

THESIS TITLE

An examination of the relationship between public participation in constitution making processes and the objective to write a democratic constitution: The case of Zimbabwe's 2010-13 constitution making exercise

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Dedication

To my Father, the faithful, gracious and merciful God of Israel.

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To my lovely son Israel Tavanoche Mavedzenge, here is the relay button. Take it, run fast and give it to your kids!

Plagiarism Declaration and Referencing style

This is a research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws Constitutional & Administrative law in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations. I have used the *South African Law Journal House Style*.

Signed by candidate

Signature removed

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23 January 2014

Date

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Abbreviations

ANC	African National Congress
BAZ	Broadcasting Authority of Zimbabwe
EISA	Electoral Institute of Southern Africa
GNU	Government of National Unity
GPA	Global Political Agreement
IBA	International Bar Association
MDC	Movement for Democratic Change
MDC-T	Movement for Democratic Change led by Morgan Tsvangirai
NP	National Party
POSA	Public Order and Security Act
SADC	Southern African Development Community
TEC	Transitional Executive Committee
UNDP	United Nations Development Program
ZANU PF	Zimbabwe African National Union Patriotic Front
ZEC	Zimbabwe Election Commission
ZLHR	Zimbabwe Lawyers for Human Rights
ZMC	Zimbabwe Media Commission
ZHRC	Zimbabwe Human Rights Commission

Abstract

In recent years, many States particularly within the SADC and East Africa region have embarked on constitution making exercises as part of the democratization process. There is a strong emphasis that such constitution making processes must be based on public participation. An assumption is often made that public participation in constitution making processes will lead to the creation of a legitimate and democratic constitution. With reference to the Zimbabwe 2013 constitution making process, this dissertation argues that whilst public participation in constitution making will surely enhance the legitimacy of the final constitution, it does not necessarily result in the writing of a democratic constitution. There are contextual and conceptual challenges that constrain public participation from resulting in the creation of a democratic constitution. Using the Zimbabwe 2013 constitution making process and the resultant final constitution as a case study, this dissertation identifies and examines these contextual challenges and they include the legal context prevailing at the time of the constitution making process, political culture of the society and its leadership, manipulation of public views by the dominant forces as well as constitutional illiteracy.

The conceptual challenges relate to the shortcomings of the theoretical foundations of public participation in constitution making. Such theoretical foundations include the doctrine of popular sovereignty and the doctrine of nation building and national reconciliation. The doctrine of popular sovereignty requires that the citizens must decide how they want to be governed and therefore must write their own constitution if they decide to adopt a constitutional democracy. However the doctrine of popular sovereignty does not necessarily require the citizens to write a democratic constitution. It simply requires the people to write their own constitution regardless of the nature of the constitution that they will write. Thus popular sovereignty is more concerned with the legitimacy of the final constitution than its democratic content or quality. As a theoretical foundation for public participation in

constitution making, the doctrine of popular sovereignty does not necessarily lead to the writing of a democratic constitution. The second theoretical basis for public participation in constitution making is the doctrine of national reconciliation and nation building. Too, this does not guarantee the creation of a democratic constitution as some democratic aspects of the constitution may have to be sacrificed in order to ensure that the final constitution preserves national stability and peace. Using Zimbabwe's 2013 constitution making process as a case study, this dissertation examines how these contextual and conceptual challenges constrained public participation from resulting in the writing of a democratic constitution

This dissertation does not however advocate for the exclusion of public participation from constitution making processes. It simply argues that public participation on its own may not necessarily lead to the writing of a democratic constitution. Constitution making must be participatory in order to secure the legitimacy of the final constitution. However public participation must be supported by certain mechanisms and strategies in order for such participation to result in the creation of a democratic constitution. These mechanisms and strategies include nurturing a political culture of democracy ahead of or as part of the constitution making process, developing constitutional literacy within the society before requesting the citizens to provide views on the content of the new constitution, putting in place key transitional mechanisms that are aimed at opening up democratic space for political participation before inviting the public to participate in the constitution making process, developing legitimate and democratic constitutional principles and using such principles to guide public participation towards the writing of a democratic constitution and using an independent tribunal to certify the final draft constitution prior to the national referendum.

Chapter 1: Background and context of the research

1.1 Problem statement

This dissertation challenges the assumption that public participation in a constitution making process will result in the creation or writing of a democratic constitution by the people. By public participation in the constitution making process, this dissertation refers to the various forms of participation by the citizens in the drafting of the text of the constitution. Although in terms of participatory democracy, public participation is an indispensable element of contemporary constitution making processes, such participation does not necessarily lead to the writing of a democratic constitution but rather it increases the legitimacy of the resultant constitution.¹ Thus public participation in a constitution making process increases the chances of the draft constitution being accepted or adopted at the constitutional referendum, but such participation does not necessarily guarantee the creation of a democratic constitution. A democratic constitution making process (in which public participation is embraced) is critical to the acceptability and legitimacy of the final product.² Thus public participation on its own, addresses the question of the legitimacy of the final constitution more than the question of the democratic content of that constitution.

With reference to public participation in the Zimbabwe 2013 constitution making process, this dissertation identifies constraints that limit public participation's chances of resulting in a democratic constitution. These constraints exist at two levels, and the first level comprises of the 'contextual challenges' that are posed by the prevailing socio-political environment. Such contextual constraints include the challenges posed by the legal system, political manipulation, absence of a political culture of democracy and constitutional illiteracy. The

¹ Ghai Y. Constitution Building Processes and Democratization: Lessons Learned (2009) International Democracy and Electoral Assistance publications at 236.

² Hart V. Democratic Constitution Making (2003) United States Institute of Peace Special Report 107 at 2.

second level of constraints is what this dissertation refers to as ‘conceptual shortcomings’ and it comprises of the inherent shortcomings of the theoretical foundations that inform discussions about the need for public political participation in processes such as constitution making. Such theoretical foundations include the doctrine of popular sovereignty and the notion of nation building and reconciliation through constitution building. Public participation in political processes such as constitution making is premised on the doctrine of popular sovereignty which demands that the people are the source of all political power.³ Constitution making is essentially about allocating political power. This dissertation argues that the doctrine of popular sovereignty has inherent deficiencies that limit the chances of public participation from resulting in the writing of a democratic constitution.

From the doctrine of nation building and national reconciliation’s point of view, public participation in constitution making is premised on the need to create a deliberative platform that is aimed at creating a constitution that unites and reconciles the nation.⁴ This dissertation argues that, public participation aimed at producing a constitution that unites and reconciles the nation may conflict with the objective to write a democratic constitution. Inevitably, a constitution that reconciles a nation may have to sacrifice certain fundamental democratic principles.

Given these contextual and conceptual constraints, public participation on its own may not be able to result in the writing of a democratic constitution. There is need for some mechanisms to be integrated into the constitution making process in order to support such public participation to result in the creation of a democratic constitution. The research identifies and discusses some of these mechanisms.

³ Ghai supra note 1 at 236.

⁴Ibid at 240.

1.1 Research Questions

The main thrust for this dissertation is to demonstrate that public participation in a constitution making process does not necessarily result in the writing of a democratic constitution because of certain contextual and conceptual constraints. To that end, the following are the key questions that guided the research;

- a. What views have been expressed in contemporary literature, on the link between public participation in constitution making and the objective to write a democratic constitution?
- b. What does public participation in constitution making involve?
- c. To what extent did the Zimbabwe 2013 constitution making process involve public participation?
- d. What does a 'democratic constitution' entail?
- e. To what extent is the new Constitution of Zimbabwe democratic?
- f. With reference to the Zimbabwe 2013 constitution making process, what are the conceptual constraints that limit the chances of public participation from resulting in the writing of a democratic constitution?
- g. With reference to the Zimbabwe 2013 constitution making process, what are the contextual constraints limiting the chances of public participation from resulting in the writing of a democratic constitution?
- h. What mechanisms can be integrated within the constitution making process in order to support public participation to result in the writing of a democratic constitution?

1.2 Scope of the study

In order to discuss the questions posed above, this dissertation identifies and examines views expressed by selected constitutional law scholars on key constitutional law concepts such as

the tenets of a democratic constitution. The dissertation also examines views expressed by contemporary scholars on constitution making, on the relationship between public participation in constitution making and the objective to write a democratic constitution. The research also explores scholarly views expressed in contemporary literature on political science in order to obtain an understanding of certain political dynamics (such as the doctrine of political culture) that affect public participation in constitution making.

This dissertation relies on the public participation process in the Zimbabwe 2013 constitution making process and the resultant final constitution as the main case study to test the veracity of the claims made about the conceptual and contextual prerequisites for the emergence of a democratic constitution. However, for purposes of drawing lessons and making recommendations, brief references are also made to contemporary constitution making exercises such as the South Africa's 1996 and Kenya's 2010 constitution making processes. The background and context of Zimbabwe's 2013 constitution making process shares some similarities with Kenya's 2010 and South Africa's 1996 constitution making processes in the sense that all these processes aimed to write a new democratic constitution as part of the process of resolving an internal socio-political crisis characterized with political dictatorship that resulted in violation of human rights. Of course there are differences in terms of how each constitution making process was executed.

Due to the dearth of literature on the Zimbabwe 2013 constitution making process, the research relied on reports produced by the Parliamentary Committee managing the constitution making process as well as reports produced by the Zimbabwean civil society and international organisations that were engaged with the Zimbabwe 2013 constitution making process. The author also used his own knowledge about the Zimbabwe 2013 constitution making process as he was involved in that process as a keen observer.

1.3 Methodology

This research focuses on and examines the views expressed in constitutional law text books, journal articles, online publications and relevant court judgments. The research also relies on information gathered by the author when he observed the Zimbabwe 2013 constitution making process.

1.4 Literature views on public participation in constitution making and the objective to create a democratic constitution

Landau (2013) makes a very pertinent observation that there is a body of literature on constitution making which emphasizes the need to make constitutional politics participatory.⁵ More specifically, this body of literature advocates for public or citizen participation in constitution making processes. Although this body of literature constitutes divergent views on some aspects of citizen participation in constitution making, it consistently makes one assumption. This assumption is that, public participation in constitution making will result in the creation of a democratic constitution. The work of Vivien Hart (2003), Louise Olivier (2007), Susan Wing (2008) and Angela Banks (2008) is part of this body of literature and their views are herein discussed to demonstrate the existing assumption that public participation in constitution making will lead to the creation of a legitimate and democratic constitution that guarantees a sustainable constitutional democracy.⁶ However, I contend that, contrary to this widely held theoretical belief, public participation does not necessarily lead to the writing of a democratic constitution because of potential contextual and conceptual constraints that operate against such participation in constitution making processes. This dissertation is inspired by David Landau (2013)'s presentation of Venezuela's 1999

⁵Landau D. Constitution Making Gone Wrong (2013) 64 (5) *Alabama Law Review* 923 at 933.

⁶ There are many other authors who make the same assumption, but there is not enough space to discuss all of them. For a detailed discussion about such issues see Elster J. and Slagstad R. (eds.), *Constitutionalism and Democracy*, (1988) Cambridge University Press.

constitution making process as a case study of high levels of participation that apparently did not prevent the constitution making process from being used to impose a competitive authoritarian regime of the then President Hugo Chavez.⁷ For this research, the Zimbabwe 2013 Constitution making process is discussed below as a living case study of how this assumption was actually tested and the result was that, public participation is definitely necessary for purposes of producing a legitimate constitutional order but it does not necessarily lead to the creation of a democratic constitution. However, before engaging in that discussion; I will first discuss the views of some of the scholars on constitution making, reflecting the assumption that public participation in constitution making will necessarily result in the creation of a democratic constitution.

According to Hart (2003) constitutions must be based on the will of the people and as such, involving the people in constitution making is the best way of arriving at a ‘democratic’ constitution.⁸ Hart (2003) suggests that contemporary constitution making should depart from the traditional old constitution making model where constitution making was a preserve of the elites. To that end, she argues that;

‘We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues...’⁹

She further argues that, according to the norms of democracy, there is a moral and perhaps a legal claim for citizens to participate in constitution making and therefore contemporary constitution making must be based on extensive public participation in the process of drafting the text of the constitution.¹⁰ For Hart (2003), a democratic constitution is no longer simply one that establishes democratic governance but one whose text is drafted through a

⁷Landau supra note 5 at 140.

⁸Olivier L. *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) OSISA at ii.

⁹Hart supra note 2 at 3.

¹⁰Ibid at 4.

democratic process based on public participation.¹¹ Having described a democratic constitution as one produced through public participation, Hart (2003) makes significant recommendations on how public participation in a constitution making process can be achieved.¹² She suggests such great ideas like setting aside adequate funding, providing civic education and allowing enough time for public consultations as means of boosting public participation in constitution making.¹³ However, she does not discuss how such public participation will practically lead to the writing of the intended democratic constitution given the potential contextual and conceptual challenges. What she simply suggests therefore is that a constitution making process must embrace public participation and a democratic constitution is one that is produced through a democratic process. Failure to discuss how public participation in constitution making practically leads to the creation of a democratic constitution reflects an underlying assumption or creates an impression that a democratic constitution making process based on public participation will on its own lead to the writing of the desired democratic constitution. Other scholars who include Olivier (2007), Wing (2008) and Banks (2008) make the same assumption as well. For instance, without discussing how public participation in the drafting of the text of the constitution will lead to the writing of a democratic constitution, Olivier (2007) argues that constitutions must be based on the will of the people and as such, involving the people in constitution making is the best way of arriving at a democratic constitution.¹⁴ Without explaining how public participation in constitution making can lead to the writing of a democratic constitution, Wing (2008) argues that, involving the public in the process of drafting the text of the constitution will usher in legitimate constitutional democracy.¹⁵ In her discussion of the traditional elitist approach to

¹¹Hart supra note 2 at 4.

¹²Ibid at 7-9.

¹³ Ibid.

¹⁴ Oliviersupra note8 atii.

¹⁵Wing S. *Constructing Democracy in Africa: Mali in Transition* (2008) Palgrave Macmillan at 20-23.

constitution making versus the new participatory approach, Banks (2008) argues that, public participation in constitution making improves the democratic quality of the content of the final constitution.¹⁶ Thus when one reads through the work of these scholars and many others, there is an underlying assumption that public participation in the drafting of the text of the constitution will necessarily lead to the creation of a legitimate and democratic constitution. These scholars overlook the potential contextual and conceptual challenges that could prevent public participation in constitution making from producing a democratic constitution.

1.4.1 The Zimbabwe Global Political Agreement and the assumption that public participation in constitution making process will lead to the writing of a democratic constitution

The assumption that public participation in constitution making will lead to the creation of a democratic constitution was also reflected in the Zimbabwe Global Political Agreement (hereafter referred to as the GPA), which is a political settlement reached between the Zimbabwe African National Union Patriotic Front (ZANU PF) and the two formations of the Movement for Democratic Change (MDC).¹⁷ In 2008, as part of an effort to resolve the political crisis that had been bedeviling Zimbabwe since 1999, the Southern Africa Development Community (SADC) facilitated a political settlement involving the three main political parties wherein the parties would work together to resolve the crisis. One of the issues to be tackled as part of the process of resolving the crisis was to undertake a constitution making process. Through article VI of the GPA, the parties undertook to conduct a ‘people-driven’ constitution making process that would produce a constitution that ‘deepens

¹⁶Banks M. Expanding Participation in Constitution Making: Challenges and Opportunities (2008) 49 (4):2 *Wm. & Mary L. Rev.* at 1043.

¹⁷Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe.Global Political Agreement (GPA) on 15 September 2008.

democratic values and principles'.¹⁸ Essentially the parties to the GPA committed themselves to undertake a constitution making process that is based on extensive public participation and that produces a democratic constitution. Article VI of the GPA outlined the key stages which the intended constitution making process would involve in order to ensure that the process was based on public participation. The assumption reflected in article VI of the GPA was that if the Zimbabwean citizens would be allowed to write their own constitution by participating in this process, they would write a democratic constitution. This research paper argues that, perhaps the GPA negotiators, particularly those from the pro-democratic MDC (the majority of which are constitutional law experts) seem to have been convinced by the same kind of thinking as that of Hart (2003), Olivier (2007), Banks (2008) as well as Wing (2008) and therefore made an assumption that public participation in the Zimbabwe constitution making process would lead to the writing of a democratic and legitimate constitution, which in turn would usher in democratic institutions and processes that are necessary to dislodge the government of President Robert Mugabe.¹⁹

After the signing of the GPA by ZANU PF and the two formations of the MDCs, most western donors through the United Nations Development Program pledged their support for the Zimbabwe constitution making process. Landau (2013) correctly observes that, there are widespread recommendations made to the United Nations and international donors, which assume that public participation in constitution making guarantees the creation of a democratic and legitimate constitution.²⁰ Consequently, the assumption that public participation in constitution making processes will lead to the creation of a democratic constitution is often reflected in constitution making processes where the United Nations and

¹⁸Article 6 of the GPA.

¹⁹ The MDC-T negotiating team was led by prominent constitutional lawyers namely Professor Welshman Ncube and Advocate Honorable Tendai Biti.

²⁰Landau supra note5 at 977.

these international donors have played a significant role.²¹ The Zimbabwe 2013 constitution making process is one such process in which western international donors through the United Nations Development Programme (UNDP) provided huge funding and technical assistance.²² In the project document which forms the basis of the UNDP and international donors' support for the Zimbabwe constitution making process, the UNDP stated that;

the overarching goal of the project is to support the Government of Zimbabwe to prepare for and conduct a participatory, inclusive and transparent constitution making process to lead to the following outcomes: strengthen the rule of law, advance commitment to principles of popular participation in governance; and entrench principles of constitutionalism.²³

Thus as Landau (2013) argues, the UNDP and international donors assumed that if the Zimbabwe constitution making process was done in a manner that embraces public participation, such participation would lead to the writing of a constitution that deepens democratic governance in Zimbabwe.²⁴

The purpose of this dissertation is not to advocate for a return to the old model of constitution making, where constitutions were made by the few elites. Rather this dissertation seeks to contribute towards knowledge on how to strengthen public participation in constitution making processes so that such participation can successfully result in the creation of a democratic and legitimate constitution. To that end, this research argues that, in as much as public participation in constitution making is necessary for purposes of securing legitimate constitution, such participation on its own does not necessarily lead to the creation of a democratic constitution. There are contextual and conceptual constraints that limit the chances of public participation from leading to the writing of a democratic constitution.

²¹Ibid 937.

