# Constitution-making in Zimbabwe: Assessing institutions and processes

By

**SYLVESTER MARUMAHOKO**

**(Student No 3003654)**

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**Promoter**

**PROFESSOR YONATAN TESFAYE FESSHA**

**Co-Promoter**

**PROFESSOR JACQUES DE VILLE**

FACULTY OF LAW

UNIVERSITY OF THE WESTERN CAPE

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# Map of Zimbabwe

# Declaration

I declare that **'Constitution-making in Zimbabwe: Assessing institutions and processes'** is my own work. None of the present work has been submitted previously for any degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced.

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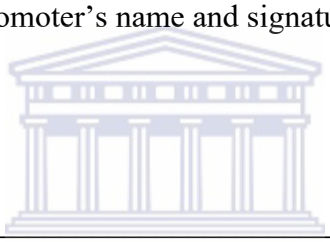
Promoter's name and signature



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Date

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**SYLVESTER MARUMAHOKO**

## Keywords

Constitution

Constitution making

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Kariba draft constitution

Global Political Agreement

Participation

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# Constitution-making in Zimbabwe: Assessing institutions and processes

**SYLVESTER MARUMAHOKO**
Faculty of Law, University of the Western Cape, Private Bag X17, Bellville, South Africa.

## Abstract

Since its conquest by Britain in 1890, Zimbabwe has witnessed a series of constitution making projects. Spanning over 100 years, the question of constitutional development has continued to dominate public debate. The end of colonial rule did not see an end to the demand for a constitution that is legitimate and durable. The search for an enduring and good constitution continued into the 21st century. With the unveiling of the 2013 constitution-making project, however, it seemed as if a long lasting solution had been 'delivered' on the question of a legitimate and durable constitution.

The thesis assesses the questions of institutions and processes in Zimbabwe's quest to construct a new constitution. It contends that institutions and processes used to make constitutions are as important as the contents of a final constitution. That is why more time and efforts are often spent negotiating the twin questions of institutions and processes of constitution-making than is spent negotiating the content of a constitution. With this in mind, the thesis develops standards for assessing institutions and processes used in successive constitution-making projects in Zimbabwe.

A major finding of the assessment is that the twin questions of institutions and processes were neglected in all constitution-making efforts undertaken in Zimbabwe, including that which culminated in the creation of the Constitution of 2013. The thesis maintains that a lot of significance must be attached to the design of institutions and processes of constitution-making if a constitution is to be enduring and widely accepted as legitimate.

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Above all, l thank God the Almighty for granting me the wisdom, health and strength to successfully finish the study.
Once again, thank you all.
I will now take it from here.

## Table of Contents

## ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| ACDP | African Christian Democratic Party |
| ACHPR | African Commission on Human and Peoples' Rights |
| CAN | Action Christian National |
| AIPPA | Access to Information and Protection of Privacy Act |
| AMB | Administrative Management Body |
| ANC | African National Congress |
| CAR | Central African Republic |
| CDC | Constitutional Drafting Commission |
| CoEs | Committee of Experts |
| COPAC | Constitution Parliamentary Select Committee |
| CRC | Constitutional Review Commission |
| DP | Democratic Party |
| DRC | Democratic Republic of Congo |
| DTA | Democratic Turnhalle Alliance |
| EC | European Commission |
| ECF-SADC | Election Commissions Forum of Southern Africa Development Community Countries |
| EU | European Union |
| FCN | Federal Convention of Namibia |
| FF | Freedom Front |
| FTLRP | Fast Track Land Reform Programme |
| GDP | Gross Domestic Product |
| GNU | Government of National Unity |
| GPA | Global Political Agreement |
| HRC | Human Rights Committee |
| IC | Interim Constitution |
| ICCPR | International Covenant on Civil and Political Rights |
| ICG | International Crisis Group |
| ID | Identity Document |
| IDPS | Internally Displaced Persons |

| | |
|---|---|
| IFP | Inkatha Freedom Party |
| IS | Internal Settlement |
| ISO | International Socialist Organisation |
| MDC | Movement for Democratic Change |
| MDC99 | Movement for Democratic Change 99 |
| MDC-M | Movement for Democratic Change-Mutambara |
| MDC-N | Movement for Democratic Change-Ncube |
| MDC-T | Movement for Democratic Change-Tsvangirai |
| NC | National Conference |
| NCA | National Constitutional Assembly |
| NCDPZ | National Council of Disabled Persons of Zimbabwe |
| NNF | Namibia National Front |
| NP | National Party |
| NPF | Namibian Patriotic Front |
| NUST | National University of Science and Technology |
| OAT | Observers Accreditation Team |
| ONHRI | Organ on National Healing, Reconciliation and Integration |
| PAC | Pan Africanist Congress |
| POSA | Public Order Security Act |
| PTU | Progressive Teachers' Union |
| RF | Rhodesian Front |
| RPA | Rwanda Patriotic Army |
| RT | Round Table |
| SADC | Southern African Development Community |
| SADC-PF | Southern Africa Development Community Parliamentary Forum |
| SIDA | Swedish International Development Agency |
| STUM | Solidarity Trade Union Movement |
| SWA | South West Africa |
| SWAPO | South West Africa People's Organisation |
| UANC | United African National Council |
| UDF | United Democratic Front |

| | |
|---|---|
| UDI | Unilateral Declaration of Independence |
| UK | United Kingdom |
| UN | United Nations |
| UNCHR | United Nations Committee of Human Rights |
| UNDP | United Nations Development Programme |
| UNFP | United National Federal Party |
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children's Fund |
| US | United States |
| USA | United States of America |
| USAID | United States of America International Development |
| WUA | Women's University in Africa |
| ZANU | Zimbabwe African National Union |
| ZANU PF | Zimbabwe African National Union Patriotic Front |
| ZCTU | Zimbabwe Congress of Trade Union |
| ZDF | Zimbabwe Defence Forces |
| ZEC | Zimbabwe Election Commission |
| ZINASU | Zimbabwe National Students Union |
| ZLHR | Zimbabwe Lawyers for Human Rights |
| ZMC | Zimbabwe Media Commission |

