
7. What is your view on the competence and credibility of the state institutions responsible for and supporting the constitution making process?
8. To what extent do you think the resultant constitution reflected your will and aspirations?
9. Are there any other issues that have not been covered in this discussion that you want to raise or discuss?

**Date:** \_\_\_\_\_

**Thank you for your participation.**

## APPENDIX C: CONFIDENTIALITY AGREEMENT

*For someone transcribing data, e.g. audio-tapes of interviews*

**Research Topic: 'Public Participation in the Drafting of the 2013 Zimbabwean Constitution: The Role and Significance of the Rural Populace'**

**Research Supervisors:** Prof. AO Nwafor

: Adv. HJ Choma

**Researcher:** Musindo Tariro

- ✓ I understand that all the material I will be asked to transcribe require my utmost confidentiality.
- ✓ I understand that the contents of the tape recordings that I will be transcribing to written form can only be discussed with the researchers.
- ✓ I will not keep any copies of either the transcripts or tape recordings nor allow third parties access to them.

Transcriber's name : \_\_\_\_\_

Transcriber's signature : \_\_\_\_\_

Transcriber's Contact Details (if appropriate):

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Date: \_\_\_\_\_

*Note: The Transcriber should retain a copy of this form*