²²United Nations Development Programme (UNDP) Zimbabwe's Project Document titled '*Support to Participatory Constitution Making in Zimbabwe Project (SPCMZ)*'. Available at: <http://www.undp.org.zw/focus-areas/democratic-governance/support-to-participatory-constitution-making-in-zimbabwe-project-spcMZ>(accessed on 24 October 2013).

²³ Ibid.

²⁴Ibid.

Using Zimbabwe's 2013 constitution making process as a reference point, these constraints are fully discussed and recommendations are made on how to address such constraints.

1.5 Structure of the Dissertation

Chapter 1: Provides the background and context of the research

Chapter 2: Defines 'public participation in constitution making' and 'a democratic constitution', as the key concepts underpinning this research. Having defined these two concepts, this chapter advances an argument that the Zimbabwe 2013 constitution making process was a process that significantly involved public participation but such participation could not result in the writing of a democratic constitution as assumed.

Chapter 3: Using Zimbabwe's 2013 constitution making process as a case study, it identifies and discusses the contextual and conceptual challenges that constrain public participation from resulting in the writing of a democratic constitution.

Chapter 4: Borrowing lessons from South Africa's 1994 and Kenya's 2010 constitution making processes, this chapter identifies and discusses recommendations concerning mechanisms and strategies that can be used to support public participation in constitution making process to result in the writing of a democratic final constitutional text.

Chapter 2: Conceptual Foundation

2.1 Defining public participation in constitution making

2.1.1 Introduction

Whilst there is a general agreement in literature on constitution making that, public participation is a critical component in the constitution making process, there is no clear definition of what such participation entails.

In order to establish what public participation in constitution making comprises of, the starting point would be to consider MacKinnon (1973)'s broad definition of public participation which is '*social action including that of a political nature, to which the people affected by that action contribute their ideas effectively...*'²⁵ This view highlights two important things which are; that there must be a process which affects the public and the participation of the public must be effective. Constitution making is a process that definitely affects the lives of the members of the public. In the sense of MacKinnon (1973), participation in a constitution making process would therefore refer to any form of action through which the members of the public effectively influence the outcome of the process, which is the content of the final constitution. Such forms of action include electing a constituent assembly, submitting views during public consultative meetings, making written submissions and voting in a constitutional referendum.²⁶ Narrowing down from MacKinnon (1973)'s broad definition of public participation, Hart (2003) provides a more specific indication of what constitutes public participation in a constitution making process. Hart (2003) suggests three critical elements that public participation in a constitution making process must involve and these are social inclusivity, extensive public consultations and that

²⁵ MacKinnon F. *Postures and Politics: some observations on participatory democracy* (1973) University of Toronto Press at 4.

²⁶ Hart supra note 2 at 1.

the final draft constitution must be representative of the views expressed by the participants.²⁷ In the sections that follow, these elements of public participation in constitution making are separately discussed with a particular focus on how they were incorporated and implemented under the Zimbabwe's 2013 constitution making process.

2.1.2 Social inclusivity

Much of the literature on public participation in constitution making argues that the process must be socially inclusive. Social inclusivity is the idea that all relevant social groups of the society must equally and effectively participate in a constitution making process.²⁸ Such social groups may vary from one context to another but they may include religious and cultural groups, youths and children, women's groups, political parties and civil society. Therefore there cannot be a fixed list of social groups which every constitution making process must include for it to qualify as embracing public participation. However, for each constitution making process, the relevant social groups must be identified. Under the Zimbabwe's 2013 constitution making process, religious groups, liberation war veterans, children's groups, disabled persons, women's groups, civil society, cultural minority groups, Zimbabweans living in the diaspora and political parties were identified as the key relevant groups which would participate in the process.²⁹ To achieve social inclusivity, there is need to make deliberate efforts to identify and secure the participation of special, previously disadvantaged or marginalized groups.³⁰ Special groups vary with contexts but could include the disabled persons, children and nationals living in the diaspora. Under the Zimbabwe 2013 constitution making process, such special groups were identified as comprising of the disabled persons, the children, Zimbabweans living in the diaspora and minority cultural

²⁷Ibid at 7.

²⁸Ibid.

²⁹Zimbabwe Constitution Select Committee (COPAC): 'National Statistical and Narrative Report' Version 1 (2012). Available at: <http://www.copac.org.zw/> (accessed 21 June 2013).

³⁰ Skjelten S. *A people's constitution: Public participation in the South African constitution-making process* (2006) Institute for Global Dialogue at 40.

groups like the Tonga people.³¹ Thus to achieve social inclusivity, those managing the constitution making process must ensure that they identify these special, and or disadvantaged groups so that they are accommodated to participate in the process.

Although some of the literature has argued that social inclusivity requires equality in participation; practically this may not be possible to achieve as some participants will always have a stronger voice than others.³² This reality has been observed in most constitution making processes including in Zimbabwe where members of the dominant political parties had a stronger voice than members of smaller parties.³³ Nonetheless, public participation in constitution making process requires that the consultative process be socially inclusive in the sense that all relevant social groups, including those previously marginalized groups, effectively participate in the process. Given the broad diversity of social groups that were consulted under the Zimbabwe 2013 constitution making process, this dissertation argues that the process involved all the relevant social groups although one cannot claim that all these groups participated equally.³⁴

2.1.3 Consulting the stakeholders

Stakeholder consultation entails collecting the views of the people on the different subjects or themes of the constitution.³⁵ This is also commonly referred to as public consultation. Stakeholder consultation takes different forms depending on the environment under which the constitution making process is being undertaken, but the common forms include holding public meetings, accepting written submissions from individuals or groups and holding a

³¹Zimbabwe Constitution Select Committee (COPAC): National Statistical and Narrative Report (2013) at 3.

³²Landau supra note 5 at 968.

³³Ndlovu-Gatsheni S. 'The Constitution and Constitutional process in Zimbabwe' (2010). Available at: <http://www.solidaritypeacetrust.org/703/the-constitution-and-the-constitutional-process-in-zimbabwe/> (accessed 21 June 2013).

³⁴ COPAC supra note 31 at 3.

³⁵Skjelten supra note 30 at 31.

referendum to give the citizens a chance to adopt or reject the final draft constitution.³⁶ Thus each environment will demand certain types or forms of public consultations. Under the Zimbabwe 2013 constitution making process, public consultation included holding public outreach meetings, of which a total of 4821 meetings were held in the country's 1950 wards.³⁷ To enhance participation in the rural areas, at least three public consultative meetings were held in each ward.³⁸ Another form of public consultation used was accepting written submissions especially from civil society and the Zimbabweans living in the diaspora of which over 100,000 online submissions were received.³⁹ A national referendum was held in which a total of 3, 316 082 citizens participated and 3, 079 966 voted in favour of the proposed draft constitution.⁴⁰

Advocates of public participation in constitution making who include Skjelten (2006) have argued that public participation in constitution making should be based on appropriate and effective methods of stakeholder consultation, capable of obtaining the views that truly reflect the wishes of the stakeholders.⁴¹ This dissertation agrees with this view and there are at least three implications that arise from this argument in terms of defining what public or stakeholder consultation entails in a constitution making process. These implications are discussed in the paragraphs that follow.

The first is that, the forms or methods of stakeholder consultation must be carefully designed taking into account the nature of targeted stakeholders and the prevailing socio-political

³⁶Brandt M. et. al.'*Constitution-making and Reform Options for the Process*' (2011) Interpeace at 7. Available at: <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf> (accessed 21 November 2013).

³⁷COPAC supra note 31 at3.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰Electoral Institute for Sustainable Democracy in Africa (EISA) report on Zimbabwe's 2013 *Constitutional referendum*. Available at: <http://www.eisa.org.za/WEP/zim2013referendum.htm> (accessed on 19 October 2013).

⁴¹Hyden G. *Constitution-Making and Democratisation in Africa* (2001) Africa Institute of South Africa at 154.

environment.⁴² For instance, the authorities must ensure that the stakeholders feel comfortable to freely express their views during those consultative meetings and there must be effective mechanisms in place to accurately record those views and submissions.⁴³ Thus different forms of public consultation may be used, but the most critical issue is that the stakeholders must freely and effectively engage with the constitution making process by way of giving their own views on the different themes and subjects of the constitution. Notwithstanding the incidences of political violence and polarization, the Parliamentary committee leading Zimbabwe's 2013 constitution making process made efforts to ensure that the stakeholders would be able to freely participate in the constitution making process.⁴⁴ Some of the measures include holding special consultative meetings with certain social groups like the children and the disabled persons, who normally would not be able to participate in the usual consultative meetings⁴⁵. The Parliamentary committee also ensured that communication during the meetings was done using the local languages in order to ensure that the local communities were not marginalized from the deliberations.⁴⁶ At least three rapporteurs with cameras and video recording equipment were allocated per each meeting to ensure that data would be sufficiently recorded.⁴⁷ The success of these measures to stimulate free and effective public participation is the subject of discussion under the next chapter, which examines contextual and conceptual constraints that restrict public participation from resulting in the creation of a democratic constitution.

⁴²Brandt et al. supra note 36 at 7.

⁴³Skjelten supra note 30 at 56.

⁴⁴COPAC supra note 29 at 3.

⁴⁵ COPAC Special Outreach Report on consultations with the Children. Available at: http://www.copac.org.zw/index.php?option=com_phocadownload&view=file&id=234&Itemid=302, (accessed on 19 October 2013).

⁴⁶ COPAC's Foreword to the National Statistical Report. Available at: http://www.copac.org.zw/index.php?option=com_content&view=article&id=620&Itemid=346, (accessed on 19 October 2013).

⁴⁷Ibid.

The second implication of the aforementioned argument on appropriate and effective forms of stakeholder engagement is that, public consultations must achieve the inclusive participation of all the identified stakeholders.⁴⁸ Thus in keeping with the spirit of social inclusivity, the process of consultation must not exclude any of the identified stakeholders.⁴⁹ This argument implies that, whatever forms of consultations used, they must be extensive to reach out to all the relevant stakeholders or social groups. Under the Zimbabwe constitution making process, extensive consultations (amounting to 4821 public meetings for all the 1950 wards in the country) were made to reach out to every ward in the country.⁵⁰ Various local civil society organisations were incorporated into the thematic subcommittees of the Parliamentary committee managing the constitution making process, in order to ensure that the civil society was represented in the decision making processes.⁵¹ Monthly briefing meetings were conducted between the Parliamentary committee managing the constitution making process and the leadership of local civil society, in order to ensure that civil society was kept up to date on the progress of the constitution making process.⁵² The constitutional referendum (which was another form of public consultation) on the draft constitution was held under a generally peaceful environment, with adequate polling stations established around the country to ensure easy access to the voting process.⁵³ In order to make it easy for the citizens to vote in the referendum, Government relaxed the voting requirements to the effect that citizens did not have to be registered voters for them to cast their vote. They simply needed to produce just a national registration document in order to cast a vote at the referendum.⁵⁴ As a result most people were able to vote as they did not have to be on the national voters' roll for them to be allowed to cast a vote. If the referendum would be based

⁴⁸Skjelten supra note 30 at40.

⁴⁹Brandt et al. supra note 36 at 7.

⁵⁰COPAC supra note 29 at 3.

⁵¹ Ibid.

⁵² Ibid.

⁵³COPAC supra note 29.

⁵⁴ EISA supra note 40.

on the national voters' roll, many people would be excluded from the voting process as they were not registered voters.⁵⁵ Thus whilst not every social group had an equal voice in the Zimbabwe constitution making process, all relevant groups were consulted from the planning stages to the rolling out of public outreach meetings and right up to the holding of the constitutional referendum.

The third implication is that different social groups may require different forms of consultations and in some cases, special methods should be used to reach out to special groups.⁵⁶ For instance, special consultative meetings could be required for the disabled and the children. Under the Zimbabwe 2013 constitution making process, such special consultative meetings were held with the identified special social groups who included the children, Zimbabweans living in the diaspora and the disabled persons.⁵⁷

Thus promoting public participation in constitution making is not just about identifying stakeholders in a socially inclusive manner but implementing processes through which the views of all the identified stakeholders are obtained and recorded. Considerable strides were made under the Zimbabwe 2013 constitution making process to ensure that the process of public consultation was socially and politically inclusive from the planning stage up to the public outreach meetings.

2.1.4 Consideration of the views of the public in drafting the final constitutional text

The exercise of collecting views from the public must not be merely a smokescreen exercise but the views expressed by the citizens must inform the drafting of the final constitution.⁵⁸

⁵⁵ See 'An Audit of Zimbabwe's 2013 Voters Roll (2013) Research and Advocacy Unit at 2. Available at: <http://www.swradioafrica.com/Documents/Audit%20of%20June%202013%20Voters%20Roll%2016%20July%202013.pdf> (accessed on 22 January 2014).

⁵⁶ Skjelten supra note 30 at 32.

⁵⁷ COPAC supra note 29..

⁵⁸ Hyden supra note 41 at 154.

Thus the content of the final constitution must be representative of the views collected during the public consultations process.⁵⁹ The essence of public participation in a constitution making process is therefore that the views expressed by the public must be reflected in the final draft constitution.

Other scholars on constitution making have counter argued that, in reality it is impossible for all the views of the stakeholders to be incorporated into the final constitution.⁶⁰ For instance, different social groups may give conflicting views on the same subject and this creates a scenario where some of the views have to be dropped.⁶¹ Sometimes, the final constitution may exclude some of the views of the public in order to balance competing social group interests. These issues are fully examined in the next chapter as part of the discussion on why public participation may fail to result in the writing of a democratic constitution. Nonetheless, for now it is important to note that there is a strong view in the participatory constitution making discourse that, public participation entails that the final constitution must be representative of the views of the public that participated in the making of that constitution.

Whether the final constitution of Zimbabwe is representative enough of the views expressed by the public during the constitution making process, is subject to debate. However what is clear is that the Zimbabwe constitution making exercise of 2013 involved an extensive public consultative process that reached out to almost all key and minor social groups, and during their participation, members of the public expressed conflicting views on the same constitutional principles such as presidential powers and terms limits.⁶² In the final analysis, some groups' views were more accommodated than others. For instance, there is a general agreement amongst the women's civic groups that the final constitution accommodated their

⁵⁹ Ibid.

⁶⁰ Landau supra note 5 at 959.

⁶¹ Ibid.

⁶² COPAC supra note 29.

demands especially concerning the women's rights and issues of gender equality, while members of the gay and lesbians community are of the view that the final constitution completely ignored their views.⁶³

2.1.5 Conclusion on the public participatory nature of the Zimbabwe 2013 Constitution Making process

This research concludes that, indeed there was a significant level of public participation under the Zimbabwe constitution making process but that participation was bedeviled with serious challenges and constraints. These challenges and constraints are the main reasons why public participation under the Zimbabwe 2013 constitution making process failed to result in the writing of a democratic constitution. Although Zimbabwe has its own unique history, these challenges and constraints are not necessarily peculiar to the Zimbabwean case but are conceptually inherent within the general relationship between public participation in constitution making and the objective to write a democratic constitution. As Landau (2013) alludes, the same contextual and conceptual challenges confronted similar constitution making processes that include Venezuela's 1999 process.⁶⁴ Whilst there are certain constraints that were particular to the Zimbabwe constitution making process, the failure of the public participation process to result in the creation of a democratic constitution is not necessarily confined to the Zimbabwean situation but it is a general conceptual issue.

2.2 Defining a democratic constitution and assessing the democratic quality of the final 2013 Constitution of Zimbabwe

⁶³*'Zimbabweans say yes to new Constitution strong on gender equality and women's rights'*. Available on <http://www.unwomen.org/en/news/stories/2013/4/zimbabweans-say-yes-to-new-constitution-strong-on-gender-equality-and-womens-rights>. See also Zimbabwe: New draft constitution includes equal marriage ban. Available at: <http://www.pinknews.co.uk/2013/01/29/zimbabwe-new-draft-constitution-includes-equal-marriage-ban/> (both sites accessed on 18 October 2013).

⁶⁴Landau supra note 5 at 925.

Having demonstrated that some sections of literature assume that public participation in constitution making will lead to the creation of a democratic constitution; and that such an assumption was made in designing and implementing the Zimbabwe's 2013 constitution making process; the next section discusses what in theory a democratic constitution entails; and briefly assesses the democratic quality of the 2013 final constitution of Zimbabwe, which was made through public participation that was underpinned by an assumption that, such participation would lead to the creation of a democratic constitution.

It is impossible to provide an exhaustive description of what constitutes a democratic constitution because constitutions provide for different forms of democracy. However, this research suggests the critical elements of a democratic constitution and argues that there are two parts to what constitutes a democratic constitution. The first part is that a democratic constitution is a constitution that underpins the idea of government by popular sovereignty.⁶⁵ Democracy is a system of governance premised on the basic idea that government must be based on and be respectful of popular sovereignty.⁶⁶ Therefore, even though constitutions may provide for different forms of democracy, the constitution must nevertheless entrench the sacrosanct idea that, the citizens are the determinants of who should govern them and how they should be governed. The new Constitution of Zimbabwe adequately entrenches the idea of government by popular sovereignty through section 3(2) (a)-(f) which provides that; the mandate to govern shall be obtained only through democratic, free and fair elections. Thus the new constitution underpins the principle of government by popular sovereignty.

The second part is that a democratic constitution is a constitution that provides for mechanisms that sustain, protect and implement democracy. These mechanisms include the provision of a bill of rights, constitutional supremacy, judicial review, regular free and fair

⁶⁵ Malherbe R. *Constitutional Law* (2009) Durban: Butterworths at 81.

⁶⁶ Becker 'What is Democracy' 2008, 4. Available at: <http://library.fes.de/pdf-files/bueros/madagascar/05860.pdf> (accessed on 15 June 2013).

elections, transparency and accountability, separation of powers and multipartyism.⁶⁷ Constitutional scholars have argued that democracy on its own is unable to sustain itself and service its own purpose.⁶⁸ From that point of view Diescho (2008) argues that, constitutional democracy, as a system of government where the governor derives power to rule from the governed, exhibits built-in problems.⁶⁹ Thus a constitution that merely provides for government based on popular sovereignty is therefore not a democratically sound constitution because popular sovereignty cannot survive on its own due to what Diescho (2008) refers to as 'built-in' challenges such as the failure to protect itself from manipulation by the government of the day. This research therefore argues that a democratic constitution is one that provides for government by popular sovereignty and at the same time entrenches mechanisms to support and protect such democracy. These mechanisms are separately discussed below, and the final 2013 Constitution of Zimbabwe is examined to establish how far it provides for these mechanisms of protecting constitutional democracy. The purpose of this particular analysis is to establish whether public participation under the Zimbabwe 2013 constitution making process succeeded to lead to the drafting of a democratic constitution.