## List of Tables

# Chapter One: Introduction

## 1. Background to the study

In 2013, Zimbabwe adopted a new constitution. The adoption of the 2013 constitution came on the back of a series of constitution-making projects that sought to provide this land-locked southern African country with a legitimate and durable constitution. Between 1889 and 2007, the country experienced twelve constitution-making exercises. Although the majority of these efforts saw the construction of complete documents in the form of new constitutions, the legitimacy of these documents was always contested. As a result, the country continued with its search for a durable constitution. In fact, the search for an acceptable constitution has arguably been the country's biggest headache since 1890 when it was placed under British protection as a semi-autonomous colony.

Southern Rhodesia, as today's Zimbabwe was known then, was granted the Royal Charter, the first document that resembled a constitution, in 1889. Thirty-four years later, the Royal Charter was replaced by the 1923 Constitution. The decision to form a political union with its two neighbours, Northern Rhodesia and Nyasaland, led to the adoption of a federal constitution in 1953. The political union was short lived. The collapse of the political union was followed by the adoption of the 1961 Constitution. The decision of the colony to unilaterally declare independence from Britain prompted the replacement of the 1961 Constitution with yet another new constitution in 1965.



By 1979, it had become clear that a new constitutional order would have to be adopted to give effect to the aspirations of the majority. The constitutional dispensation that was in place at the time was perpetuating social injustice and the marginalisation of the black majority.[1] However, efforts to overhaul the constitution could not be realised as the liberation struggle failed to deliver a conclusive settlement of the war effort. Faced with a stalemate and a protracted war with no end in sight, the war weary leaders, on both sides of the divide, agreed to negotiate a new constitution. The negotiated settlement, mediated by the colonial power, Britain, resulted in the 1980 constitution, which is commonly referred to as the Lancaster House Constitution. That, however, did not resolve the search for a legitimate and durable constitution. Other constitution-making projects followed soon.

[1] Hatchard 2001: 212.

The next major attempt at creating a legitimate and durable constitution came in 2000 when a government backed Constitutional Commission created a draft constitution, which was, however, rejected in a referendum.[2] The following year, civil society organisations, under the aegis of the National Constitutional Assembly, created a constitution which was ignored by government.[3] Six years later, three major political parties that were locked in a bitter tussle for power, namely the Zimbabwe African National Union Patriotic Front (ZANU PF) and the two Movement for Democratic Change (MDC) formations, secretly negotiated a document commonly known as the Kariba draft constitution. Civil society groups successfully mobilised public opinion against the adoption of the constitution.[4]

It was against this background that Zimbabwe went to the polls on 28 March 2008 to vote in the general election covering local government, parliamentary and presidential elections. When the Zimbabwe Election Commission began to announce election results, it became clear that the opposition MDC, led by Morgan Tsvangirai, had defeated the ruling party, ZANU PF at the poll. It won most of the local government and parliamentary seats. With the presidential election pointing to victory for Tsvangirai, the electoral authorities postponed the announcement of the result for more than one month. When the result was finally announced, it showed that Tsvangirai had obtained the largest vote, which was, however, slightly short of the majority vote required to win the election.[5] The inconclusive result necessitated a run-off election.

Tsvangirai withdrew from the runoff election citing the harassment and intimidation of his supporters. Despite his withdrawal, Robert Mugabe entered the presidential race alone and was declared the winner. The presidential election result was nullified by the Southern African Development Community (SADC). With the concurrence of the African Union, the SADC tasked Thabo Mbeki, former President of South Africa, to mediate the crisis by facilitating the formation of a Government of National Unity. On 15 September 2008, the protagonists signed the Global Political Agreement (GPA), a document that, among other

[2] Dorman 2003: 851.

[3] This is not a government body.

[4] Hatchard 2001: 213.

[5] Feldman 2013: 2. Tsvangirai secured 48 per cent of the vote instead of the 50+1 one threshold provided for in the Constitution to avoid a run-off election.

things, mandated the creation of a new constitution. It was this agreement that eventually led to the adoption of the 2013 constitution.

## 2. Statement of the problem

From the quick survey of Zimbabwe's constitutional history, it is clear that the country has failed to produce a legitimate and durable constitution. The study explores this persistent failure of the authorities of the Zimbabwe government to come up with a good and enduring constitution. It does so by focusing on the institutions and processes of constitution-making that led to the creation of Zimbabwe's many, but often short-lived, constitutions. It, in particular, assesses the extent to which the institutions and processes of constitution making met the demands of participatory, inclusive and transparent constitution-making. In order to achieve these objectives, the following questions are asked:

- What are the issues that one must consider when creating participatory, inclusive and transparent constitution-making institutions?
- What are the issues that one must consider when designing participatory, inclusive and transparent constitution-making processes?
- Did the institutions and processes that led to the creation of the successive constitutions, including the current Constitution, meet the demands of participatory, inclusive and transparent constitution making?



## 3. Objectives of the study

The objectives of this study are twofold. The first objective of the thesis is to illustrate that the institutions and processes of constitution-making are key considerations in deciding whether a new constitution is successfully created. The second objective is to demonstrate that the failure to create an acceptable constitution in Zimbabwe is partly associated with the failure to place a premium on the institutions and processes of constitution-making.

## 4. Limitations of the study

The study uses the desk research methodology and follows a purely procedural approach. It seeks to identify issues relating to institutions and processes of constitution-making that a country must consider when creating a constitution. The same issues are then discussed in the context of assessing the institutions and processes of constitution making in Zimbabwe.

It must be made clear from the outset that this thesis is not based on the premise that institutions and processes are the only factors that matter in creating a legitimate and durable constitution. The content of a constitution also matters. The content, after all, articulates the visions and aspirations of the society, the kind of society it seeks to create. It also sets out the common values that define the political community. It is furthermore in the content of the constitution that one finds the ways in which state power is to be exercised as well as the Bill of Rights that allows individuals to limit the exercise of power by government.

A constitution that has an excellent and progressive content and one that is an outcome of institutions and processes that were inclusive, participatory and transparent may nevertheless not become a living document that commands respect and enjoys longevity.[6] 'Old vested interests, armed with money and other resources, may capture new institutions and neutralize the progressive agenda of the constitution.'[7] Alternatively, '[p]owerful foreign actors who may have pushed for a democracy are likely to find that their own economic and geopolitical interests are incompatible with genuine local democracy and seek to limit public participation'.[8] A constitution that is created using inclusive, participatory and transparent institutions and processes could be ignored or may not take root. What is equally important is thus what happens in the days after the constitution is enacted. In this regard, the continuous engagement of civil society with the constitution, and more importantly, an active civil society that monitors governance are crucial in ensuring that a constitution becomes 'a living reality'. [9]



[6] In Eritrea, a constitution that passed through institutions and processes that were inclusive, participatory and transparent was not signed into law as the State president feared to lose his monopoly on power. On the other hand, the constitutions of Japan, Germany and Eastern Europe have withstood the test of time although these documents were either imposed by foreign powers or were the result of roundtables dominated by the elite in society. See Mataza 2012:1; Elster 1995:369.

[7] Ghai & Galli 2006a: 238.

[8] Ghai & Galli 2006b: 238.

[9] In South Africa, for example, civil society organisations have been involved in public interest litigation and advocacy. One such case is The Treatment Action Campaign (TAC) case involving citizens' right to access anti-retroviral drugs upon testing positive for HIV. In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002), the TAC sued the South African government for not ensuring that mother-to-child-transmission (MTCT) prevention was available to all pregnant mothers. Although the government devised a programme to deal with mother to child transmission of HIV at birth and identified nevirapine as its drug of choice for the purpose, the programme imposed restrictions on the availability of nevirapine in the public health sector. Sections 27 and 28 of the

In short, this study is not based on the understanding that inclusive, transparent and participatory institutions and processes of constitution- making are the *sine qua non* for the creation of a durable and legitimate constitution. They form but one crucial part of the jigsaw puzzle that must be completed to have a sustainable constitution that contributes toward the consolidation of democracy and the culture of human rights. It is with this in mind that the thesis discusses how the different choices of institutions of constitution-making and the different stages of the process can be used to give effect to the constitutional principles of inclusion, participation and transparency.

**5. Significance of the study**

The attention given thus far to issues of institutions and processes of constitution-making has been scant. This is particularly the case in Zimbabwe. The thesis provides a comprehensive analysis of the institutions and processes that led to the creation of the 2013 Constitution. It, in particular, seeks to answer the extent to which the institutions and processes of constitution-making were based on the norms of participatory, inclusive and transparent constitution-making. By doing so, the thesis seeks to break new ground by focusing on issues of institutions and processes that have not always received prominence whenever an account of the history of constitutional development in Zimbabwe is told. It emphasises that institutions and processes of constitution-making are as important as the content of a constitution.

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Constitution, the TAC contended, oblige the government to implement a comprehensive programme for the prevention of MTCT throughout South Africa. The TAC won the case, forcing the reluctant government of former South African President Thabo Mbeki to roll out a comprehensive anti-retroviral access drugs programme across the country through its health clinics. In *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC), the Cape Town's Walladene Informal Settlement, represented by Irene Grootboom, a housing rights activist applied to the Cape of the Good Hope Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted relief. The respondents, assisted by the Human Rights Commission and the Community Law Centre of the University of the Western Cape, argued that the Constitution provides everyone the right to adequate housing and imposes an obligation upon the State to take reasonable legislative powers and other measures to ensure the progressive realisation of this right within its available resources. The court found that the government had not met its obligations to provide adequate housing for the residents of the informal settlement. The ruling did not only keep the Constitution alive, it provided a clear legal support for housing rights campaigns in South Africa and elsewhere. See also Arato 2000: 35.

## 6. Literature review

Very few writers have directed their efforts to analyse the constitution- making project that ended recently in Zimbabwe. Even fewer have written on the legitimacy of the constitution-making process in providing a platform for capturing the aspirations of Zimbabweans. Most of the views on the constitution-making process in Zimbabwe take the form of newspaper articles trying to capture the constitutional process as it unfolded on an intermittent basis. Occasionally, one comes across articles in journals and on the web trying to analyse the making of the 2013 constitution.

In 'Fundamentals of constitution making in Zimbabwe: A case for Zimbabwe', Chigwangwa examines some of the reasons why previous processes of constitution-making failed to deliver a widely acceptable constitution. Some of the reasons given by the author include the effects of political intimidation as well as interference and mistrust between government and citizens. The author concludes by making the observation that the history of constitution-making in Zimbabwe has witnessed self-evident tension between the need to reach a broad-based consensus on the process of constitution-making, on the one hand, and the need to ensure that the authority of the government is not undermined, on the other.[10]



In an article titled 'Zimbabwe's constitutional reform process: Challenges and prospects', Dzinesa discusses efforts at constitution-making in the period between 1999 and 2007.[11] The author traces the efforts at constitution-making to the objectionable piecemeal amendments of the Lancaster House Constitution. Thereafter, the author argues that constitution-making under the auspices of the Constitutional Commission was 'inherently flawed in that it was specifically designed to ensure presidential control'.[12] The author praises the constitution-making of the National Constitutional Assembly (NCA) for 'carrying out a people driven constitutional reform process'.[13] Although the draft it produced was ignored, the NCA managed to keep constitutional issues on the national agenda. Turning to the 2007 constitution-making effort, the author criticises ZANU PF and the MDC formations for restricting the constitutional reform process to a select team of partisan representatives. The

[10] Chigwangwa 2009: 2.