2.2.1 Judicial independence and impartiality

Judicial independence is a principle which requires that the judiciary branch of government must be independent and officers of the courts should be protected from political influence or other pressures and that, the courts must practice fidelity to the law in their adjudication.⁷⁰ Judicial impartiality is the principle that the judiciary must apply the law without fear, favour or prejudice.⁷¹ A democratic constitution must adequately provide for

⁶⁷ Oliviersupra note8 at31-56.

⁶⁸ Walker N. Constitutionalism and the Incompleteness of Democracy: An Interactive Relationship (2010) 3 *Netherlands Journal of Legal Philosophy* 39.

⁶⁹ Diescho J.B. The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 19.

⁷⁰ Ibid at 18.

⁷¹ Ibid.

both judicial independence and mechanisms to safeguard and promote the impartiality of the judiciary. But perhaps the question is still asked as to how exactly is judicial independence and impartiality essential to the protection of a constitutional democratic system? In a constitutional democracy, an independent and impartial judiciary is essential for the task of implementing and upholding the constitution.⁷² Essentially this is a sensitive task that involves applying the law to adjudicate disputes, reviewing the constitutionality of law and conduct, including the conduct of other branches of government.⁷³ As such, an independent and impartial judiciary is perhaps the most important check and balance on executive and legislative power, the transgression of constitutional limits and the protection of fundamental rights and freedoms.⁷⁴ Thus an independent judiciary is seen as a defender of the constitution from attacks emanating from the executive and the legislature. In order to perform this delicate task, the judiciary must be able to exercise fidelity to the law and therefore must operate in such a manner that it is independent of influences from any other institution or persons but is subject only to the constitution and the law.

A judiciary that is not independent renders the checks and balances implicit in the democratic system ineffectual.⁷⁵ Thus the independence and impartiality of the judiciary is essential for the survival and proper functioning of all the other constitutional mechanisms for the protection of democracy such as constitutional supremacy, separation of powers, judicial review, the rule of law, the bill of rights, government transparency and accountability. The constitution may provide for these mechanisms but their effectiveness in protecting democracy lies in their enforcement. Thus such mechanisms are only able to protect constitutional democracy as far as the judiciary is independent and impartial enough to

⁷² Wesson M and Du Plessis M. Fifteen Years on: Central Issues Relating To the Transformation of the South African Judiciary (2008) 24 *South African Journal for Human Rights* 188.

⁷³ Currie et. al. *The New Constitutional and Administrative Law* (2001) JUTA at 95.

⁷⁴ Oliviersupra note8 at43.

⁷⁵ Goredema C. Whither Judicial Independence in Zimbabwe? In Raftopoulos, B. and Savage, T. (eds.), *Zimbabwe: Injustice and Political Reconciliation*, (2005) Harare, Weaver at 100.

enforce them. For instance, a comprehensive and extensive bill of rights remains meaningless unless the judiciary is able to enforce it when called upon to do so by the affected citizens.⁷⁶ A constitution may declare itself or certain constitutional values supreme but such supremacy can only protect democracy from being undermined by the executive if the judiciary is capable of enforcing the supremacy of the constitution. Thus the effectiveness of all the mechanisms that are put in place through a constitution, to protect human freedom and democracy is dependent on the strength of the judiciary and the strength of the judiciary largely depends on its independence and impartiality. This is why some scholars have described judiciary independence and impartiality as the anti-thesis of arbitrary rule and a cornerstone of constitutional democracy.⁷⁷ Thus in all its facets, a democratic constitution must therefore entrench the principle of judicial independence and impartiality in order to ensure the effective implementation of all the other principles and elements of the constitutional democratic system. More specifically, a democratic constitution must adequately provide for judicial independence and protect judicial impartiality to ensure the impartial application of the law, which is necessary for the protection of democracy from arbitrary exercise of power by politicians in government.

Having explained the significance of judiciary independence to the survival of a constitutional democratic system, this dissertation now proceeds to evaluate the extent to which the final 2013 Constitution of Zimbabwe provides for the independence and impartiality of the judiciary. Before such an evaluation, a brief overview is hereby provided on the state of judicial independence and impartiality as at the time the new constitution was drafted. Such an overview is necessary for purposes of contextualizing the criticism that this

⁷⁶ Ibid.

⁷⁷ Horn N and Bosl (eds).supranote 69 at 19.

research makes relating to the constitution's failure to promote the independence and impartiality of the judiciary.

2.2.1.1 Overview on the state of judicial independence and impartiality in Zimbabwe at the time the new 2013 constitution was drafted

Various reports produced by international human rights organisations, scholars and researchers in the field of human rights have indicated that the period from 2000 to 2013 has seen the ZANU PF government making considerable efforts to bring the judiciary under its direction and control.⁷⁸ The International Bar Association's (IBA) 2004 *State of Justice in Zimbabwe* report concluded that, since the year 2000 the ZANU PF government has consistently attacked the judiciary, forcing several judges to resign well before their tenure.⁷⁹ Notable examples are former Chief Justice Antony Gubbay, who (after ruling against the land reform) was forced to resign after government told him that it no longer had confidence in him and could not guarantee his safety in the country.⁸⁰ Further examples are Justice Ishmael Chatikobo who was forced to resign after ruling in favour of a private radio station, Justice Michael Majuru who was forced into exile and faxed his resignation after receiving threats from government and Justice Sandra Mungwira who was again forced into exile after ruling in favour of opposition activists.⁸¹ After purging the judiciary of judges who were seemingly 'opposed' to the ZANU PF government, President Mugabe began appointing judges with previous connections and known sympathies towards ZANU PF.⁸² The previous constitution effectively allowed President Mugabe to hand pick persons that were loyal to him and

⁷⁸Human Rights Watch 'Our Hands are tied: Erosion of the rule of law in Zimbabwe' (2008) at 14. Available: <http://www.hrw.org/sites/default/files/reports/zimbabw1108.pdf>

⁷⁹ Ibid, Human Rights Watch at 14.

⁸⁰Goredema supra note 75 at 102.

⁸¹ Human Rights Watch supra 78 at 15.

⁸²Ibid at 37.

appoint them as judges.⁸³ Using this authority, President Mugabe unilaterally appointed six new judges to the High Court and one to the Supreme Court just before the new 2013 constitution came into effect.⁸⁴ To ensure the loyalty of the new judges, since the year 2000 the government has allocated farms to 95% of all the members of the judiciary.⁸⁵ Since then, the judiciary has failed to apply the law impartially, making a series of questionable judgments in favour of the government, which scholars and legal experts have described as indicative of a judiciary that is captured by the ruling ZANU PF party.⁸⁶ To date, ZANU PF remains the ruling party following its ‘victory’ in the national government elections held soon after the adoption of the new constitution.⁸⁷

2.2.1.2 Does the new 2013 constitution guarantee judicial independence and impartiality?

The new Constitution produced out of the Zimbabwe 2013 constitution making process formally provides for the independence and impartiality of the judiciary through various sections notably section 164 which clearly provides that, the courts are independent and subject only to the constitution and the law, which they must apply impartially, expeditiously, without fear, favour or prejudice. Section 180 outlines an elaborate, transparent process with checks and balances to ensure that impartial judges are appointed.⁸⁸ However the fatal challenge is that the same constitution through section 13 of Part 4 of Schedule 6 provides that all the existing members of the judiciary must remain in place and the Supreme Court judges will sit as the Constitutional Court until they retire or their tenure ends. As described

⁸³ Section 84 of the previous Constitution of Zimbabwe as amended 30th October 2007 allowed President Mugabe to appoint judges in consultation with the Judiciary Services Commission. Mugabe had handpicked the members of this commission and, so the JSC lacked independence from him.

⁸⁴ Simbisai B. ‘Mugabe judges appointments stink’ *The Zimbabwe Independent* 19 July 2013.

⁸⁵ Human Rights Watch supra 78 at 37.

⁸⁶ Goredema supra note 75 at 117.

⁸⁷ Whilst the ZANU PF victory was endorsed by SADC and AU observer missions, Zimbabwean civil society organisations, international human rights organisations and Zimbabwean opposition parties have accused ZANU PF of massively rigging the elections.

⁸⁸ Section 189 and 189 of the Constitution of Zimbabwe Amendment No. 20 (2013).

under the overview of the state of judicial independence and impartiality in Zimbabwe, the current judiciary has consistently demonstrated partiality towards ZANU PF and lack of independence from President Mugabe.⁸⁹ Therefore, by requiring that this judiciary remain in place and preside over the new constitution, the Constitution of Zimbabwe effectively protected a judiciary that is weak, already captured by ZANU PF and therefore incapable of implementing the new constitution in defence of constitutional democracy against abuse of power by the executive and the legislature. In similar contexts where a new constitution has been introduced as part of resolving an internal national political conflict, the new constitution provides for a process of vetting the sitting members of the judiciary. This is done to ensure that a credible, independent and impartial judiciary that is capable of enforcing the new constitution is put in place. For instance, the new 2010 Constitution of the Republic of Kenya, which was made as part of resolving an internal political crisis, provided for vetting of the then existing judiciary in order to ensure that an independent and impartial judiciary was created and protected.⁹⁰ By retaining the existing judiciary through section 13 of Part 4 of Schedule 6, the new Constitution of Zimbabwe retained a partial judiciary system which is incapable of implementing the constitution especially against the interests of the ruling party ZANU PF and President Mugabe. Thus the new Constitution of Zimbabwe did not adequately provide for an independent and impartial judiciary but rather protected the already existing partial judiciary.

2.2.2 Provision and entrenchment of fundamental rights

Fundamental rights are defined as those entitlements which are due to a human being because he or she is a human being and these can be divided into civil liberties as well as soci-

⁸⁹Goredema supra note 75 at 117.

⁹⁰Section 23 of Schedule 6 of the Constitution of the Republic of Kenya (2010).

economic rights.⁹¹ Fundamental rights are usually provided for under the bill of rights. In a constitutional democracy, the bill of rights functions as a constitutional mechanism to protect individuals by means of guaranteeing them fundamental rights which they can invoke to protect democracy.⁹² For instance, political rights can be invoked to enforce one's democratic right to participate in electoral processes.⁹³ Thus, political rights can be enforced to protect the very basic democratic principle of government by popular sovereignty.

There is a gradual movement in contemporary constitutionalism to ensure that constitutions provide for both civil liberties and socio-economic rights because of the realization that the provision of both types of fundamental rights is at the core of the protection and implementation of democracy.⁹⁴ Thus some scholars have argued that, socio-economic rights are an essential mechanism for enforcing social justice, and the achievement of social justice is a necessary condition for sustainable constitutional democracy.⁹⁵ For instance, socio-economic rights can be invoked in order to ensure that government uses national resources to improve the socio-economic welfare of its people.⁹⁶ Meeting the welfare needs of the people is critical for purposes of building sustainable democracy. Where there are no constitutional mechanisms to enforce social justice, the citizens' welfare may be ignored, and the people could turn against their government or each other, leading to the breakdown of the entire political system.⁹⁷ Thus the provision of both civil liberties and socio-economic rights is a necessary mechanism for supporting and protecting democracy and therefore a democratic constitution must provide for such fundamental rights.

⁹¹Pollis A. A new Universalism. In Pollis A. and Schwab P (eds), *Human Rights: New perspectives, New realities* (2000) Lynne Rienner Publishers at 10.

⁹² Becker supra note 66 at 5.

⁹³ Conte A. and Burchill R. *Defining Civil and Political Rights: Jurisprudence of the United Nations Human Rights Committee* 2ed (2013) Ashgate Publishing, Ltd at 3-4.

⁹⁴ Oliviers supra note 8 at 47.

⁹⁵ Horn N and Bosl (eds). supra note 69 at 27.

⁹⁶ Liebenberg S. The right to social assistance: the implications of 'Grootboom' for policy reform in South Africa (2001) 17 *South African Journal on Human Rights* 256.

⁹⁷ Horn N and Bosl (eds). supra note 69 at 27.

The final constitution produced out of Zimbabwe's 2013 constitution making process provides for an extensive bill of rights that guarantees both civil liberties and socio-economic and cultural rights.⁹⁸ However, the bill of rights allows unfair discrimination against certain social groups of the Zimbabwean population. For instance, section 78(3) prohibits marriage between persons of same sex and therefore allows for unfair discrimination against this social group on the basis of sexual orientation. As already discussed under the section on judicial independence, the failure by the constitution to adequately provide for the independence and impartiality of the judiciary is likely to make the enforcement of the bill of rights ineffectual. As such, the democratic quality of this constitution is questionable in as far as protection of human fundamental rights is concerned.

2.2.3 Transparency and Accountability

Democratic governance requires that a government must be transparent and always account for its decisions and conduct.⁹⁹ Subject to a few exceptions such as those relating to protecting state security and personal privacy, governmental powers must be exercised in a manner that is open to public scrutiny.¹⁰⁰ This view raises two critical questions and the first one is why is transparency and accountability significant for the protection of constitutional democracy?

Public power and influence without accountability amounts to despotism.¹⁰¹ The duty to be transparent and accountable in the exercise of public power is therefore meant to ensure that the public is able to keep the government in check against possible abuse of power. In the context of separation of powers, transparency and accountability places a duty on each arm of government to be transparent and account to the other; thereby making it practically possible

⁹⁸Chapter 4 of the Constitution of Zimbabwe Amendment Act No.20 (2013).

⁹⁹ Currie et. al. supra note 73 at 89.

¹⁰⁰ Oliviersupra note8 at39.

¹⁰¹Cameron E. Judicial Accountability in South Africa (1990) 6 (2) *South African Journal of Human Rights* 253.

for the different arms of government to check against each other's actions.¹⁰² Without transparency and accountability, government has the potential to become arbitrary and self-serving because the public would not have access to government records to detect any possible excesses or abuse of power.¹⁰³

The second question is why should transparency and accountability be a constitutional issue rather than a moral duty of the government? Governments have a tendency of being secretive in decision making and this eventually leads to manipulation and break down of the democratic system.¹⁰⁴ In order to protect the democratic system against such manipulation, transparency and accountability cannot be left as an optional or a mere moral responsibility but should be a constitutional duty imposed upon the government and there must be adequate mechanisms available to the citizens to demand the fulfillment of that obligation.

Therefore a democratic constitution is one that obliges government to uphold the democratic principle of transparency and accountability, while at the same time providing effective mechanisms to actually hold the government accountable and enforcing the transparency obligation. These mechanisms should be available at different levels, including legislative oversight on the executive, judiciary oversight, oversight by independent constitutional institutions and civil society.¹⁰⁵ Furthermore, one of the most important mechanisms of enforcing government transparency and accountability is the provision of the right of access to information, especially the information held by the state.¹⁰⁶ Right of access to information

¹⁰²Ville M.J.C. *Constitutionalism and the separation of powers* (1967) Oxford University Press at 17.

¹⁰³ Democracy Web 'Accountability and Transparency: Essential principles'. Available: <http://www.democracyweb.org/accountability/principles.php>, (accessed on 25 April 2013).

¹⁰⁴EISA supra note 40.

¹⁰⁵ Oliviersupra note 8 at 90.

¹⁰⁶Ibid at 89. See also Jagwanth S. *The Right to Information as A Leverage Right* (2002) University of Cape Town, Open Democracy Advice Centre at 3.

held by the state allows citizens to access government records to scrutinize government decisions especially those that affect individual rights and public interests.

Whilst the new 2013 constitution of Zimbabwe provides for the right of access to information held by the state through section 62 (1), such right is due to Zimbabweans and those that are permanent residents in Zimbabwe only. Section 62(1) provides that only Zimbabweans and those that are permanent residents in Zimbabwe are entitled to the right of access to information held by the state. Therefore the right of access to information held by the state is not available as a mechanism to enforce government transparency and accountability by aliens in Zimbabwe. Currently Zimbabwe hosts about 1,500, 000 aliens mainly from neighboring Mozambique, Malawi and Zambia¹⁰⁷. In terms of section 62(1) these people cannot invoke the right of access to information held by the state to demand government accountability on decisions that affect them. Foreign journalists operating in Zimbabwe may also experience challenges in invoking the right of access to information held by the state unless where such journalists hold permanent residence in Zimbabwe. Furthermore, the right of access to information held by the state is only applicable in so far as the information is required in the interests of public accountability. Section 62(1) provides that, Zimbabweans and those that are permanent residents in Zimbabwe have the right to access information held by the state ‘in so far as the information is required in the interests of public accountability’. Thus anyone claiming this right may be required to demonstrate that they need the information held by the state for purposes that are in the interests of public accountability. This raises a doubt on whether one will be able to claim this right in order to enforce the protection of individual, private rights which may not necessarily be a matter of public accountability or interest. Therefore, there is a possibility that the new constitution has

¹⁰⁷Mike Campel Report ‘*Stateless in Zimbabwe, the Only Country They’ve Ever Called Home*’. Available: <http://www.mikecampbellfoundation.com/page/stateless-in-zimbabwe-plight-of-aliens> (accessed on 21 July 2013).

provided for the right of access to information held by the state in a manner that limits government accountability only to those matters capable of being defined as public issues and not individual private issues. Thus the way in which the constitution provides for the right of access to information held by the state restricts the ability of individuals to demand government transparency and hold their own government accountable.

The new constitution does not provide for strong legislative oversight on the executive. Whilst the new constitution provides for legislative oversight on the executive, it leaves it up to the President to decide whether to attend Parliament and respond to questions or not. Section 140 (3) of the constitution provides that the President ‘may’ attend Parliament to answer questions. The use of the word ‘may’ in section 140(3) does not create a constitutional duty for the President to attend Parliament and respond to questions. Rather section 140 (3) makes it a matter of discretion which the President may choose to exercise or not. This undermines the ability of the legislature as the representative of the electorate to demand accountability from the President as the head of the executive.

Furthermore, as already discussed under the section on judiciary independence, the new constitution failed to adequately provide for an independent and impartial judiciary that is able to exercise strong oversight on the executive and the legislature. As already explained, through section 13 of Part 4 of Schedule 6, the new constitution prohibited any vetting of the existing members of the judiciary and rather retained and protected an already partial judiciary.

Overall the 2013 Zimbabwe constitution making process produced a constitution that fails to provide for strong mechanisms of enforcing government transparency and accountable because it provides for a weak right of access to information held by the state, it fails to

provide for strong legislative oversight on the executive and it retained and protected a weak judiciary that is unable to perform effective oversight on the other branches of government.

2.2.4 Constitutional supremacy and limited government

Most scholars of constitutional law concur that the edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules in the constitution, hence the principle of constitutional supremacy.¹⁰⁸ Constitutional supremacy is a principle that elevates the constitution to the level of being the supreme law of the land unto which all other laws and conduct must conform with.¹⁰⁹ In essence, this is a principle of constitutionalism whose implication is to put government and every citizen below the constitution such that no one can claim to be above the constitution.¹¹⁰

In a constitutional democracy, it is important that the constitution be the supreme law of the land because ideally a constitution is an expression of values and principles by which the people would like to be governed.¹¹¹ Thus by insisting on constitutional supremacy, those values and principles are raised to the level where they become the standards against which all other laws and conduct is measured. Assuming that these values and principles are democratic, their supremacy works as a form of protection of democracy because undemocratic laws and decisions will be invalidated for their want of constitutionality.

Concerning the concept of limited government; the constitution must limit government powers to those provided for under the constitution and such power must be exercised in the manner prescribed under the constitution.¹¹² In other words, government must not have any other powers other than or beyond those provided for under the constitution. Power tends to

¹⁰⁸Horn N and Bosl (eds). supra note 69 at 40.

¹⁰⁹Currie et. al. supra note 73 at 21 and 74.

¹¹⁰Linington G, Reflections on the Significance of Constitutions and Constitutionalism for Zimbabwe. In Masunungure E. V. and Shumba J. M. (eds.), *Zimbabwe: Mired in Transition*, (2012), Harare, Weaver Press at 63.

¹¹¹Currie et. al. supra note 73 at 24-25.

¹¹²Ibid10-11.

corrupt, and absolute power corrupts absolutely and therefore it is safer to limit governmental powers than to give governments a free reign.¹¹³ The idea of limited government is therefore viewed as a constitutional measure to protect the democratic system from possible arbitrary rule by government. Thus constitutional supremacy and limited government are significant mechanisms for protecting constitutional democracy and are necessary elements that a democratic constitution must entrench.

Through sections 2 and 3(1)(a), the new constitution of Zimbabwe declares itself as the supreme law of the Republic and requires all other laws and practices to be consistent with it. Section 3 gives supreme legal status to national democratic values such as respect for the rule of law, human rights and multi-partyism and as such, all other laws and practices are required to be consistent with those values. Section 110(1) provides for limited government by requiring that, the powers of the President are limited to those provided for under the constitution and legislation consistent with the constitution. However, as discussed earlier on, the constitution has failed to provide for strong mechanisms of enforcing government transparency and accountability. The Constitution through section 13 of Part 4 of Schedule 6 prevented vetting of the members of the judiciary by requiring that the existing members of the judiciary shall remain in place and preside over the newly created Constitutional Court. Consequently, the existing members of the judiciary who over the years have demonstrated partiality towards ZANU PF remained in charge of implementing the new constitution.¹¹⁴ This renders constitutional supremacy and the entrenched democratic values hollow because without a judiciary that is capable of enforcing government accountability by applying the constitution impartially, those democratic values cannot be enforced.¹¹⁵ A case in point is *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* CCZ1/13, the first case that was decided

¹¹³Becker supra note 66 at 10.

¹¹⁴Goredema supra note 75 at 117.

¹¹⁵Ibid.

by the new Constitutional Court. In order to understand how the judiciary (Constitutional Court) failed to uphold the constitutional supremacy, there is need to provide a brief background of this case.

Brief background to Jealous Mbwire v Robert Gabriel Mugabe CCZ1/13

The Global Political Agreement which was the basis for the Government of National Unity (GNU) between ZANU PF and the two MDC formations essentially required that the date for the next elections would be set jointly by the three leaders of the parties to the GNU and SADC, after the completion of the constitution making process.¹¹⁶ SADC, which was monitoring the implementation of the GPA by the Zimbabwean government, had taken a position that elections in Zimbabwe should be held only at a time when all the substantive constitutional electoral reforms had been fully implemented.¹¹⁷ ZANU PF was opposed to the idea of implementing electoral reforms ahead of the elections.¹¹⁸ Political analysts argued that ZANU PF was opposed to electoral reforms because such reforms would make it difficult for the party to manipulate the results of the impending elections.¹¹⁹ Given that SADC was opposed to the idea of elections without reforms, ZANU PF had to use the Constitutional Court to impose the date of elections so that President Mugabe would argue before SADC and his partners in the GNU that the court had set the date and he had to comply with the ruling of the court.¹²⁰

2.2.4.1 The Constitutional Court's ruling and what it means for constitutional supremacy in Zimbabwe

¹¹⁶ Article xxiii of the Global Political Agreement supra note 17.

¹¹⁷ Resolution 6.8 read together with 6.10 of the Communiqué of the SADC summit in June 2012 Angola. See also resolution 8 of the Communiqué of the SADC summit held in Maputo June 2013.

¹¹⁸ See the article '*Mugabe to call for early general election*' for a detailed analysis of ZANU PF's position on elections. Available at: <http://www.thezimbabwedaily.com/zimbabwe/13145-mugabe-to-call-for-early-general-election.html> (accessed on 24 October 2013).

¹¹⁹ Zamchiya P. 'Pre-election detectors: ZANU PF's attempt to reclaim political hegemony' (2013) Crisis in Zimbabwe Coalition Publication at 5.

¹²⁰ '*Mugabe to call for early general election*' Supra note 118.

It is argued that ZANU PF and President Mugabe used Mr. Jealous Mawarire to approach the Constitutional Court seeking the court to order President Mugabe to set the date of government elections and that the date must not be later than 30 June 2013 or alternatively not later than 25 July 2013¹²¹. The then Prime Minister of Zimbabwe and leader of the MDC-T, who was cited as the second respondent argued that the applicant's request must be rejected because the operative provisions of the new constitution obliged government and the Zimbabwe Election Commission to undertake a 30 day long voter registration process to allow previously disenfranchised persons to register and vote in the next elections.¹²² If the elections were to be held by 25 July 2013, there would not be sufficient time for government to undertake this constitutionally prescribed voter registration process. This would result in the violation of section 67 right to participate in elections for many Zimbabweans who could not qualify to register as voters under the previous constitution.¹²³ The court however rejected this argument and ruled that elections must be held by 31 July 2013.¹²⁴ This decision was widely criticized by leaders of local opposition parties and constitutional lawyers who accused the new Constitutional Court of failing to uphold and defend the constitution against ZANU PF who had publicly indicated that they wanted the elections to be held as soon as possible and without electoral reforms.¹²⁵ Thus it is widely believed that President Mugabe used the Constitutional Court to impose a date of elections that was favorable to him and his party. The Constitutional Court failed to enforce and protect the supremacy of the

¹²¹ *Jealous Mbwire Mawarire v Robert Gabriel Mugabe* (2013) CCZ1/13 at 4.

¹²² Section 6 (3) of Part 3 of Schedule 6 of the new Constitution of Zimbabwe provides that the Zimbabwe Election Commission shall supervise a 30 day intensive voter registration process prior to the holding of the first elections under the constitution.

¹²³ Many Zimbabweans had been denied citizenship by virtue of chapter 2 of the previous constitution of Zimbabwe. The new constitution granted citizenship to such people through chapter 3 and so they were qualified to register and vote in elections.

¹²⁴ *Jealous Mbwire Mawarire v Robert Gabriel Mugabe* supra note 121 at 25.

¹²⁵ 'Parties gang up against Mugabe' which highlights reactions to the Constitutional Court ruling. *Newsday*, June 6, 2013. Available at: <https://www.newsday.co.zw/2013/06/06/parties-gang-up-against-mugabe/> (accessed on 24 October 2013).

constitutionally entrenched human rights and principles for democratic elections.¹²⁶ Being the first case to be heard by the Constitutional Court, the judgement in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe CCZ1/13* gives credence to the argument that the 2013 Zimbabwe constitution making process produced a constitution whose supremacy is rendered ineffective by the same Constitution's section 13 of Part 4 of Schedule 6 which preserved a weak and partial judiciary that is incapable of enforcing the constitutional values and defend the supremacy of the constitution against manipulation by the ruling politicians.

2.2.5 Constitutional separation of powers

Constitutional separation of powers is the idea that government must be divided into three arms namely the executive, the judiciary and the legislature.¹²⁷ These three arms must operate independent of each other but must have powers to check against each other.¹²⁸ Thus separation of powers creates a system of checks and balances amongst the three branches of government, which protects democracy by making sure that power is not concentrated in one institution or one person but is distributed across the government. The checks and balance system may lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power.¹²⁹ A democratic constitution must therefore entrench separation of powers as a mechanism of checking and balancing government's power and holding that government accountable.

However, there are two types of separation of powers. Separation of powers can be 'strict' whereby the executive and the legislature are completely separated from each other and there is no overlap in terms of functions or personnel.¹³⁰ Alternatively, it can also be 'partial' in which case, some degree of functional and personnel overlap between the executive and the

¹²⁶Section 155 and 156 of the Constitution of Zimbabwe Amendment Act No. 20 (2013).

¹²⁷ Malherbe supra note 65 at 78.

¹²⁸ Ville supra note 102 at 13.

¹²⁹Currie et. al. supra note 73 at 91.

¹³⁰Barber N.W. Prelude to Separation of powers (2001) 60 *The Cambridge Law Journal*59- 60.

legislature is allowed.¹³¹ The partial version of separation of powers is more effective as long as it allows smooth coordination of government functions and promotes checks and balances between the three arms.¹³² The 'strict' version has a tendency of leading to deadlocks between the executive and the legislature and this prevents government from taking action especially when faced with a crisis.¹³³ Thus a democratic constitution should rather provide for the partial separation of powers in order to allow government to discharge its duties but in a manner that is accountable and subject to internal checks by other branches of government.

The new constitution of Zimbabwe produced from the 2013 constitution making process formally provides for partial separation of powers through section 88 (2) which vests executive authority in the President and Cabinet, while section 162 vests judicial authority in the courts. Section 116 vests legislative authority in both the Parliament and the President, although the President cannot perform primary law-making functions. Through section 134, the President is delegated with the authority to enact subsidiary legislation which must be consistent with the original legislation passed by Parliament and the constitution. Thus in terms of the constitution, the legislative authority given to the President is controlled by the legislature and the constitution itself.

However, separation of powers under the Zimbabwe constitution is undermined by the very fact that this Constitution failed to provide for the appointment of a new, independent and impartial judiciary as discussed earlier. Section 13 of Part 4 of Schedule 6 preserved the current judiciary which is already captured by the ruling ZANU PF party and has been unable to assert its independence from the ZANU PF controlled government executive and

¹³¹Currie et. al. supra note 73 at 95.

¹³² Ibid.

¹³³Ville supra note 102 at 23.

legislature.¹³⁴ Absence of an independent and impartial judiciary renders constitutional separation of powers ineffectual because without a strong judiciary, it may almost be impossible to enforce separation of powers to protect democracy and constitutionalism.¹³⁵ Thus although the new constitution provides for separation of powers, it undermines this same doctrine by virtue of section 13 of Part 4 of Schedule 6 which preserved a weak and partial judiciary that is incapable of enforcing the constitution.

2.2.6 The Rule of law

Essentially the rule of law is a principle which requires that all citizens and their government are bound by the same laws and are protected by the same standards or rules; which are interpreted by the same principles at all times, and as fairly as possible.¹³⁶ Some constitutional law experts have argued that, the rule of law is a necessary condition for sustainable constitutional democracy.¹³⁷ Rosenfield (2001) elaborates on this view by arguing that, the rule of law is a cornerstone of contemporary constitutional democracy as it plays a dual role of protecting the normative values of a constitutional democracy against manipulation and it also functions as a vehicle for the enforcement of the same normative values.¹³⁸

For instance in other constitutional democracies like South Africa, the protective role of the rule of law was demonstrated in the case of *Democratic Alliance v President of the Republic of South Africa*(263/11) [2011] ZASCA 241, where the court used the concept of the rule of law to find that the President had acted in a manner that was likely to undermine democracy through weakening the institutional independence of the National Prosecuting Authority of

¹³⁴ Section 13 of Part 4 of Schedule 6 of Constitution provides that the existing members of the judiciary would remain in office and preside over the newly created Constitutional Court.

¹³⁵ Goredema supra note 75 at 100.

¹³⁶ Horn N and Bosl (eds). supra note 69 at 27.

¹³⁷ Horn N and Bosl (eds). supra note 69 at 25.

¹³⁸ Rosenfield M. The Rule of Law and the Legitimacy of Constitutional Democracy (2001) 74 *Southern California law Review* 1307.

South Africa¹³⁹. Sometimes government undermines democracy by abdicating from its responsibilities, for example failure to implement policies that lead to realization of human rights.¹⁴⁰ In such cases, the principle that court decisions must be complied with (which is an integral part of the doctrine of rule of law) functions as a mechanism for the enforcement of democratic values which government would have otherwise sought to leave unimplemented. Thus through the rule of law, government may be compelled to enforce or implement democratic values such as human rights. For purposes of constitutional design, there are two schools of thought on the definition of the rule of law. The first one is the formal perspective of the rule of law which emphasizes that government action must be based on the law and must be carried out in conformity with the procedural requirements of the law.¹⁴¹ This is the principle of legality which does not concern itself with the substance of the law but is focused on ensuring that government acts according to the law.¹⁴² The other school of thought is the material side from which Dyzenhaus (2007) argues that the rule of law must not only be defined from a formalistic point of view but its substantive side is even more important.¹⁴³ Thus the law in terms of its content must be just and promote the normative values of democracy which include (though not limited to) democratic accountability, transparency, political pluralism and tolerance as well as fundamental rights. Both the formal and material aspects of the rule of law are critical for purposes of protecting and enforcing the constitutional democratic system.¹⁴⁴ The formalistic side ensures that government decisions are in conformity with the law (principle of legality) while the material side ensures that the

¹³⁹*Democratic Alliance v President of the Republic of South Africa* (263/11) [2011] ZASCA 241; para 27-41.

¹⁴⁰ See *Treatment Action Campaign v Minister of Health* CCT 8/02 where Government was indicted against failure to take adequate measures to ensure the fulfillment of the right to adequate healthcare.

¹⁴¹Craig P. Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, (1997) 21 *Public Law* 467.

¹⁴²Currie et. al. supra note 73 at 76.

¹⁴³Dyzenhaus D. The pasts and future of the rule of law in South Africa (2007) *South African Law Journal* 736.

¹⁴⁴ Ibid.

law itself is consistent with the entrenched constitutional democratic values.¹⁴⁵ Therefore, a democratic constitution must entrench the principle of legality as well as democratic normative values which should guide the formulation, interpretation and implementation of all other laws and decisions in future, as means of protecting the democratic system.

The final constitution produced out of Zimbabwe's 2013 constitution making process entrenches the rule of law as a foundational value in section 3, and through section 44, it imposes a duty on all organs of the state to uphold fundamental rights. Section 90 imposes a general duty on the President to uphold the constitutional values, including the rule of law, while section 164 (3) imposes a duty on all organs of the state to respect the rule of law by obeying the decisions of the courts. Thus the new Constitution of Zimbabwe formally provides for the principle of the rule of law. However this is undermined by section 13 of Part 4 of Schedule 6 which preserved the existing weak and partial judiciary and prevented the appointment of new judges for the new Constitutional Court, which could have ushered in a fresh independent judiciary. Effectively section 13 of Part 4 of Schedule 6 kept intact a judiciary system that for long has been captured by the ZANU PF party and enjoys no independence from President Mugabe.¹⁴⁶ Enforcement of the rule of law requires an independent and impartial judiciary that is capable of applying the constitution without fear or favour.¹⁴⁷ Zimbabwe's new constitutional era lacks that kind of a judiciary and therefore the rule of law under the new constitution remains illusory.

2.2.7 Judicial review

Judicial review refers to the institutional arrangements whereby courts of law exercise the power to examine the constitutional validity of the decisions of the legislature, the executive

¹⁴⁵Currie et. al. supra note 73 at 78 and 81.

¹⁴⁶ Human Rights Watch supra 78 at 1-4.

¹⁴⁷Horn N and Bosl (eds). supra note 69 at 17.

and administrative officials.¹⁴⁸ Although some constitutional democracies do not provide for judicial review, this paper argues that governments have a tendency to manipulate democratic principles and judicial review is necessary as a mechanism of ensuring governance is in accordance to the constitutionally entrenched normative values of democracy.¹⁴⁹ In terms of the principle of judicial review, it is possible to challenge the constitutionality and therefore the validity of any law or conduct before a competent court and where the law or conduct is found to be unconstitutional, the court can declare it invalid and therefore of no legal force.¹⁵⁰ Judicial review is therefore a critical mechanism for the protection of democratic values and norms which may be sacrificed by politicians in the executive and the legislature. In most cases, particularly in one party dominant democracies where a single party controls both the legislature and the executive, the citizens have had to rely on judicial review to stop the executive and the legislature from conniving to abuse power to the detriment of such normative values of democracy like human rights.¹⁵¹ Thus, judicial review is one of the critical restraint mechanisms which the citizens can use to protect democracy especially in the absence of other checks and balance mechanisms like legislative oversight or independent constitutional institutions. In fact, in contemporary democracies like South Africa, such checks and balance mechanisms like legislative oversight, civil society and independent constitutional institutions have had to resort to judicial review in order to protect and defend their oversight role and independence which is always under threat from the manipulative tendencies of the executive.¹⁵² Thus, democracy is vulnerable without the power of the courts to determine the constitutionality and validity of laws and decisions made by government.

¹⁴⁸Ibid at 39.

¹⁴⁹Nwabueze B. *Judicialism and Good governance in Africa*, (2009) Nigerian Institute of Advanced Legal Studies at 91.

¹⁵⁰Ibid 93.

¹⁵¹ Choudhry S. 'He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 18.

¹⁵² See *Justice Alliance of South Africa v President of the Republic of South Africa* CCT 53/11 (2011) ZACC para 23 and *Mario Gaspare Oriani- Ambrosini MP v Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly* CCT 16/12 (2012) ZACC para 27.

Even constitutional supremacy would be meaningless without giving the judiciary a mandate to review the constitutionality of laws and government conduct. Therefore, a democratic constitution must provide the judiciary with the power to review government conduct as a means of protecting the democratic system from the day to day manipulative tendencies of the politicians.