[11] Dzinesa 2012a: 5.

[12] Dzinesa 2012b: 4.

[13] Dzinesa 2013: 4.

author concludes on a rather sad note by observing that the process of constitution-making has always occurred in fits and starts and that it has largely been intermittent in character.

In an article titled 'Some lessons on constitution-making from Zimbabwe', Hatchard discusses constitution-making under the 2000 Constitutional Commission. The author notes a number of shortcomings in the manner in which the draft constitution was produced. These include a poorly structured consultation process, manipulation of the work of the Constitutional Commission by the State President, the domination of the constitution-making body by the State President and the unfettered discretion enjoyed by the State President in deciding the fate of the draft. These shortcomings prompt Hatchard to conclude that unless a constitution-making body is 'demonstrably independent, its membership fully representative of civil society and its deliberations transparent, the drafting process is susceptible to manipulation'.[14]

In an article titled 'Zimbabwe's constitution-making and electoral reform processes: Opportunities and challenges', Sachikonye explains why constitution making has been a chequered process. The author cites the 'country's history of militarisation, authoritarianism, elite intransigence, and lack of a national consensus over a social contract and reform framework'[15] as the main reasons why the country continues to be locked in a never ending search for a durable constitution. Constitution-making cannot succeed, the author argues, as the elite have tended to regard constitutions as major instruments for 'access to power or sharing of power'.[16]

In an article titled 'Designing constitution-making processes: Lessons from the past, questions for the future', Miller discusses a number of issues relating to constitution-making in Zimbabwe.[17] These include participation, state-society engagement, consultation, endorsement and ratification. The author concludes that government control of constitution-making is the reason the country continues to grapple with the creation of a durable constitution. The effort to control the processes comes against the backdrop of vigorous resistance by civil society organisations seeking to limit the role of the government in constitution-making. Many argue that government's failure to limit its role in constitution-

[14] Hatchard 2001: 212.

[15] Sachikonye 2011: 2.

[16] Sachikonye 2011: 19.

[17] Miller E.L, 2010: 620.

making is one of the reasons that led to the rejection of the 2000 draft constitution in a referendum.[18]

From the foregoing, it is clear that there has not been a study that examined the successive constitution-making efforts in a comprehensive manner. Further, the institutions and processes that were used to create the successive constitutions have not been given specific attention. The thesis intends to change that. It will do so by providing the first comprehensive examination of the constitution-making bodies and the procedures that were used to create the successive constitutions of Zimbabwe. Particular attention is to be given to the making of the current Constitution. In short, the thesis provides a comprehensive historical and contemporary discussion of the constitution-making projects that Zimbabwe has seen in the last one hundred and twenty four years.

## 7. Structure of the study

The study is organised into six Chapters. Chapter Two provides a background to the history of constitution-making in Zimbabwe. It focuses on the institutions and processes that were used in successive constitution-making efforts in Zimbabwe between 1889 and 1980. The first period, which runs from 1889 to 1961, focuses on the history of constitution-making under colonial rule. The second period, which runs from 1965 to 1980, focuses on the history of constitution-making under white nationalist rule. By providing a historical background, the thesis aims to achieve two goals. First, it provides the context within which to evaluate the latest efforts at constitution-making, particularly the 2013 Constitution. Second, it also highlights the shortcomings that characterised the earliest constitution-making projects that, apparently, were not confined to Zimbabwe and have given rise to the emerging consensus that constitution-making must be guided by a set of constitutional principles, which are the focus of Chapter Three.

In Chapter Three, the thesis takes a detour from the discussion on the history of constitution-making in Zimbabwe to take stock of the constitutional principles that were emerging as Zimbabwe was moving away from a century of colonial and white rule. These are principles that are designed to guide the making of a constitution. The chapter begins the discussion by outlining the principles. After outlining the constitutional principles, the Chapter focuses on the different choices of institutions for constitution-making and examines how these

[18] Miller E.L, 2010: 620.

institutions can give effect to the principles. This is followed by a discussion of the general features of a typical process of constitution-making. The purpose of the Chapter is to identify 'process related issues' that must be taken into account in assessing a constitution-making project.

Having reviewed the principles that a constitution-making project must comply with, the thesis returns, in Chapter Four, to the history of constitution-making in Zimbabwe. This time, the focus is on the institutions and processes of constitution-making that were used in the period between 2000 and 2007. Relying on the standards identified in the preceding Chapter, Chapter Four assesses the institutions and processes used in the creation of successive (draft) constitutions.

Chapter Five focuses on the institutions and processes leading to the creation of the 2013 Constitution. Relying on the criteria established in Chapter Three, Chapter Five assesses the constitution-making body and its auxiliary institutions. In addition, it provides a rigorous examination of the processes that culminated in the creation of the current constitution.

Chapter Six concludes the thesis by restating major findings and offering some recommendations.

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# Chapter Two: Historical background: Constitution-making in Zimbabwe from colonial annexation to independence (1889 to 1979)

## 1. Introduction

The making of constitutions in Zimbabwe has a long history. Prior to independence, the country saw not less than ten attempts at creating a new constitution. Some failed but many succeeded in creating a new constitution. Yet, a number of them were short-lived.