The new Constitution of Zimbabwe gives the judiciary the mandate to review the constitutionality of laws and government decisions.¹⁵³ The constitution also created the Constitutional Court and designated it as the chief guardian of the constitution.¹⁵⁴ However the challenge is that the constitution failed to provide for the appointment of a new, independent judiciary capable of exercising such powers of reviewing executive and legislative actions. As mentioned earlier on, the constitution through section 13 of Part 4 of Schedule 6 prescribed that, the existing members of the judiciary must remain in place and occupy the new Constitutional Court, and this resulted in the preservation of a partial judiciary system, long captured by the ruling ZANU PF party.¹⁵⁵ Judicial review can only function as an effective constitutional mechanism to ensure the upholding of the constitution and protection of democracy if such review is performed by a strong, impartial judiciary that is able to apply the law without fear or favour.¹⁵⁶ Unfortunately, as a direct consequence of section 13 of Part 4 of Schedule 6 of the Constitution, Zimbabwe's new constitutional era is dogged by the absence of an impartial judiciary and judicial review remains very weak and unable to protect democratic values. A case in point is the *Morgan Tsvangirai v Chairperson of the Zimbabwe Election Commission and others* EC 27/13 in which the applicant who was a contestant in the 2013 presidential elections approached the High Court (sitting as the Electoral Court) to review the decision by the Chairperson of the Zimbabwe Election

¹⁵³See sections 167(2) (d) and 167 (3) of the Constitution of Zimbabwe Amendment No.20, (2013).

¹⁵⁴ Ibid section 166.

¹⁵⁵ Human Rights Watch supra note 78 at 1-4.

¹⁵⁶ Wesson M and Du Plessis M. supra note 72.

Commission (ZEC) to refuse the applicant's request for access to election materials that include the national voters' roll that was used to conduct the 2013 national government elections. As a contestant in those elections, the applicant needed access to such materials in order to examine whether the elections had been conducted in accordance to the law and the constitution. By denying the applicant access to election materials, ZEC was acting in violation of the constitutionally entrenched principles of democratic elections and the applicant's constitutional political rights under the bill of rights.¹⁵⁷ Without giving reasons, the High Court denied the applicant's request and held ZEC's decision as legally valid. Just as in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe CCZ1/13* the court in *Morgan Tsvangirai v Chairperson of the Zimbabwe Election Commission EC 27/13* failed to uphold and enforce the constitution particularly section 62 (1) right of access to information held by an organ of the state and section 155's principles of democratic elections. The court's verdict is an apparent indicator of lack of an independent judiciary; thereby buttressing the argument that the judiciary is already captured by ZANU PF who want to hide from the opposition any information which could expose the suspected election irregularities.¹⁵⁸ Thus constitutional democracy remains vulnerable under this constitution because the judicial review mechanism which is meant to protect constitutional democracy is undermined by a weak and partial judiciary which is a direct result of the constitution's section 13 of Part 4 of Schedule 6.

2.2.8 Regular as well as free and fair elections

Rousseau argues that the essence of democracy is that the people are the sovereign or highest authority in the state, and they enter into a social contract with their government through which they give the government the mandate to exercise powers on their behalf.¹⁵⁹ In

¹⁵⁷ Section 67(1) which entitles every Zimbabwean the right to a free and fair election, section 62(1) which entitles every Zimbabwean including political parties the right of access to information held by the state needed for purposes of advancing public accountability.

¹⁵⁸EISA supra note 40.

¹⁵⁹Malherbe supra note 65 at 75.

contemporary constitutional democracies, ideally the people exercise such sovereignty and give the mandate to govern through an election. Thus regular, free and fair elections are an important part of democracy. Former United States of America President Abraham Lincoln's famous quote '*Government of the people by the people for the people*' best captures the aspect of democracy which demands that the people should decide whom they want as their government.¹⁶⁰ A government can only be a government by the people if in the first place that government has been chosen by the people themselves. Elections are the means through which people are able to decide whom they want as their governor. Elections are therefore a mechanism through which the idea of government by popular sovereignty is implemented.¹⁶¹ It is important that such elections be held in between constitutionally defined intervals, and they should be conducted in a manner that is free of any fraud, violence or any other form of coercion.

Through section 155 (1), the new Constitution of Zimbabwe prescribes principles of democratic elections which every election in Zimbabwe must adhere to. Section 238 and 239 provide for the establishment and functions of an independent election management body, in line with the democratic principle that democratic elections must be managed by an independent body. Sections 156 and 155(2) respectively prescribe strict democratic guidelines under which elections must be conducted and obliges government to undertake legislative and other measures to ensure that all elections fully adhere to the prescribed principles of democratic elections. However, as discussed earlier on under the section on government transparency and accountability, the constitution provides for weak mechanisms of enforcing government accountability and the rule of law. For instance, the constitution through section 13 of Part 4 of Schedule 6 preserved a weak and partial judiciary that is

¹⁶⁰Keane J. *Democracy: The Rule of Nobody?*(2004) Wissenschaftszentrum Berlin für Sozialforschung at 2. Available at: http://johnkeane.net/wp-content/uploads/2011/01/rule_of_nobody.pdf (accessed on 24 October 2013).

¹⁶¹Malherbe supra note 65 at 74.

incapable of forcing government to fulfill its constitutional duty to ensure that all elections are held in conformity with the prescribed constitutional principles of democratic elections. A case in point is *Nixon Nyikadzinov President of the Republic of Zimbabwe and Others* CCZ34/13 in which the applicant Mr. Nixon Nyikadzino who had been unconstitutionally deprived of a chance to register as a voter, approached the Constitutional Court seeking an order from the court that the date of government elections be pushed further to beyond the set 31 July 2013. The applicant argued that if elections were to be held on 31 July 2013, his right to register as voters and participate in the elections would not be fulfilled. The applicant based his argument on section 67 right to vote and section 6(3) of Part 3 of Schedule 6 which obliges ZEC to conduct an intensive voter registration process for a period of 30 days prior to the holding of the first elections under the constitution. ZEC had not fulfilled this constitutional obligation and if elections were to be held on 31 July 2013, many Zimbabweans in similar circumstances with the applicant would be excluded from participating in these elections. The court refused to grant the applicant's request despite the fact that President Mugabe's decision to set 31 July 2013 as the date of elections would clearly result in the violation of section 155(2) constitutional principles of democratic elections and section 6(3) of Part 3 of Schedule 6 which required a mandatory voter registration process to be carried out before the elections are conducted.¹⁶² The court's failure to stamp its authority in the face of abuse of power by President Mugabe is indicative of a partial judiciary that is unable to apply the law without fear or favour. Thus although the new constitution provides for democratic, free and fair elections, the same is undermined by weak constitutional mechanisms of holding government accountable such as a weak and partial judiciary system.

¹⁶² Section 155 (2) (a) of the Constitution of Zimbabwe obliges the state to take necessary measures to ensure that Zimbabweans who are qualified to vote are registered to participate in elections.

2.2.9 Independent Constitutional Institutions

In discussing the significance of independent constitutional institutions in a constitutional democracy, two critical issues must be pointed out immediately and these are the fact that, independent constitutional institutions differ from one democracy to another and not all democracies provide for these institutions. For instance, in Zimbabwe they include the Zimbabwe Human Rights Commission and the Zimbabwe Media Commission while in South Africa; they include the Public Protector and the Commission for Gender Equality.¹⁶³

Even though some democracies do not have these institutions, they are an important mechanism of protecting the democratic system from manipulation by government because they act as part of a system of checks against possible abuse of power by government and they monitor the general implementation of government policy.¹⁶⁴ For instance the Human Rights Commission in South Africa monitors and assesses the observance of human rights.¹⁶⁵ Amongst other things, this commission therefore checks against decisions by government which may undermine the democratic system through violating human rights. Independent constitutional institutions are therefore a necessary element of the constitutional infrastructure of a democracy, and as such a democratic constitution must not just provide for these institutions but must entrench their independence and give them effective powers to act as robust oversight institutions for purposes of protecting democracy.

Through section 232, the new Constitution of Zimbabwe provides for the establishment of these independent commissions which include the Zimbabwe Human Rights Commission. Sections 233 and 235 respectively mandate these institutions to promote constitutional democracy, and oblige the State to support these institutions to discharge their functions

¹⁶³Chapter 12 of the Constitution of Zimbabwe and Chapter 9 of the Constitution of the Republic of South Africa (1996).

¹⁶⁴Currie et. al. supra note 73 at 90.

¹⁶⁵Section 184 (1) (c) of the Constitution of the Republic of South Africa No. 108 (1996).

impartially and effectively. Thus the new constitution provides for independent constitutional institutions to support, promote and protect constitutional democracy in Zimbabwe. However the challenge could be that the same constitution through section 13 of Part 4 of Schedule 6 guaranteed the continuation of the existing weak judiciary which has over the years demonstrated partiality towards the ruling ZANU PF party and President Mugabe and therefore may not be eager to enforce government accountability especially on politically sensitive matters where the interests of the ruling party and the President are involved. These independent constitutional institutions require an independent judiciary to enforce government accountability. Without a judiciary that is capable of enforcing the constitution, the independent constitutional institutions may not be able to hold government accountable and protect constitutional democracy.

2.2.10 Constitutional guarantee of a multiparty system

A multi-party system is a political system that encourages the general constituency to form political parties and each party has an opportunity to compete for votes from the enfranchised constituents.¹⁶⁶ Multipartyism therefore requires the constitution to guarantee the formation and promote the free participation of multiple political parties in the political system.¹⁶⁷ The existence of multiple political parties provides alternatives for the people during elections. As Olivier (2007) argues, a single party political system represents a single choice for a voter, which in effect is no choice at all, whereas a multi-party system provides a voter with a choice at the ballot, of which the idea of a choice is the essence of democracy.¹⁶⁸ By presenting the electorate with viable alternative choices, multipartyism makes elections meaningful and presents an opportunity for alternation of governing parties, which is

¹⁶⁶ Oliviersupra note8 at35.

¹⁶⁷ Malherbe supra note 65 at 122.

¹⁶⁸ Oliviersupra note8 at37.

something very critical for both the test and survival of democracy.¹⁶⁹ If a party remains in power for too long and without a viable opposition, such a party has a tendency of degenerating into a dictator.¹⁷⁰

Furthermore, the existence of multiple political parties promotes political participation as political parties function as platforms which the citizens can use to participate or demand to participate in political processes.¹⁷¹ Constitutional law scholars also argue that, political competition that is created through the existence of multiple political parties will enhance government accountability in the sense that, such political competition enhances the effective functioning of separation of powers between branches of government.¹⁷² The effectiveness of a system of checks and balances (separation of powers) depends on the level of competition between the branches of government and such competition is partly determined by whether or not those branches are controlled by different political parties.¹⁷³ Where different political parties control the executive and the legislature, there is likelihood of vibrant legislative oversight on the executive because the legislature is likely to be independent and eager to expose any abuse of authority by the executive.¹⁷⁴ Thus a multiparty system enhances and protects the democratic principle of accountability through stimulating political competition in a setting of separation of powers.

Therefore, a democratic constitution must seek to establish a multi-party system for purposes of promoting political competition, promoting political participation and enhancing government accountability.

¹⁶⁹Walker N. supra note 68 at 227.

¹⁷⁰ Ferim V. Flaws in Africa's dominant one party democracies: The case of Cameroon and South Africa (2010) 4 *CJDHR* 29.

¹⁷¹Malherbe supra note 65 at 121.

¹⁷²Levinson D. Separation of Parties, Not Powers (2006) 119 (1) *Harvard Law Review* 4.

¹⁷³Ibid 73.

¹⁷⁴Malherbe supra note 65 at 122.

Through section 3, the new constitution recognizes a multi-party democratic political system as a sacrosanct element of Zimbabwe's politics. Political rights provided for under section 67 are one of the constitutional mechanisms for the establishment of the envisaged multi-party democratic political system. Thus the new constitution produced out of the 2013 constitution making process does provide for a multi-party democratic political system as a mechanism of protecting and sustaining constitutional democracy in Zimbabwe. However, for such a political system to take effect there must be such strong mechanisms of holding government accountable such as an impartial and independent judiciary.¹⁷⁵ However as discussed earlier on, section 13 of Part 4 of Schedule 6 of the Constitution provided for the continuation of the existing weak, partial judiciary that is unable to enforce the constitution to establish the constitutionally envisaged multi-party democratic political system. Therefore, just like every other mechanism provided under this constitution to protect democracy, the multi-party democratic political system remains an illusory because of the fact that the constitution preserved a weak and partial judiciary through section 13 of Part 4 of Schedule 6.

2.2.11 Conclusion on the democratic quality of the final constitution of Zimbabwe

The preceding discussion on the definition of a democratic constitution has indicated that, the final 2013 constitution of Zimbabwe provides for government through popular sovereignty but fails to provide for adequate mechanisms that are strong enough to protect the envisaged constitutional democracy. The biggest democratic deficit of this constitution is its preservation of a weak and partial judiciary through section 14 of Part 4 of schedule 6. Therefore this research argues that this constitution does not qualify to be described as a democratic constitution. Thus as was the case with Venezuela's 1999 constitution making

¹⁷⁵Horn N and Bosl (eds). *supra* note 69 at 41.

process, public participation under the Zimbabwe 2013 constitution making process failed to create a democratic constitution as assumed. With particular reference to the Zimbabwe constitution making process, the next chapter examines the contextual and conceptual constraints that restricted public participation from resulting in the creation of a democratic constitution and rather led to the creation of an undemocratic final constitution.

Chapter 3: Constraints against public participation's chances of resulting in the writing of a democratic constitution

3.1 Introduction

Chapter one has demonstrated that there is a theoretical assumption that public participation in a constitution making process will result in the writing of a democratic constitution.¹⁷⁶ In chapter two, this research identified what public participation in constitution making processes and a democratic constitution entail. The purpose of this research is to argue that although public participation may be a pre-requisite for the writing of a democratic constitution, such participation on its own may not necessarily result in the writing of a democratic constitution. The first reason for that relates to the nature of the relationship between public participation in constitution making and the objective to write a democratic constitution. Conceptually the relationship between public participation in constitution making and the objective to write a democratic constitution is not necessarily complimentary. Usually, there are gaps and sometimes tension between the goal of public participation in constitution making and the objective to write a democratic constitution.¹⁷⁷ The second category of reasons why public participation may not result in the creation of a democratic constitution relates to the fact that such participation may be manipulated by the dominant political actors or may be affected by the restrictive legal environment, constitutional illiteracy as well as lack of appreciation of a political culture of democracy by the broader society and the main political actors. With reference to public participation in the Zimbabwe's 2013 constitution making process, this chapter examines how these factors can work against public participation from resulting in the writing of a democratic constitution.

¹⁷⁶Bankssupra note 16 at1050.

¹⁷⁷ Ludsin H. Peacemaking and Constitution drafting: A Dysfunctional Marriage (2011) 33 (1) *U.Pa.J.Int'LL*. 239 at 241.

3.2 Political Culture

Political culture refers to the predominant political ideology, beliefs and traditions of a society and how ‘*masses of citizens evaluate their political institutions and officials*’.¹⁷⁸ Whilst societies and organisations are not necessarily homogeneous, they possess a predominant political culture signified by the nature of political views and beliefs held by the majority members of that society. These views relate to what they perceive as the ideal way of organizing their political system and what they view as the appropriate nature of the relationship between the masses and their political institutions or leaders.¹⁷⁹ A constitution is a legal document that defines how a State will be politically organized by virtue of prescribing such things like the nature and system of government, powers ascribed to government and how such powers are to be exercised.¹⁸⁰ Consulting the public as part of a constitution making process is essentially requesting them to provide views around how they would like their State to be organized and their political culture will largely inform the nature of the views that they will give. It therefore can be argued that if a constitution was to be drafted solely on the basis of the views of the majority, such a constitution would simply be a mirror reflection of the political views and beliefs that the majority hold with respect to how they prefer their State to be organized.

The failure or success of public participation to result in the writing of a democratic constitution therefore partly depends on the level of appreciation of a political culture of democracy by the members of that society. A democratic culture entails the appreciation and desire by the majority of members of society to be governed through democratic means and an orientation by members of that society towards the virtues of tolerance, civic participation,

¹⁷⁸Rosenbaum W. *Political Culture* (1975) Praeger at 4.

¹⁷⁹ Ibid.

¹⁸⁰Currie I. and De Waal J. *The Bill of Rights Handbook* 4ed (2013) JUTA at 7.

efficacy and civility.¹⁸¹ Where society appreciates a democratic culture, the public is likely to demand a democratic constitution and when given an opportunity to participate in the writing of a constitution, they will provide democratic views that result in the drafting of a democratic constitution.

On the other hand, a participatory constitution making process may fail to produce a democratic constitution because *'the country's populace is accustomed to older forms of rule, based on tradition, often hierarchical, sometimes arbitrary and with little possibility of challenging authority. They may not understand the concept of constitutional government...'*¹⁸² Thus a constitution making process may be designed in such a way that it is participatory and intended to secure a democratic constitution, but the views that the public may give could be completely undemocratic because of lack of appreciation of a culture of democracy. This was reflected in some of the public consultative meetings during the Zimbabwe constitution making process where some members of the public demanded that the new constitution must allow President Mugabe to declare himself a life President, while in some cases; some people demanded that the new constitution must prohibit women from wearing trousers.¹⁸³ Such views reflect a society lacking a sufficient appreciation of a democratic culture and if drafted into the final constitution, such views would result in an undemocratic constitution that fails to entrench fundamental democratic principles like the right to equality and regular as well as free and fair elections.

At another level, lack of appreciation of a democratic culture by the political leadership and actors presiding over a constitution making process could also determine whether public participation results in the writing of a democratic constitution or not. The political

¹⁸¹Diamond L. *Political Culture and Democracy in Developing Countries* (1993)Lynne Rienner Publishers at1.

¹⁸² Ghai supra note 1 at 240.

¹⁸³Joint Report on the Constitutional Outreach Meetings, August (2011), compiled by Zimbabwe Lawyers for Human Rights, Zimbabwe Peace Project and Zimbabwe Election Support Network.

leadership often shapes the level of participation and the political atmosphere under which the constitution making process unfolds.¹⁸⁴ Where the leadership lacks a culture of democracy, they are likely to stifle democratic views expressed by the members of the public, or may fail to stimulate vibrant public discussions that produce strong democratic constitutional ideas. ZANU PF's long history of human rights violations, disregard of the rule of law and contempt of political competition within and outside of the party; demonstrate lack of appreciation of a culture of democracy by both the party and its leader.¹⁸⁵ During the Zimbabwe constitution making process, the leadership of ZANU PF showed its contempt of constitutional democracy as the party vigorously campaigned for a constitution that retains centralization of power.¹⁸⁶ On the other hand, the MDC as another political actor demonstrated questionable commitment towards the writing of a democratic constitution.¹⁸⁷ Such criticism emanates from the MDC's willingness to negotiate and compromise with ZANU PF's demands on fundamental issues like limited presidential powers and devolution of powers while uncompromising on election management related issues like the powers of the Zimbabwe Election Commission. This led to the suspicion that the MDC was pre-occupied with using the constitution making process to facilitate electoral power transfer from ZANU PF rather than to produce a democratic constitution for the country regardless of who would win in the following elections. Without a leadership committed to and appreciative of a democratic culture, public participation in the Zimbabwe constitution making process was set to be manipulated to produce a constitution that protects the narrow

¹⁸⁴Landau supra note 5 at 923.

¹⁸⁵ Meredith M. Mugabe: *Power, Plunder and the Struggle for Zimbabwe* (2007) Public Affairs, New York at 241.

¹⁸⁶Dzinesa G. Zimbabwe's Constitutional Reform Process: Challenges and Prospects (2012) *Institute for Justice and Reconciliation* at 6. Available at: <http://www.ijr.org.za/publications/pdfs/IJR%20Zimbabwe%20Constitutional%20Reform%20OP%20WEB.pdf> (accessed on 16 January (2014)).

¹⁸⁷See NCA's criticism of MDC's compromises under the article, Staff reporter 'Mugabe Profiting from the New Constitution' *Bulawayo 24 News* 08 September 2013. Available at: <http://bulawayo24.com/index-id-news-sc-national-byo-35797.html>, (accessed on 16 September 9 (2013)).

interests of the political leadership at the expense of a vibrant constitutional democratic dispensation. Manipulation will be further discussed later on under the section on ‘political manipulation of the public views’. Due to absence of a political culture of democracy, the leadership could not stimulate vibrant public discussions to tease out democratic views and the result was a democratically weak constitution as demonstrated in the previous chapter.

3.3 Legal Context

It is argued that public participation in constitution making brings together diverse views which will enrich the democratic content of the final constitution.¹⁸⁸ However, such participation could be hindered by the prevailing legal context within which the constitution making process takes place and may fail to improve the democratic content of the final constitution. Legal context basically refers to the impact of the laws operative in a society at a particular moment in time. Public participation in constitution making is a process involving public debates over conflicts, problems and preferences.¹⁸⁹ Therefore, for such participation to result in the writing of a democratic constitution, the legal context must at least allow the public to have sufficient access to diverse information, freedom of assembly and association, freedom of expression and political tolerance. These freedoms shall now be discussed separately, demonstrating how they impact on the chances of public participation resulting in the writing of a democratic constitution and how they played out in the Zimbabwe constitution making process.

3.3.1 Freedom of Access to Information

Freedom of access to information is a fundamental right relating to the right of individuals to access information held by the state or other private persons.¹⁹⁰ Relating to public

¹⁸⁸Bankssupra note 16 at1050.

¹⁸⁹Ibid 1048.

¹⁹⁰Currie I. and De Waal J. note 180 at698.

participation in constitution making, access to information assists the public to develop necessary awareness concerning the critical aspects of the constitution making process. If public participation is to result in the writing of a democratic constitution, members of the public must have unlimited access to information on various models of constitutional democracy, key principles of constitutional democracy like the rule of law, human rights and separation of powers and they must have access to information on how the constitution making process itself will unfold.¹⁹¹ Through the media, the public must be exposed to dialogues on these aspects of constitutional democracy where divergent views are debated. Equipped with such information, the public will be able to participate and make meaningful contributions towards the writing of the new constitution. Thus it is necessary to ensure that there are sufficient and diverse mechanisms of enabling the public to access information and divergent opinions on the constitution making process. During the Zimbabwe constitution making process, the public had limited access to information. Due to the Broadcasting Authorities Act (BAZ), the state enjoys monopoly in radio and television broadcasting, the key means of public information dissemination in the country. ZANU PF used its influence to grant the only two private radio broadcasting licenses to persons loyal to the party and the licensees' broadcasting policy has consistently remained biased towards ZANU PF's political views, while the other private radio station broadcasting from outside of the country has very limited ability to reach the broader society.¹⁹² The writer attests that the state television and all the radio stations disseminated information on the constitutional reform in a manner that advanced ZANU PF's anti -democratic constitutional preferences. Thus the public was subjected to ZANU PF propaganda as the only source of public information and had very limited access to independent sources of information on the constitution making process.

¹⁹¹Skjelten supra note 30 at32.

¹⁹² Freedom House. 'Freedom of the Press Report-Zimbabwe' (2013). Available at: <http://www.freedomhouse.org/report/freedom-press/2013/zimbabwe> (accessed on 16 September 2013).

Consequently, this compromised the capacity of the public to make strong submissions which could strengthen the democratic content of the final constitution.

3.3.2 Freedom of Assembly and Association

Public participation in a constitution making process will be effective if the public is able to exercise their right to freedom of assembly and association. Freedom of Assembly includes the right of individuals to mobilise each other and conduct public gatherings in a peaceful manner, while freedom of association relates to the right of individuals to associate with other individuals, form or belong to social and political groups of their choice.¹⁹³ Such freedoms are necessary for the public to effectively influence the writing of a constitution. Where there is freedom of association and assembly, members of the public including civil society can mobilise each other around key democratic constitutional issues, and can freely conduct public discussions to engage in vibrant public dialogue that results in exchanging and generating democratic constitutional ideas. Under such an environment, civil society groups will be able to engage communities and provide civic education around key constitutional issues, thereby raising awareness amongst the citizens.

Relating to the Zimbabwe constitution making process, the *Public Order and Security Act*[Chapter 11:17] of 2002 restricted freedom of assembly and association as the Act requires the public to seek permission from the police in order to conduct public meetings. The Act gives the police a wide discretion to decide whether to grant the permission to hold a public meeting.¹⁹⁴ Using its control over the police, ZANU PF uses this legislation to prevent opposition groups from holding public meetings and organize communities.¹⁹⁵ Such restricted

¹⁹³Currie I. and De Waal J. supra note 180 at 398.

¹⁹⁴ See Sections 24, 25 and 26 of the Public Order and Security Act of Zimbabwe [Chapter 11:17].

¹⁹⁵Freedom House. 'Freedom of Association Under Threat: The New Authoritarians' Offensive Against Civil Society' (2012). Available at: <http://www.freedomhouse.org/report/freedom-association-under-threat-new-authoritarians-offensive-against-civil-society/zimbabwe> (accessed on 16 September 2013).

freedom of assembly and association meant that the public had limited opportunities to collectively discuss constitutional ideas, share opinions and strategize on how to work together towards the writing of a democratic constitution. Under such an environment, civil society could not effectively play its role of providing civic education targeted at raising public awareness and facilitating dialogue on key democratic constitutional issues. Thus the legal context did not allow vibrant, independent public dialogue around constitutional democratic issues and consequently the public could not develop and submit democratically sound constitutional ideas during the government sponsored public meetings.

3.3.3 Freedom of Expression and Political Tolerance

Any form of political participation, including public participation in a constitution making process would require the participants to enjoy the freedom to form, hold and express political thoughts and ideas without fear of being victimized.¹⁹⁶ Participation in a constitution making involves expressing one's interests and questioning each other's views.¹⁹⁷ Thus public participation in a constitution making process essentially revolves around developing and communicating opinions on how one prefers the State to be organised. Such participation requires a context where there is tolerance of divergent political and social views; otherwise the public will not be free to share their honest opinions on what they want the constitution to prescribe. During the Zimbabwe constitution making process, legislation such as the *Criminal Law (Codification and Reform) Act 23/2004* restricted the right of individuals to express their own opinions on the new constitution. Section 33 criminalizes;

the making, publicly and intentionally, of any false statement (including an act or gesture) about or concerning the President, if the person knows or realizes that there is a risk or possibility of engendering feelings of hostility towards or

¹⁹⁶Banks supra note 16 at1049.

¹⁹⁷Ibid.

causing hatred, contempt or ridicule of the President, whether in his official or personal capacity .¹⁹⁸

Between 2010 and 2013 (which is the period of the constitution making exercise) the Zimbabwe Lawyers for Human Rights recorded 63 criminal prosecutions for insulting the President.¹⁹⁹ These prosecutions were based on section 33 of the *Criminal Law (Codification and Reform) Act 23/2004*. Such legislation and its enforcement potentially scared the public from engaging in free debates and express divergent opinions concerning key constitutional issues like Presidential powers. Therefore, although there was public participation in the numerous public meetings organised by government during the constitution making process, such participation could not result in the writing of a democratic constitution because the legal context restricted the public from freely expressing their political thoughts and opinions on key constitutional issues.

3.4 Constitutional Illiteracy

Participatory constitution making process is preferred because it brings in actors who have traditionally been excluded from ordinary politics, and these actors will enrich the democratic content of the final constitution thereby deepening the quality of constitutional democracy.²⁰⁰

However public participation in a constitution making exercise may only enrich the democratic content of the final constitution if the public participating in that process is constitutionally literate. Constitutional literacy is the state of affairs where members of the public have sufficient awareness of the kind of issues that a constitution ought to regulate.²⁰¹

Where the general public is constitutionally illiterate, they are essentially ignorant of the issues that they are expected to raise and debate during their participation in the constitution

¹⁹⁸ See section 33 (2) (a) (i-ii) of the Criminal Law (Codification and Reform) Chapter 9:23 Act 23/2004.

¹⁹⁹See SW Radio press statement. Available at: <http://www.swradioafrica.com/2013/07/09/mdc-youth-leader-challenges-mugabe-insult-law-in-constitutional-court/> (accessed on 16 September 2013).

²⁰⁰Banks supra note 16 at1050.

²⁰¹Wing supra note 15 at3.

making process. Consequently, poor quality of participation will ensue and this may include submission of views on issues that are not regulated by the constitution. For instance, during some of the public meetings in Zimbabwe, members of the public demanded the new constitution to reduce prices of basic commodities.²⁰² Thus where public participation was anticipated to deliver views that would result in the writing of a democratic constitution, the public submitted views that were unfit for regulation through a constitution because they lacked sufficient knowledge about the constitutional issues relevant to the discussion around the making of the new constitution.

3.5 Manipulation of public views by dominant forces

Public participation in a constitution making process may not result in the writing of a democratic constitution because of manipulation of the people's views by those that are in power at the time the process is unfolding. As part of his criticism against participatory constitution making, Landau (2013) argues that *'strongmen or individual parties can manipulate [the public] in order to reshape the political system in a manner that is not conducive to competitive democracy'*.²⁰³ This argument is quite true of the Zimbabwe constitution making process, which represents a participatory process that on paper was purposed to produce a democratic constitution, but the democratic views which the public was expected to express were stifled by the dominant political forces-ZANU PF and the MDC formations. These parties ran extensive programs to coach members of the public to parrot the constitutional positions and preferences compatible with their partisan interests.²⁰⁴ For instance, ZANU PF developed and campaigned amongst its supporters to back its constitutional position which included anti- sexual orientation rights, an all-powerful

²⁰² See Joint Report on the Constitutional Outreach Meetings, August 2011, compiled by Zimbabwe Lawyers for Human Rights, Zimbabwe Peace Project and Zimbabwe Election Support Network.

²⁰³ Landau supra note 5 at 925.

²⁰⁴ Dzinesa G. supra note 186 at 6.

executive presidency, upholding the death penalty and a unitary system of government.²⁰⁵ There were reports of intimidation and coercion of the members of the public by ZANU PF to support the party's constitutional preferences.²⁰⁶ For instance, the writer attended some of the government sponsored public outreach meetings where members of the public refrained from submitting their views as ZANU PF local leadership had appointed persons who would speak on behalf of the community. At some of these meetings, participants would simply regurgitate the position given to them by ZANU PF. Given this level of manipulation, the views obtained during some of the public meetings may not necessarily be the honest views of the people.

As such, it can be argued that public participation in this constitution making process was hijacked to give legitimacy to ZANU PF's constitutional preferences, with a little bit of compromise to accommodate the MDC's preferences as well.²⁰⁷ Thus public participation may not necessarily result in the writing of a democratic constitution because of political manipulation by the dominant forces.

3.6 The inherent shortcomings of the theoretical foundations of public participation in constitution making

The previous sections of this chapter have argued that public participation alone in a constitution making process is not able to result in the writing of a democratic constitution because of practical contextual challenges that include absence of a democratic culture within the broader society, constitutional illiteracy, lack of appreciation of a democratic culture by the political leadership, manipulation of public views by the dominant actors and a restrictive legal context. In the next section, this dissertation argues that, conceptually public

²⁰⁵ Ibid.

²⁰⁶ Human Rights Watch *'World Report'* (2011) at 194. Available at: <http://www.hrw.org/world-report-2011> (accessed on 20 November 2013).

²⁰⁷ Dzinesa G. supra note 186 at 6.

participation on its own does not guarantee the writing of a democratic constitution because the theoretical goals of public participation are not necessarily in tandem with the objective to write a democratic constitution.²⁰⁸ Thus apart from the contextual challenges operating against public participation, the theoretical foundations for public participation in constitution making are flawed with inherent shortcomings which constrain public participation from resulting in the writing of a democratic constitution. This research argues that, even in cases where free political participation is possible, public participation on its own may still be unable to result in the creation of a democratic constitution because of the shortcomings of the very theoretical foundations that inform the doctrine of public participation in constitution making.

3.6.1 The doctrine of popular sovereignty and the creation of a democratic constitution

The view that a constitution making process must embrace and be informed by the participation of the people is rooted in the doctrine of popular sovereignty. Popular sovereignty is an idea propagated by social contract philosophers including John Locke and Thomas Hobbes and it basically emphasizes that the people are the source of all political power.²⁰⁹ This implies that the source of power for a constitutional government must be a constitution whose content has been determined by the people. Thus the people should determine through a constitution the kind of powers they would like to give to their government and how they want such powers to be exercised.

Within the same discourse of popular sovereignty, some scholars look at the constitution as a social contract between citizens on how they would like to be governed.²¹⁰ If therefore the constitution is to be understood as a form of social contract between the people, then the

²⁰⁸ Ludsin supra note 177 at 241.

²⁰⁹ Ghai supra note 1 at 241.

²¹⁰ Brandt et al. supra note 36 at 7.

process of making that constitution must be highly participatory to enable those people to determine the content of that constitution. It would be a violation of the principle of popular sovereignty if the people are to be excluded from a process of writing a constitution which would govern their lives. Such a constitution would be illegitimate. Thus public participation in constitution making is informed by the desire to achieve legitimacy in keeping with the principle of popular sovereignty.

However, popular sovereignty does not necessarily require that the constitution to be written by the people must be democratic. It simply insists that the people must write their own constitution. Where the society is still committed to its traditional, non –democratic systems of governance, public participation in constitution making will result in the writing of a constitution that is largely conservative and democratically weak.²¹¹ Despite its democratic weaknesses, such a constitution would still be legitimate as long as it is reflective of the views of the public that participated in its development. It is necessary at this juncture to define what a legitimate constitution entails.

A legitimate political system is one in which the participants or citizens have faith in it and are willing to obey it.²¹² A constitution embodies a framework of governance and therefore seeks to establish a political system or socio-economic order.²¹³ The legitimacy of a constitution therefore refers to whether the citizens have faith in that constitution and are willing to obey and or accept the constitutional order that flows from that constitution. The people are most likely to accept a constitution if it represents their views.²¹⁴ The concept of legitimacy therefore emphasizes acceptance by the people and does not concern itself with the democratic content or quality of the constitution. This means public participation in a

²¹¹ Ibid.

²¹² Giglioli M. *Legitimacy and Revolution in a Society of Masses: Max Weber, Antonio Gramsci, and the Fin-de-Sicle Debate on Social Order* (2013) Transaction Publishers, New Brunswick, New Jersey at 130.

²¹³ Currie I and De Waal J 'The Bill of Rights Handbook' 6 ed (2013) at 7.

²¹⁴ Ghai supra note 1 at 232.

society that is devoid of a political culture of democracy could achieve the writing of a legitimate but not necessarily democratic constitution. This is the gap that exists between popular sovereignty as the theoretical basis for participatory constitution making and the objective to write a democratic constitution through a participatory process. Even though the Zimbabwe 2013 constitution making process was characterized with incidences of political intimidation, certain areas were largely peaceful and people still provided undemocratic views during the public meetings. For instance in some parts of Mashonaland East in Zimbabwe, where the writer attended some of the government sponsored public meetings on the new constitution, the public was almost unanimous that the new constitution must provide President Mugabe with life presidency. One can argue that this demonstrates society's abhorrence or lack of appreciation of such fundamental democratic constitutional principles like limited presidential authority and free and fair elections. A constitution that results from such public consultations will inevitably be undemocratic but legitimate hence the argument that public participation might be a pre-requisite for writing a democratic constitution but on its own, it may not result in the creation of a democratic constitution because popular sovereignty as a doctrine that informs participatory constitution making does not insist on the nature of a constitution that the people must write but simply insists that the people must write their own constitution.

3.6.2 The doctrine of reconciliation, nation building, and the creation of a democratic constitution

Constitution making processes are increasingly being viewed as crucial for promoting national reconciliation and developing national consensus around key issues.²¹⁵ This is particularly true considering that constitutions are often made or reformed in the aftermath of

²¹⁵ Ghai supra note 1 at 240.

a civil conflict, where the constitution making process serves to promote reconciliation amongst the communities previously in conflict.²¹⁶ Under such circumstances, a constitution must therefore be understood as a national document that is meant to reflect the compromises and convergence of thoughts and ideas of the people in a nation around key issues such as the system of political governance, human rights etc. The process of making that constitution ought to present a platform for the people to engage in a national dialogue in which they express their interests, make trade-offs and the resultant constitutional text is a compromise and reconciliatory document in which all the people feel that their interests are accommodated. If the constitution making process is to achieve reconciliation, it then ought to be as participatory and inclusive as possible in order to ensure that all communities feel accommodated in the final constitution.²¹⁷ Thus public participation in constitution making is also informed by the desire to reconcile communities through a deliberative process in which all communities feel that they determined the content of the constitution and their interests are protected by that constitution.