Chapter Two assesses constitution-making in Zimbabwe from a historical perspective. For reasons that will become clear later, the focus of this Chapter is on the creation of the successive colonial constitutions, i.e. the constitutions that were adopted before independence in 1980. Chapter Two, thus, focuses on the period between 1889 and 1979 which was characterised by colonial rule. It specifically focuses on the institutions and processes that were used to make successive constitutions.

What emerges from the discussion is that the history of constitution-making in Southern Rhodesia was driven by the desire to entrench colonial rule and facilitate white hegemony. Britain continued to dominate the history of constitutional development in Southern Rhodesia (now Zimbabwe) well after the unilateral declaration of independence.[1] As the colonial power, Britain had the last word on the acceptability of a model constitution for Southern Rhodesia. It also determined the nature of the institutions and processes that were used to create the successive constitutions.

## 2. The 1889 constitutional process

The history of constitutional development in Southern Rhodesia can be traced back to 1888 when King Lobengula granted Cecil John Rhodes, a South African based politician and businessman of English descent, exclusive mining rights through the Rudd Concession.[2] It

[1] Mangwiro 2004: 3. Zimbabwe assumed its current name in terms of section 1 (1) of the Southern Rhodesia Act passed by Her Majesty's parliament on 14 November 1979. Prior to that, it was known by several names: Southern Rhodesia, Rhodesia, and Rhodesia-Zimbabwe. In this thesis, for purposes of convenience, the designation Southern Rhodesia is used in respect of the period under colonial rule (from 1888 to 1979) and Zimbabwe is used for the period spanning from 18 April 1980 to the present. See also Palley 1966: 29; Chimbwa 2012: 3.

[2] Ndulo 2010: 176. Cecil John Rhodes was a British mining magnate who had the vision of expanding British rule from Cape Town to Cairo. Cecil John Rhodes died on 2 March 1902 in Cape Town, South Africa and is

was Charles Rudd, James Maguire and Francis Thompson, three emissaries acting on behalf of Cecil John Rhodes, who secured, through deceit, a written concession for exclusive mining rights in Mashonaland and Matabeleland on 30 October 1888.[3] The concession conferred on the grantees the sole right to extract minerals throughout Southern Rhodesia as well as the power to defend this exclusive mining right by force, in return for weapons and a monthly stipend of £100.[4]

Following the grant, Cecil John Rhodes and a consortium of business people agreed to pool resources. In March 1889, Rhodes travelled to London where he shared with government officials his plans for an amalgamated charter bid involving two companies, namely the Central Search Association and the Exploring Company Limited. The two companies would be amalgamated into a company to be known as the British South Africa Company (BSACo). His proposal received support from the government and, on 29 October 1889, the then British Prime Minister Lord Salisbury (Robert Gascoyne-Cecil) granted the BSACo the right to operate in Southern Rhodesia.[5]

The approval of the grant came in the form of a Royal Charter, a document that allocated notable administrative powers of governance nature to the BSACo. Clause 3 of the Royal Charter granted the BSACo the right to obtain powers necessary for the preservation of public order in territories that fall under its concessions.[6] More specifically, it granted the

buried at Matopos Hills, Southern Rhodesia (Zimbabwe), a country named after him. See also Chadwa 2010: 3; Mutandwa 2010: 19.

[3] Palley 1966: 29. King Lobengula was a King of the Ndebele people who claimed sovereignty over the entire territory of Zimbabwe. Cecil John Rhodes's emissaries lied to King Lobengula about the full extent of the agreement the King signed. The King, who was illiterate, only found out what the agreement entailed when someone translated the document from English to Ndebele (the language spoken by the King). Realising that he had been misled, the King dispatched two emissaries to go and meet Queen Victoria in Britain in 1889. Although the misrepresentations were brought to the attention of the Queen, the agreement was not set aside. Shortly after the meeting, Cecil John Rhodes, with the assistance of mercenaries from South Africa invaded Southern Rhodesia in 1890. The King was defeated in the battle that ensued. The cause of the King's death is not clear up to this day. Some authors, including Dickson Mungazi (1992: 8) argue that King Lobengula was killed by Cecil John Rhodes's men during the invasion. Others, however, attribute the King's death to smallpox. See also Matshazi 2012: 2.

[4] Mungazi 1992: 9. See also Woolridge 1939: 1; Olsson 2011: 14.

[5] Palley 1966: 30.

[6] Palley 1966: 95. See also Chatora 2009: 2.

BSACo the right to maintain public order by establishing and maintaining a police force. In addition, the Royal Charter allowed the BSACo to enter into business agreements including the right to form banks and to own, manage, grant or distribute land. In exchange for these extensive powers, the Charter obliged the BSACo to use its resources to develop the annexed territory and to facilitate free trade within the territory. In addition, the Charter enjoined the BSACo to respect existing African laws and all religions.[7] Importantly, the Charter provided for a legislative body called the Legislative Council whose main function was to assist the Company to run the country by enacting laws.[8]

The Royal Charter had a limited lifespan of twenty-five years. Following its expiry in 1914, the colonial power had two choices. It could either extend the validity of the Royal Charter or put in place a new constitutional arrangement. Two issues dominated the debate on the fate of the Charter. On the one hand, the colonial power was reluctant to put in place a constitutional arrangement that would make it assume full responsibility for Southern Rhodesia. The colonial power was happy with the status quo as long as the BSACo continued to use its financial resources to fund governance activities in Southern Rhodesia.[9] It did not wish to take full responsibility as doing so meant that taxes collected from British citizens would end up being used to run Southern Rhodesia. There was a fear that such a decision would trigger a backlash from tax weary British citizens.[10]



At the same time, the colonial power had to consider the capacity of the BSACo to competently govern Southern Rhodesia. In 1914, the colonial power authorised the setting up of a Legislative Assembly for Southern Rhodesia. Although the directive from the colonial power was for the Company to ensure that all members of the white community voted, the

[7] Olsson 2011: 14. See also Martin & Johnson 1981: 46: Oldfield Z, 1934: 3.