Reconciliation and nation building as the basis for public participation in constitution making processes does not necessarily require that the process should produce a democratic constitution but the emphasis is on a process that promotes public dialogue, resulting in a constitution that promotes and consolidates reconciliation.²¹⁸ Although the objective to write a democratic constitution and that of promoting national reconciliation could overlap in some cases, participation in a post- civil conflict constitution making exercise prioritizes peace and reconciliation and not necessarily the creation of a democratic constitution. Some democratic elements of the draft constitution may be sacrificed in order to preserve the confidence of certain groups or communities in the unfolding peace cum constitution making process.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ludsin supra note 177 at 245.

Zimbabwe's constitution making process was conducted as part of a peace process aimed at resolving a long drawn out political crisis that pitted the opposition against the incumbent regime of President Robert Mugabe. This conflict reached its height in 2008 when up to 200 opposition supporters were killed, 5000 people were tortured and 36,000 were internally displaced due to political violence.²¹⁹ In essence, the constitution making process had a peace process dimension to it; whereupon it intended to produce a constitution that facilitates reconciliation between the previously antagonistic groups particularly the incumbent ZANU PF regime and the opposition parties.²²⁰ This process could result in a constitution that bear democratic qualities but only as far as those qualities fitted within the primary objective of reconciling the various socio-political groups. This meant that some democratic mechanisms, especially those that sought to create accountability for past human rights violations would be sacrificed in order to secure national unity and or retain the confidence of the incumbent regime in the constitution making process. For instance, through the schedule six, the final constitution of Zimbabwe postponed the implementation of fundamental aspects of the constitution which would have made that constitution more democratic than it is. This schedule secured the continuation of the existing officers till the formation of the next government, despite the changes introduced. Consequently it blocked the anticipated personnel audit and reform of such key institutions like the judiciary and the prosecuting authorities ahead of the elections that would follow after the new constitution is put in place. Given that the persons leading these institutions had consistently discharged their duties clearly in a partial and partisan manner, change of personnel was essential as part of

²¹⁹Human Rights Watch Report '*Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe*' (2013) Available at: <http://www.hrw.org/news/2011/03/08/zimbabwe-no-justice-rampant-killings-torture>, (accessed on 11/06/13).

²²⁰ See the preamble of the Global Political Agreement supra note 17 which set the legal and political framework for the constitution making process.

institutional reform necessary to secure the anticipated constitutional democracy.²²¹ However, removing such personnel from these offices would have greatly threatened ZANU PF's power base as it depended on them for its power retention strategy.²²² Schedule six was therefore crafted as a compromise to calm down the fears of the incumbent regime which was feeling threatened by the impending constitutional changes, and had begun plotting to derail the constitution making process. However, although schedule six was a compromise that ensured that the constitution making process is completed, it heavily sacrificed the democratic content of the final constitution. Thus where constitution making is part of a peace process, public participation in that process is most likely to result in public dialogue and the creation of a constitution fraught with compromises as the previously antagonistic groups seek to accommodate each other. As argued in the Zimbabwean case, the democratic content and quality of the final constitution was compromised partly in order to retain the confidence of the incumbent and other antagonistic groups in the unfolding transition process. Participation in such a process is therefore likely to achieve inclusivity, promote reconciliation but not necessarily result in a democratic constitution.

²²¹ See Zimbabwean Senator Obert Gutu's paper titled '*Transformation of the Rule of Law institutions: A necessary good*' presented at the SADC symposium on common standards for judicial and prosecutorial independence in the SADC Region held in Harare 2013.

²²² Crisis in Zimbabwe Coalition 'Zimbabwe Transition Barometer–Trekking the Transition' (2013) at 15.

Chapter 4: Strategies and mechanisms that can support public participation to result in the creation of a democratic constitution

4.1 Introduction

With reference to the Zimbabwe constitution making process, the previous chapter has demonstrated that public participation in a constitution making process may not result in the writing of a democratic constitution because of certain contextual constraints. Chapter three has also argued that, public participation may not result in the creation of a democratic constitution because of the inherent shortcomings of the theoretical foundations of public participation in constitution making. Such theoretical foundations include the doctrine of popular sovereignty and the notion of reconciliation and nation building.²²³ Despite the challenges associated with public participation, this dissertation does not advocate the exclusion of public participation from the process of creating a democratic constitution. Public participation remains a pre-requisite for the creation of a democratic constitution. In fact, a democratic constitution is no longer simply one that establishes democratic governance but one made through a democratic process.²²⁴ Without the general sense of ownership that comes from sharing authorship, the public will not understand, respect, support, and live within the constraints of constitutional government.²²⁵ Thus a democratic constitution must be written through a participatory process in order to secure the necessary legitimacy of that constitution. However, public participation alone may fail to create a democratic constitution because of the constraints explained under the previous chapter. Certain mechanisms and strategies need to be introduced in order to support public participation so that such participation can result in the creation of a legitimate and

²²³ Ghai supra note 1 at 236.

²²⁴ Hart supra note 2 at 4.

²²⁵ Ibid.

democratic constitution. Through this chapter, this dissertation suggests and explains some of these strategies and mechanisms.

4.2 Nurturing a Culture of Democracy

Chapter three identified absence of a political culture of democracy as a key constraint that limits the chances of public participation from resulting in the writing of a democratic constitution. Political developments, including the outcome of a constitution making process, are partly determined by the underlying political culture of a society.²²⁶ Therefore, any efforts to build democracy in a society should start by influencing individual members of that society to shift their underlying political beliefs, attitudes and values towards appreciating a political culture of democracy. This implies transforming the society towards appreciating such virtues as tolerance, efficacy, participation, demanding accountability, moderation and civility.²²⁷ This is not achievable in a short space of time but through carefully planned and implemented long term projects that provide civic education on democracy and human rights to local communities. If a society is exposed to information on an alternative and better social and political order, it is likely to gradually abandon its old order and embrace the new one.²²⁸ Thus information dissemination on democratic governance and culture could effectively market democracy as a better system of governance.

In states like Zimbabwe, dictatorships thrive on society's lack of a political culture of democracy and such governments are keen on suppressing any civic education effort that is likely to nurture appreciation of a political culture of democracy.²²⁹ However, international

²²⁶Diamond supra note 181 at3.

²²⁷Ibid at 1.

²²⁸Ibid at 19.

²²⁹ For greater details on civil society repression and reasons for such repression in Zimbabwe see Human Rights Watch 'Zimbabwe: End Police Crackdown on Civil Society' Mar 19, (2013). Available at: <http://www.hrw.org/news/2013/03/19/zimbabwe-end-police-crackdown-civil-society> (accessed on 28 November (2013)).

development agencies, local civil society and opposition parties have a duty to engage in this civic education exercise, as well as promoting public dialogue on governance. The successful role that civil society and opposition parties played in developing a political culture of democracy in countries like Zambia and South Africa (which share a history with states like Zimbabwe) supports the suggestion that, notwithstanding the challenges and slow pace of the process, civic education and public dialogue on governance will surely develop society's appreciation and appetite for democratic change and governance.²³⁰

Comprehensive, long term civic education on social and political democratic attributes will eventually transform members of a society to appreciate the need to tolerate each other, demand and exercise participation in political processes and demand accountability from their leaders. As noted earlier on, public participation in constitution making can only result in the creation of a democratic constitution when the citizenry reaches a stage where they embrace a political culture of democracy.²³¹ Creating a democratic constitution through public participation is therefore a long term process because transforming a political culture of a society towards being democratic takes a long time to accomplish. Nonetheless, influencing local communities towards embracing the political culture of democracy is an imperative process that must be completed before anticipating public participation in a constitution making process to result in the creation of a democratic constitution.

4.3 Building constitutional literacy

Constitutional illiteracy has been identified as one of the constraints limiting the chances of public participation from resulting in the writing of a democratic constitution.²³² Essentially, constitutional illiteracy is the absence of sufficient knowledge of the issues relevant to the

²³⁰ Nordlund P. *Organizing the Political Agora: Domination and Democratisation in Zambia and Zimbabwe*. (1996) Unpublished PhD Thesis, University of Uppsala at 59 and 63-64.

²³¹ Diamond supra note 181 at 3.

²³² Wing supra note 15 at 3.

constitution making process.²³³ Constitutional illiteracy is not necessarily the same as absence of a political culture of democracy. Though a society may be appreciative of a democratic political culture, its members may nevertheless be ignorant of the constitutional issues upon which they are expected to pronounce views on during their participation in a constitution making process. Therefore, there is need to ensure that public participation in a constitution making process is preceded by a process of building constitutional literacy in order to develop public awareness of the constitution making process and the relevant constitutional issues upon which public views will be solicited.

Building constitutional literacy is a process of educating the citizens on such key aspects of constitutionalism and democracy as government accountability, human rights and civic duties.²³⁴ Consequently, this process will create or enhance public awareness on democracy, the significance of the constitution, the key issues to be regulated by the constitution and qualities of a democratic constitution. Such awareness will enable the participating public to make meaningful and sound contributions that influence the writing of a democratic constitution.

Local civil society organisations should undertake this process of creating constitutional literacy through civic education projects. Even though in countries like Zimbabwe, where the State refuses to acknowledge civic education as the proper role of civil society, the writer argues that civil society must nevertheless continue to provide this education for it is a pre-requisite of the process of enhancing the capacity of the local communities to demand democratic governance. Besides, both domestic and international law (to which most states including Zimbabwe are signatories) recognizes the right of individuals to freely associate,

²³³ Ibid.

²³⁴ Wing supra note 15 at3.

assemble and participate in their government.²³⁵ Therefore, when local civil society groups engage in civic education, they are simply exercising their right as a group of individuals to associate, assemble and share opinions in line with both international and domestic law. Building constitutional literacy with the aim of enhancing the capacity of the local communities to demand and write a democratic constitution for themselves is therefore legitimately part of the right and duty of civil society to assist local communities participate in their government.

This strategy has been used in contemporary participatory constitution making processes which include Kenya's 2010 constitution making process, where civil society organizations partnered with the body managing the constitution making process to provide Kenyans with civic education on constitutionalism and democracy.²³⁶ As part of this civic education programme, public media organizations played a critical role of disseminating information on constitutionalism and democracy. This raised public awareness amongst the Kenyans concerning relevant issues that needed to be raised during the public discussions on the constitutional review process and the result was a fairly democratic constitution.²³⁷ Thus public participation in a constitution making process will most likely result in the writing of a democratic constitution if the participants are well informed on key democratic constitutional issues and are prepared to raise those issues during public debates on the new constitution. Building constitutional literacy is therefore an important mechanism that can be used to increase the chances of successfully writing a democratic constitution through a participatory process.

²³⁵See Article 13 of the African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 and Section 44 and 58 of the Constitution of Zimbabwe.

²³⁶The National Civil Society Congress (NCSC), Katiba Sasa! Campaign: A score card for the draft constitution. Available at: <http://www.crecokenya.org/wp-content/uploads/principles2.pdf> (accessed on 23 July 2013).

²³⁷ Ibid.

4.4 Effecting Transitional Mechanisms

Earlier on, a review of the Zimbabwe constitution making process has demonstrated that, public participation may fail to result in the writing of a democratic constitution because of a legal context that restricts free political participation. Constitutions are usually made or reformed in the aftermath of a political crisis.²³⁸ At the time of writing the new constitution, the legal system is usually characterized with draconian laws that restrict basic freedoms like the right to freedom of association, expression and access to information. As demonstrated under the previous chapter, absence of these basic freedoms restricts the public from effectively participating in any political process including a constitution making exercise.²³⁹ For instance, without freedom of association and freedom of expression, the public cannot participate in independent public discussions to learn and share ideas on the content of the new constitution. Without sufficient access to information, the public remains uninformed about the constitution making process and therefore cannot make meaningful contributions to that process.

In order to create a conducive environment for free political participation, some transitional mechanisms must be put in place. Transitional mechanisms are legal and political reforms introduced to facilitate the transition from the old to the new constitutional order and amongst many other things, they serve the purpose of creating democratic space for free political participation.²⁴⁰ It is not possible for this research to suggest an exhaustive list of transitional mechanisms applicable in all cases because each society has its own particular realities and would require its own set of transitional mechanisms. However, based on the experiences

²³⁸Samuels K. and Wyeth V.H. 'State Building and Constitutional Design after Conflict' (2006) International Peace Academy, New York at 4.

²³⁹Huntington S. et. al. No easy choice: political participation in developing countries (1977) 83:3 *American Journal of Sociology* at 751.

²⁴⁰Klug H. Constitution-Making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might We Learn from the South African Miracle? (2007) *Wisconsin University, Legal Studies Research Paper Series* 1046 at 9.

from contemporary constitution making exercises particularly Kenya's 2010 and South Africa's 1994 process, this dissertation suggests that there ought to be transitional mechanisms targeted at opening up some democratic space for political participation.²⁴¹ For instance, transitional mechanisms could entail the repeal and amendment of certain draconian laws that restrict the basic freedoms necessary for free political participation. Government must introduce laws and other measures that seek to create, protect and promote such freedoms as access to information, freedom of expression, assembly and association so that the public is able to freely associate with each other, share political opinions, argue with each other and agree on the content of a new constitution.²⁴² South Africa's 1994 constitution making process was preceded by the introduction of a set of legal transitional reforms to provide fundamental freedoms of the media, association and expression, which created democratic space for public participation and South Africa succeeded to write a democratic constitution through a participatory process.²⁴³ Thus introduction of legal transitional reforms significantly contributes towards the creation of a conducive legal environment in which it is possible for free and unhindered public participation in a constitution making process to result in the writing of a democratic constitution; of course subject to sufficient levels of constitutional literacy and society's appreciation of a political culture of democracy.

Transitional mechanisms should not be limited to legal reforms only, but could also include political and institutional reforms targeted at creating democratic space for public participation as well as enhancing public confidence in the political processes. Notwithstanding its challenges, South Africa's 1993 Transitional Executive Council (TEC) serves as an example of a transitional political institution created to provide legitimacy to the

²⁴¹ Klug supra note 240 at 13.

²⁴² Ibid at 16.

²⁴³ Skjelten supra note 30 at 5.

transitional processes including the constitutional negotiations.²⁴⁴ Despite the public's distrust of the ruling National Party, the majority of South Africans had confidence in the constitutional negotiations because that process involved the participation of the African National Congress (ANC) leaders like Nelson Mandela whom the public trusted.²⁴⁵ It is therefore critical to create credible transitional political institutions that assist in giving credibility to the constitution making process so that the public will be confident to participate in that process and share their opinions on the content of the new constitution. Thus before calling out for public participation in a constitution making exercise, political leaders must analyze the context and identify necessary transitional mechanisms that must be introduced in order to create a suitable environment for the people to participate and write a democratic constitution for themselves.

The previous chapter has argued that lack of a political culture of democracy limits the capacity of the public to participate in a constitution making process and write a democratic constitution by themselves. Earlier on in this chapter, the writer suggested that there must be deliberate efforts by local civil society, development agencies and opposition parties to nurture a political culture of participation, tolerance and moderation in the local communities. Transitional mechanisms are therefore an essential element of the process of nurturing a political culture of democracy in the local communities because they open up democratic space for civic participation. Thus local civil society and opposition parties can use that space to provide civic education and promote public dialogue that results in local communities appreciating a political culture of democracy, which in turn will influence them to demand and write a democratic constitution.

4.5 Development of democratic and legitimate constitutional principles

²⁴⁴Klug supra note 240 at 19.

²⁴⁵Skjelten supra note 30 at 6.

One of the reasons why public participation in a constitution making process may not result in the writing of a democratic constitution is the absence of a framework or constitutional vision that guides the people towards writing a democratic constitution. The previous chapter has indicated that public participation in a constitution making process is more likely to achieve a legitimate but not necessarily a democratic constitution.²⁴⁶ Unfortunately, it is often assumed that a democratic constitution will emerge out of a participatory constitution making process.²⁴⁷ As such there is usually no framework that is put in place to deliberately guide the public participatory process towards achieving the desired democratic constitution.

Developing a set of democratic constitutional principles could be one of the mechanisms that help to guide public participation towards the writing of a democratic constitution. Basically, constitutional principles are a set of minimum standards that the final constitution must fulfill and seek to advance.²⁴⁸ A set of constitutional principles creates a vision of a constitution to be produced out of the constitution making process. This vision will guide the public to identify the nature of views they must submit during the public consultation phase. They will also guide the drafting process in the sense that the drafters can rely on the constitutional principles to interpret the views submitted by the public. That way, constitutional principles assist to stimulate and guide constitutional imagination and drafting during the constitution making process.²⁴⁹ Constitutional principles therefore function as both a vision and a framework which guides the constitution making process towards the creation of a particular nature of a constitution, depending on the nature of those constitutional principles.

²⁴⁶ Samuels *supra* note 238 at 4.

²⁴⁷ Olivier *supra* note 8 at ii.

²⁴⁸ Klug *supra* note 240 at 20.

²⁴⁹ *Ibid.*

If the constitutional principles are democratic in nature, then the vision of the constitution to be produced is that of a democratic constitution. In South Africa's 1994 constitution making process, the people (through their political parties, civic society and church groups) agreed to a set of constitutional principles which sought to produce a democratic constitution and these included the writing of a constitution that protects and promotes human rights, that entrenches separation of powers, multipartyism and rule of law.²⁵⁰ In various ways, these democratic constitutional principles guided public participation in South Africa's 1994 constitution making process towards the writing of a democratic constitution.²⁵¹

Notwithstanding the mistrust between leading political groups and the heterogeneous nature of contemporary States, constitutional principles must be developed through a consensus born out of an inclusive and participatory process. Constitutional principles must never be imposed upon the people. Thus, when developing constitutional principles, the government must ensure that all the key social, religious, civil society and political groups are involved in order to secure the legitimacy of the resultant constitutional principles.²⁵² If the constitutional principles are legitimate, then it is possible and appropriate to subject the entire constitution making process and public views to those principles.

It is possible to develop consensus on a set of constitutional principles through an inclusive process of continuous deliberation and negotiations.²⁵³ Contemporary constitutional negotiations have shown that, even though parties may have divergent interests and views, they are willing to compromise if they are assured that they will still have a significant role to play in both the transition and post transition period.²⁵⁴ Therefore, through deliberations and

²⁵⁰Schedule 4 of the Interim Constitution of South Africa Act No. 200 of (1993).

²⁵¹Theunis R. The constitutional framework and deepening democracy in South Africa (2005) Vol. 18, No.6 *Centre for Policy Studies* at 2-6

²⁵²Skjelten supra note 30 at 15.

²⁵³ Ibid.

²⁵⁴Klug supra note 240 at 10.

negotiation, the various groups will be able to make trade-offs and agree to a set of constitutional principles, thereby agreeing to a common vision of the nature of the constitution to be produced. Assuming that the society is constitutionally literate and it values a political culture of democracy, it is possible for that society to agree on a set of constitutional principles that are democratic enough to guide the public towards writing a democratic constitution. Experiences from contemporary participatory constitution making exercises like South Africa in 1994 and Kenya in 2010 have demonstrated that it is possible to produce legitimate, democratic constitutional principles through a participatory process. During South Africa's constitution making process, key parties which included the ANC and the National Party as well as church and civil society groups were involved in the process of negotiating and agreeing to constitutional principles.²⁵⁵ In South Africa's 1994 constitution making process, constitutional principles played a significant role of guiding the entire process (particularly the drafting) towards producing a democratic constitution.

In Zimbabwe, although the political leaders agreed to a set of constitutional principles, the process of developing those principles was exclusive and ad hoc. There were no consultations beyond the parties in the government of national unity and the decision to develop those constitutional principles appeared to have been made as an afterthought, because the official programme of the constitution making process did not include developing a set of constitutional principles.²⁵⁶ The writer witnessed some of the constitutional negotiations and can attest that during those negotiations, the parties deviated from and made no reference to those constitutional principles. It can be argued therefore that, the Zimbabwe constitution making process lacked adherence to and guidance of democratic constitutional principles and this further contributed towards the creation of a democratically weak constitution.

²⁵⁵Ibid at 6.

²⁵⁶Zimbabwe Constitution Select Committee (COPAC) milestones towards a new Constitution for Zimbabwe. Available at: <http://www.copac.org.zw/phocadownload/Milestones%20Brochure-01.pdf> (accessed on 19 September 2013).

Democratic constitutional principles developed through a participatory process are therefore a critical mechanism of assisting public participation to result in the writing of a democratic constitution.

4.6 Constitutional Certification

Constitutional certification is the idea that the draft constitution must be reviewed against the set constitutional principles and be certified by an impartial tribunal before being submitted for adoption through a popular referendum or a vote by the Constituent Assembly.²⁵⁷ Certification involves examining the draft constitution to check if it complies with and fully gives effect to the agreed constitutional principles. The process is such that the people's views are drafted into the draft constitution which is then submitted to an impartial tribunal for review and certification. Assuming that the constitutional principles are legitimate and democratic, certification plays an important role of ensuring that the process of drafting the final constitution remains in conformity with and gives full effect to the society's aspirations for a democratic constitution.

The use of constitutional certification as part of a participatory constitution making process has proven to be effective in terms of helping the process produce a democratic constitution. Certification was successfully used during the South Africa's 1994 constitution making process, where before the draft was adopted by the Constituent Assembly, it had to be certified by the Constitutional Court.²⁵⁸

Concerns are often raised as to how legitimate and suitable is constitutional certification in a participatory constitution making process? Like any other judicial review process, constitutional certification could be viewed as counter-majoritarian and therefore illegitimate

²⁵⁷ Klug supra note 240 at 20.

²⁵⁸ Ibid at 29.

because the process is usually conducted by a few unelected people.²⁵⁹ It is therefore argued that, constitutional certification gives power to a few people to veto what the majority would have wanted and is therefore incompatible with participatory constitution making.²⁶⁰ However this dissertation argues otherwise. To begin with, constitutional certification is not a parallel constitution drafting process but a mechanism of ensuring that those that are leading the constitution drafting and negotiation process remain accountable to the constitutional principles and vision set by the people. It is therefore a mechanism to protect the public and the constitution making process against possible manipulation by the dominant forces.

Furthermore, constitutional certification is legitimate if conducted by a tribunal of credible and impartial individuals, selected through a consensus by all the key parties to the constitution making process.²⁶¹ This tribunal must therefore be legitimate and acceptable to the people. Furthermore, like any other judicial process, the tribunal must exercise fidelity to the constitutional principles in order to retain the confidence of the people and ensure that the people's vision for a democratic constitution is achieved.

However, it is often argued that in dictatorships such as Zimbabwe, the judiciary is already captured by the ruling party and therefore cannot function as an impartial tribunal that is fit to exercise fidelity to the constitutional principles as what South Africa's independent Constitutional Court did in 1996.²⁶² In this dissertation, I argue that political actors that are engaged in constitutional negotiations must ensure that an impartial tribunal is created even where it means creating a totally new structure all together. On that point, a leaf should be borrowed from South Africa's negotiations for a new constitution, where a new court called the Constitutional Court was created after the realization that the existing courts of law (such

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid at 20.

²⁶² Human Rights Watch *supra* 78 at 14.

as the Appellate Division of South Africa) were not independent from the ruling Nationalist Party.²⁶³ Creating such an independent tribunal should be included as part of the transitional mechanisms discussed earlier on in this chapter.

The necessity of constitutional certification is also questioned given that in a participatory process the people can still reject the draft constitution at the referendum if it deviates from the set constitutional principles. However this dissertation argues that practically, participation during the referendum is often hijacked by the dominant forces who manipulate the people to support or reject the draft constitution not necessarily because of its quality but on the basis of whether the draft suits the selfish interests of these dominant forces.²⁶⁴ For instance, Zimbabwe's 2013 draft constitution was supported by 94.49 percent of the votes cast not necessarily because the people were happy about its quality but the dominant forces (MDC and ZANU PF) campaigned amongst their supporters to vote in favour of the draft because it satisfied their partisan interests.²⁶⁵ Certification works as a measure against such manipulation of the public's views by the dominant forces. Holding a referendum after the certification process, gives the people the final say on whether the draft should become law or not. If the people are not happy with the certified draft constitution, they can still reject that draft at the referendum. That way certification does not replace or veto public participation but helps protect and guide the process to give effect to society's aspiration for a democratic constitution as expressed by the set constitutional principles. Constitutional certification is therefore one of the mechanisms that can be integrated into a participatory constitution making process in order to assist the people to write a democratic constitution.

²⁶³Spitz R. and Chaskalson M. *The Politics of Transition: A hidden history of South Africa's negotiated settlement*, Johannesburg: Witwatersrand University Press, (2000) at 200.

²⁶⁴ Landau supra note 5 at 933.

²⁶⁵Dzinesa G.A. 'Draft Zimbabwean constitution entrenches the status quo' *BusinessDay* 15 March 2013. Available at: <http://www.bdlive.co.za/africa/africanews/2013/03/15/draft-zimbabwean-constitution-entrenches-the-status-quo>, (accessed on 22 July 2013).

References

1. Books

Conte A. and Burchill R. *Defining Civil and Political Rights: Jurisprudence of the United Nations Human Rights Committee* 2 ed (2013) Ashgate Publishing, Ltd.

Currie et. al. *The New Constitutional and Administrative Law* (2001) JUTA.

Currie I. and De Waal J. *The Bill of Rights Handbook* 6ed (2013) JUTA.

Diamond L. *Political Culture and Democracy in Developing Countries* (1993) Lynne Rienner Publishers.

Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa in Horn N and Bosl (eds), *The Independence of the Judiciary in Namibia* (2008).

Elster J. and Slagstad R. (eds.), *Constitutionalism and Democracy*, (1988) Cambridge University Press.

Giglioli M. *Legitimacy and Revolution, in a Society of Masses: Max Weber, Antonio Gramsci, and the Fin-de-Sicle Debate on Social Order* (2013) Transaction Publishers, New Brunswick, New Jersey.

Goredema, C. Whither Judicial Independence in Zimbabwe? In Raftopoulos, B. and Savage, T. (eds.), *Zimbabwe: Injustice and Political Reconciliation*, (2005) Harare, Weaver Press.

MacKinnon F. *Postures and Politics: some observations on participatory democracy* (1973) University of Toronto Press.

Malherbe R. *Constitutional Law* (2009) Durban: Butterworths.

Meredith M. *Mugabe: Power, Plunder and the Struggle for Zimbabwe* (2007) Public Affairs, New York.

Nwabueze B. *Judicialism and Good governance in Africa*, (2009) Nigerian Institute of Advanced Legal Studies at 91.

Rosenbaum W. *Political Culture* (1975) Praeger.

Skjelten S. *A people's constitution: Public participation in the South African constitution-making process* (2006) Institute for Global Dialogue.

Spitz R. and Chaskalson M. *The Politics of Transition: A hidden history of South Africa's negotiated settlement*, Johannesburg: Witwatersrand University Press, (2000).

Ville M.J.C. *Constitutionalism and the separation of powers* (1967) Oxford University Press.

Wing S. *Constructing Democracy in Africa: Mali in Transition* (2008) Palgrave Macmillan.

2. Articles in Journals and Conferences, and Chapters in Books

- Barber N.W. Prelude to Separation of powers (2001) 60 *The Cambridge Law Journal* 59.
- Banks M. Expanding Participation in Constitution Making: Challenges and Opportunities (2008) 49 (4):2 *Wm. & Mary L. Rev.* 1050.
- Cameron E. Judicial Accountability in South Africa (1990) 6 (2) *South African Journal of Human Rights* 253.
- Choudhry S. He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 18.
- Craig P. Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, (1997) 21 *Public Law* 467.
- Crisis in Zimbabwe Coalition 'Zimbabwe Transition Barometer–Trekking the Transition' (2013).
- Dyzenhaus D. The pasts and future of the rule of law in South Africa (2007) *South African Law Journal* 736.
- Ferim V. Flaws in Africa's dominant one party democracies: The case of Cameroon and South Africa (2010) 4 *CJDHR* 29.
- Ghai Y. Constitution Building Processes and Democratization: Lessons Learned (2009) International Democracy and Electoral Assistance publications.
- Hart V. 'Democratic Constitution Making' (2003) United States Institute of Peace Special Report 107.
- Hyden G. *Constitution-Making and Democratisation in Africa* (2001) Africa Institute of South Africa.
- Huntington S. et. al. No easy choice: political participation in developing countries (1977) 83:3 *American Journal of Sociology* 751.
- Jagwanth S. *The Right to Information as A Leverage Right* (2002) University of Cape Town, Open Democracy Advice Centre.
- Klug H. Constitution-Making, Democracy and the "Civilizing" of Unreconcilable Conflict: What Might We Learn from the South African Miracle? (2007) Wisconsin University, Legal Studies Research Paper Series 1046.
- Landau D. Constitution Making Gone Wrong (2013) 64 (5) *Alabama Law Review* 923.
- Levinson D. Separation of Parties, Not Powers (2006) 119 (1) *Harvard Law Review* 4.
- Liebenberg S. The right to social assistance: the implications of 'Grootboom' for policy reform in South Africa (2001) 17 *South African Journal on Human Rights* 256.
- Linington G, 'Reflections on the Significance of Constitutions and Constitutionalism for Zimbabwe,' in: E V Masunungure & J M Shumba (eds.), *Zimbabwe: Mired in Transition*, (2012), Harare, Weaver Press.
- Ludsin H. Peacemaking and Constitution drafting: A Dysfunctional Marriage (2011) 33 (1) *U.Pa.J.Int'LL.* 239.

Pollis A. 'A new Universalism' in Pollis A. and Schwab P (eds), Human Rights: New perspectives, New realities (2000) Lynne Rienner Publishers.

Rosenfield M. The Rule of Law and the Legitimacy of Constitutional Democracy (2001) 74 *Southern California law Review* 1307.

Samuels K. and Wyeth V.H. *State Building and Constitutional Design after Conflict* (2006) International Peace Academy, New York.

Theunis R. The constitutional framework and deepening democracy in South Africa (2005) Vol. 18, No.6 *Centre for Policy Studies*

Walker N. Constitutionalism and the Incompleteness of Democracy: An Interactive Relationship (2010) 3 *Netherlands Journal of Legal Philosophy* 39.

Wesson M and Du Plessis M. Fifteen Years on: Central Issues Relating To the Transformation of the South African Judiciary (2008) 24 *South African Journal for Human Rights* 188.

Zamchiya P. 'Pre-election detectors: ZANU PF's attempt to reclaim political hegemony' (2013).

Zimbabwean Senator Obert Gutu 'Transformation of the Rule of Law institutions: A necessary good' presented at the SADC symposium on common standards for judicial and prosecutorial independence in the SADC Region held in Harare 2013.

3. Web Sources

Becker 'What is Democracy' 2008, 4. Available at: <http://library.fes.de/pdf-files/bueros/madagascar/05860.pdf>

Brandt M. et. al. 'Constitution-making and Reform Options for the Process' (2011) *Interpeace* at 7. Available at: <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>

Democracy Web 'Accountability and Transparency: Essential principles'. Available: <http://www.democracyweb.org/accountability/principles.php>

Electoral Institute for Sustainable Democracy in Africa (EISA) report on Zimbabwe's 2013 Constitutional referendum. Available at: <http://www.eisa.org.za/WEP/zim2013referendum.htm>

Freedom House, Freedom of the Press Report-Zimbabwe (2013). Available at: <http://www.freedomhouse.org/report/freedom-press/2013/zimbabwe>

Freedom House 'Freedom of Association Under Threat: The New Authoritarians' Offensive Against Civil Society' (2012). Available at: <http://www.freedomhouse.org/report/freedom-association-under-threat-new-authoritarians-offensive-against-civil-society/zimbabwe>

Human Rights Watch 'World Report' (2011). Available at: <http://www.hrw.org/world-report-2011>

Human Rights Watch Report 'Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe' (2013) Available at: <http://www.hrw.org/news/2011/03/08/zimbabwe-no-justice-rampant-killings-torture>,

Human Rights Watch ‘Our Hands are tied: Erosion of the rule of law in Zimbabwe’ (2008). Available at: <http://www.hrw.org/sites/default/files/reports/zimbabwe1108.pdf>

Human Rights Watch ‘Zimbabwe: End Police Crackdown on Civil Society’ Mar 19, (2013). Available at: <http://www.hrw.org/news/2013/03/19/zimbabwe-end-police-crackdown-civil-society>

Joint Report on the Constitutional Outreach Meetings, August (2011), compiled by Zimbabwe Lawyers for Human Rights, Zimbabwe Peace Project and Zimbabwe Election Support Network.

Keane J. *Democracy: The Rule of Nobody?*(2004) Wissenschaftszentrum Berlin für Sozialforschung. Available at: http://johnkeane.net/wp-content/uploads/2011/01/rule_of_nobody.pdf

Mike Campel Report “Stateless in Zimbabwe, the Only Country They’ve Ever Called Home” Available at: <http://www.mikecampbellfoundation.com/page/stateless-in-zimbabwe-plight-of-aliens>

Ndlovu-Gatsheni S. ‘The Constitution and Constitutional process in Zimbabwe’ (2010). Available at: <http://www.solidaritypeacetrust.org/703/the-constitution-and-the-constitutional-process-in-zimbabwe/>

Roschmann C et. al. ‘Human Rights, Separation of powers and Devolution in Kenya Constitution, 2010: Comparison and lessons for EAC member states’. Available at: http://www.kas.de/wf/doc/kas_33086-1522-2-30.pdf?121213123905

Samuels K. and Wyeth V.H. ‘State Building and Constitutional Design after Conflict’ (2006) International Peace Academy. Available at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/events-documents/1216.pdf>

The National Civil Society Congress (NCSC), Katiba Sasa! Campaign: A score card for the draft constitution. Available at: <http://www.crecokenya.org/wp-content/uploads/principles2.pdf>

United Nations Development Programme (UNDP) Zimbabwe’s Project Document titled ‘*Support To Participatory Constitution Making In Zimbabwe Project (SPCMZ)*’. Available at: <http://www.undp.org.zw/focus-areas/democratic-governance/support-to-participatory-constitution-making-in-zimbabwe-project-spcmz>

Zimbabwe Constitution Select Committee (COPAC): National Statistical and Narrative Report Version 1 (2012). Available at: <http://www.copac.org.zw/>

Zimbabwe Constitution Select Committee (COPAC) milestones towards a new Constitution for Zimbabwe. Available at: <http://www.copac.org.zw/phocadownload/Milestones%20Brochure-01.pdf>

4. Legislation, Resolution and Instruments

African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

Constitution of the Republic of Kenya, Revised Edition (2010).
Constitution of the Republic of South Africa No. 108 (1996).
Constitution of Zimbabwe as amended 30th October (2007).
Constitution of Zimbabwe Amendment No. 20 (2013).
Criminal Law (Codification and Reform) Chapter 9:23 Act 23/2004.
Interim Constitution of South Africa Act No. 200 of (1993).
Public Order and Security Act of Zimbabwe [Chapter 11:17].
Resolution 6.8 of the Communique of the SADC summit in June 2012 Angola.
Resolution 8 of the Communique of the SADC summit in June 2013 Maputo.

5. Cases

Democratic Alliance v President of the Republic of South Africa (263/11) [2011] ZASCA 241.
Jealous Mbizvo Mawarire v Robert Gabriel Mugabe (2013) CCZ1/13.
Justice Alliance of South Africa v President of the Republic of South Africa CCT 53/11 (2011) ZACC 23.
Mario Gaspare Oriani- Ambrosini MP v Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly CCT 16/12 (2012) ZACC 27.
Morgan Tsvangirai v Chairperson of the Zimbabwe Election Commission and others EC 27/13
Nixon Nyikadzino v President of the Republic of Zimbabwe and Others CCZ34/13
Treatment Action Campaign v Minister of Health CCT 8/02.

6. Agreements

Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe. Global Political Agreement (GPA) on 15 September 2008.

7. Newspapers

Dzinesa G.A. 'Draft Zimbabwean constitution entrenches the status quo' BusinessDay 15 March 2013. Available at: <http://www.bdlive.co.za/africa/africanews/2013/03/15/draft-zimbabwean-constitution-entrenches-the-status-quo>

NCA's criticism of MDC's compromises under the article, Staff reporter 'Mugabe Profiting from the New Constitution' *Bulawayo 24 News*, 08 September 2013. Available at: <http://bulawayo24.com/index-id-news-sc-national-byo-35797.html>,

'Parties gang up against Mugabe' *News Day*. June 6, 2013. Available at: <https://www.newsday.co.zw/2013/06/06/parties-gang-up-against-mugabe/>

Simbisai B. 'Mugabe judges appointments stink' *The Zimbabwe Independent* 19 July 2013.

SW Radio press statement. Available at: <http://www.swradioafrica.com/2013/07/09/mdc-youth-leader-challenges-mugabe-insult-law-in-constitutional-court/>

8. Thesis

Nordlund P. *Organizing the Political Agora: Domination and Democratisation in Zambia and Zimbabwe*, (1996) Unpublished PhD Thesis, University of Uppsala.