[8] Between 1898 and 1922, the Legislative Council assisted the Company to run Southern Rhodesia by making laws. Composed of nine members, of whom five were appointed by the Company and four elected by registered voters, members of the Legislative Council held office for three years. Although they could be dismissed by the Company, they were eligible for re-election. Those nominated by the Company took precedence over those elected by ordinary citizens. The deliberations of the Legislative Council were chaired by an Administrator who was an appointee of the colonial power. The appointee, also known as the BSACo administrator, was responsible for implementing policy. The administrator was accountable to the Company and to the British High Commissioner for Southern Africa. In turn, the British High Commissioner for Southern Africa was accountable to the Office of Colonies in London. See also Murray 1970: 1.

[9] Chirevo 2010: 3. See also Chinhange 2013: 5.

[10] Oldfield Z, 1934: 4.

Company did not implement the directive fearing that it would undermine its influence. Instead, it facilitated the creation of a Legislative Council in which it appointed three quarters of legislative members. The remainder comprised members elected by the members of the white community that had shares in the Company.[11] As the number of whites in Southern Rhodesia increased, so did conflict between the BSACo and members of the white community without shares in the Company that demanded voting rights. Demands for more voting rights clashed with the priorities of the BSACo, which was to administer the country on a profit basis so that dividends could be paid to shareholders.

Keen to control the Legislative Council, members of the white community argued that the colonial power needed to link the issue of the renewal of the Royal Charter to the BSACo's commitment to extend, unconditionally, voting rights to all whites. To avoid making a decision with financial implications, the colonial power pressured the BSACo to extend voting rights to all whites. Once the BSACo agreed, the colonial power renewed the period of validity of the Royal Charter from 1914 to 1922.[12]

There is often a debate around the nature and status of the Royal Charter. At the centre of the debate is whether the Royal Charter can be regarded as a constitution. The general consensus is that the Charter ought to be regarded as Zimbabwe's first written, albeit colonial, constitution. This is because it included some of the defining characteristics of a contemporary constitution. In the same way as the modern day constitution, the Charter was the supreme law of Southern Rhodesia. It provided the legal foundation for the existence of the country. It defined the nature of the power that the BSAC could exercise. Through it, the BSAC could establish governmental institutions usually provided for in modern day constitutions like those for the maintenance of law and order.[13] It was, in short, a document of fundamental principles around which the country was organised. The Charter was a document that had the status and significance that resembled that of a modern day constitution.

For purposes of this study, very little need be said about the institutional arrangements that accompanied the creation of Zimbabwe's first constitution. Put simply, it was a document

[11] Bowman 1973: 7. See also Murray 1970: 1.

[12] O'Meara 1975: 6. See also Goredema S, 2005: 3.

[13] Chigayo 2012: 1. See also O'Meara 1975: 6.

that came in the form of a grant. The fact that it was 'granted' is not surprising as that epitomised the manner in which colonial powers produced constitutions for colonies under their 'protection'.[14] Like many other documents of the time in colonial Africa, the Royal Charter was a document that was created to 'advance colonial interests more than the interests of the people for whom they were created'.[15]

## 3. The 1923 constitutional process

Following the expiry of the Royal Charter in 1922, the colonial power, Britain, organised a referendum which gave members of the white community an opportunity to state whether they wish to join the Union of South Africa as its sixth province or become a semi-autonomous colony of Britain. 59% voted to become a colony of Britain while 41% voted for incorporation into the Union of South Africa. Based on the results of the referendum, Britain decided not to renew the Royal Charter, thereby ending the administration of Southern Rhodesia by the BSACo under the Royal Charter and the protection of Britain. The territory was formally annexed by Britain by virtue of the Southern Rhodesia (Annexation) Order in Council which came into operation on 12 September 1923.[16] Southern Rhodesia was integrated into the British Empire and accorded the status of a self-governing colony under the protection of Britain.



In the wake of the annexation, Britain proceeded to produce a constitution for its semi-autonomous colony. At the centre of the process of the creation of the constitution was the Office of Colonial Affairs, a government department mandated to manage colonies under British protection. As was the case with constitutions created by the Colonial Office in other parts of the British Empire, colonial preferences dominated the process. In fact, there is very little to talk about by way of a process of constitution-making. It commenced with the Office of Colonial Affairs appointing its officers as legal drafters, a practice that was common at the time. The officers drafted the constitution guided by colonial preferences. Once a draft was finalised and accepted by the Office of the Colonial Affairs, it was submitted to the two Houses of the British Legislature and approved as an Act of the British Parliament.[17] It was

[14] Mavare 2013:2. See also Musgrave 1930: 2; Brown 1980: 7.

[15] Chikoya 2013: 4.

[16] Marsh 1974: 183. See also Phimister 1984: 280; Sprack 1974: 3.

[17] Chitande 2011: 3. See also Vosloo 1974: 25.

then granted royal assent before it was unveiled to Southern Rhodesia on 1 September 1923 as the Constitution of Southern Rhodesia.[18]

The Constitution of 1923 provided for a Legislative Assembly.[19] Based on the constitution, the colonial power arranged legislative elections in which only members of the white community participated. Blacks did not participate in the elections as they did not meet the requirements for voting rights, which stipulated that one needed to earn a yearly salary of £100 and own property worth £150.[20] Those elected to parliament were sworn in on 30 May 1924, marking the opening of the First Session of the First Parliament of Southern Rhodesia. At their first parliamentary session, legislators elected Sir Charles Coghlan as Prime Minister. The Constitution of 1923 served Southern Rhodesia for thirty-eight years. Under it, nine parliaments were elected before it was replaced by the Federal Constitution of 1953.

The Constitution of 1923 was welcomed by whites as a significant step in the constitutional development of the colony. This is because it confirmed the position of the colony as a self-governing territory under the protection of Britain. It was popular among the majority of



[18] Murray 1970: 6. Murray points out that the Constitution introduced in 1923 provided only an outline framework. He contends that the working system that existed in Southern Rhodesia was guided by traditions and conventions as well as the Letters Patent and Royal Instructions to the Governor. According to the two documents, the government in Southern Rhodesia was subordinate to that in Britain. The Letters Patent was a document that provided for a system of responsible government. The Royal Instructions to the Governor was a document that provided for a Governor as the authorised agent of the Royal Crown in the colony. In creating the Constitution of 1923, the colonial power reserved for itself certain functions, the most important of which was the right to veto discriminatory legislation that adversely affected the interests of blacks or ran counter to the colonial power's international obligations. It also reserved for itself significant powers to take constitutional decisions without the approval of the colony's legislature. See also Halkett 2002b: 3.

[19] The Legislative Assembly had 30 seats until the enactment of the 1961 Constitution, when it was increased to 65 (50 constituencies and 15 districts). It was presided over by a Speaker who was an ex officio member of the Legislative Assembly. See North 2013: 5; Chibaya 2012: 3.

[20] O'Meara 1975: 8. Other requirements were that eligible voters needed to be aged 21 years and above, and be British subjects. To be eligible one also needed to be able to write one's own name and address, sign one's name on the voter registration forms as well as being able to write at dictation 50 words in the English language (if required to do so by the authorities). However, if a person owned a registered mining claim in Southern Rhodesia, such person became automatically eligible to vote. See also Palley 1966: 217.

whites of English descent who did not wish to see the country become a sixth province of South Africa. It also introduced the concept of responsible government.[21]

In so far as the making of the 1923 constitution is concerned, it is clear that the process that led to its creation was as uninspiring as its predecessor. The fact that the Office of Colonial Affairs was responsible for drafting the constitution indicates that colonial priorities overshadowed the 'need for participatory constitution-making'.[22] Although this undermined the credibility of the constitution in the eyes of the majority of the population, it was not unusual as more emphasis, at the time, tended to be placed on the hegemonic interests of the colonial power. In the absence of the involvement of the local population in the making of the constitution at any stage of the process, the Constitution of 1923 can be described as British legislation called by another name.[23]



[21] Weyer 2011: 1. Responsible government was a concept that referred to many fundamentals of good governance in Southern Rhodesia. Those who used the term advocated a situation in which legislators were elected as opposed to a situation prevailing at the time in which legislators were appointed by the BSACo. It was argued that Southern Rhodesia should be ruled through democratically elected representatives rather than Company imposed representatives. The number of democratically elected legislators, it was contended, needed to be more than the number of appointed representatives. It also embodied the idea that the Executive and Government of the day is accountable to an elected Parliament. Individual ministers of government, it was argued, are responsible and accountable to Parliament for their official actions and for the administration of the departments of State under their control. The Executive and Government, it was pointed out, should resign in the event that the majority of elected parliamentarians pass a vote of no confidence. Should that happen, the Executive must either resign or dissolve Parliament and call a general election. This is called the collective responsibility of government. These features require that the ministers who compose government must be members of the legislature. An advantage of this is that a minister who is criticised has the right to reply. Also included in the phrase 'responsible government' was the idea that all major national decisions need to be ratified by citizens before implementation. The phrase was also used to describe a situation in which citizens of Southern Rhodesia continued to govern themselves under the protection of the British Empire as opposed to incorporation into the Union of South Africa. The campaign for responsible government was spearheaded by a political party named the Responsible Government League (Association). Credited with the rejection of the idea of incorporating Southern Rhodesia into the Union of South Africa, the party changed its name to the Rhodesian Party in 1923. See also Good 1973: 32; Read 1959: 136.

[22] Zhanje 2012: 3. See also Chikoya 2013: 4; Stone 1935: 3.

[23] Chibaya 2012: 2.

## 4. The 1953 constitutional process

A few years after the installation of the Constitution of 1923, some influential authorities in Southern Rhodesia and Britain mooted the idea of establishing a political order that brings together Southern Rhodesia, Northern Rhodesia and Nyasaland, all colonies of Britain at the time. Under this plan, it was envisaged that the three colonies could enter into a federal partnership that is based on the territorial distribution of power and the principle of shared sovereignty.[24]

The federal idea was initially mooted as far back as 1922. Initially the suggestion was to link up Southern and Northern Rhodesia. However, the idea was turned down by whites in Southern Rhodesia who thought that the union was to be at their expense. The issue of a union between the three colonies came up again in 1938 with the colonial power, Britain, setting up a Royal Commission under Lord Bledisloe. The Commission was tasked with consulting people in the three colonies on the desirability and acceptability of a union. In its findings, the Bledisloe Commission found that a closer association was desirable. In 1948, Sir Roy Welensky and Sir Godfrey Huggins, two influential politicians from Northern and Southern Rhodesia, convened a meeting to discuss the Federation at the resort town of Victoria Falls.[25] It was that meeting that paved the way for the formation of the Federation of Rhodesia and Nyasaland on 1 August 1953.[26]



The federation was established to bring together three countries into a closer association that would facilitate economic development. It was envisaged that the alliance would bring together cheap labour from Nyasaland for the expansion of the agricultural and industrial sector in Southern Rhodesia, minerals from Northern Rhodesia and capital and technical skills from Southern Rhodesia to grow the integrated economy. Moreover, it was argued that a single economic system would attract more investment for the federation than each of the three small countries was able to realise on its own. Associated with this was the argument that the federation would make it easy to co-ordinate the provision of basic infrastructure that is key for meeting socio-economic development such as health and educational facilities.[27] In particular, the federation, it was argued, would promote development by widening the local

[24] Brown 1980: 7. See also King 2009: 48; North 2013: 4.

[25] Brown 1980: 7. Nyasaland was not represented at the meeting. See also Mhuka 2012: 3.

[26] Reynolds 2012: 6. See also Bwanusi 1953: 1; Hance 1954: 13.

[27] Keatley 1963: 392. See also Sprack 1974: 14.

market, diversifying the regional economy, facilitating more efficient use of regional resources and making the region more attractive to foreign investors. It was also hoped that by joining territories together, racial partnership would be fostered. Finally, the British Government argued that a federation would made it easy for the political union to obtain full membership of the British Commonwealth, after which the federal state would be granted independence as a dominion.

The translation of the federal idea into an institutional reality came through the creation of a federal constitution by the so-called Constitutional Commission, which was held in London in 1953. The Constitutional Commission was comprised of members representing the colonial power, Britain, and representatives of the three colonies. In total, forty-one delegates attended the Constitutional Commission.[28] Thirteen delegates led by Oliver Lyttelton, Secretary of State for Colonial Affairs, represented the colonial power.[29] Thirteen delegates led by Sir Godfrey Huggins (later Lord Malvern), long time Prime Minister of Southern Rhodesia, represented the people of Southern Rhodesia. Northern Rhodesia had eight delegates led by its territorial Governor, Sir Gilbert Rennie. Six delegates led Sir Geoffrey Colby, Governor of Nyasaland, represented the people of Nyasaland. Of the forty-one delegates, only two delegates from Southern Rhodesia were black (these were Joshua Nkomo and Jasper Savanhu). Black delegates from Northern Rhodesia and Nyasaland declined to attend the Constitutional Commission in any capacity even though they remained in London during the conference and carried out significant discussions with a wide range of people.[30]



The Constitutional Commission was chaired by Oliver Lyttelton. The Constitutional Commission, with the assistance of Professor Kenneth Clinton Wheare, a renowned international expert on federalism, commenced the task of negotiating the provisions of the Constitution. The negotiations were carried out in plenary sessions. It was characterised by acrimony. The representatives of the black community demanded nothing short of majority rule as well as full and equal rights. The demand was ignored. Not much effort was made to address the demands of the representatives of the black community that were opposed to the

[28] Campbell 2012: 5. See also Government of Britain 1952: 23; Palley 1966: 335.

[29] Chimbwa 2012: 2. See also Mangwiro 2004: 5.

[30] Palley 1966: 339. Support staff comprised eight people of whom three were legal advisers, one conference adviser, and four secretaries. See also Fraser 1968: 3; Parliament of Britain 1953: 11.

federation.[31] The white delegates from the three colonies were determined to establish a constitution that facilitated a union that entrenched white interests. Although the colonial power ruled out amalgamation without the consent of blacks in the three territories, it accepted the principle of federation.

After extensive deliberation, an agreement was reached to divide responsibilities between the federal government and the constituent units. The federal government was made responsible for matters like foreign affairs, defence, extradition, citizenship of the federation, customs and excise, exchange control and promissory notes, copyright, patents and designs, audit of federal public accounts, federal public service, meteorology, supply of electricity, communication infrastructure and immigration. Both levels of government were empowered to pass legislation on matters concerning deportation, movements of persons from one territory to another, banks and banking, distribution of electricity, regulation of road traffic, prisons, health, geological, trigonometrical, typographical and cadastral surveys, census and statistics. These formed part of what was called the concurrent list. Matters not listed under the exclusive and concurrent lists were regarded as residual matters that belong to the units.[32] In cases of inconsistency between federal law and the laws of the component units, federal law prevailed.



Following agreement on the content of the Federal Constitution, a draft constitution was produced by officials from the Colonial Office. This was submitted to the British Parliament on 19 July 1953. The legislative proceedings began with Oliver Lyttelton moving a motion requesting British legislators to go through the provisions of the document, which was divided into two parts. The first part consisted of 15 sections containing all those measures necessary to set up the Federation and to enable it to begin its work in the interim period. The second part consisted of 99 Articles and two Schedules which formed the provisions of the Federal Constitution. The legislators spent a considerable amount of time discussing the issue of concurrent and exclusive powers within the federal arrangement. In addition, the legislators spent a great deal of time discussing the question of how an effective and efficient system of federal government would operate and fit in with the colonial power's governance

[31] Chimbwa 2012: 3. See also Bowman 1973: 18.

[32] King 2009: 49. See also Brown 1980: 7; Somerville 1963: 390.

structures. It was agreed that there would be five different government departments with overlapping and interlocking responsibilities for the federal government.[33]

Before the draft Constitution was presented to both Houses of the Parliament of Britain for final approval, it was submitted on 9 April 1953, in terms of the Federation Poll Act, for a referendum in Southern Rhodesia in which only members of the white community participated. It was approved by 63.45%. The draft constitution was not, however, submitted for a referendum in Northern Rhodesia and Nyasaland.[34] The draft Constitution was instead submitted to the Legislative Councils of the two colonies. Both passed resolutions in favour of adopting the federal constitution. Shortly afterwards, the Federal Constitution was presented to Queen Elizabeth for her assent, which was granted. The Constitution was enacted as the Federation of Rhodesia and Nyasaland (Constitution) Order in Council 1953, Statutory Instrument 1953, No. 1199.[35] The enactment took place on 1 August 1953. The Federation of Rhodesia and Nyasaland came into existence on 3 September 1953 and the Federal Constitution came into full operation on 23 October 1953.

The federation was in force for ten years during which time it was characterised by acrimony that ultimately led to its demise. The unwillingness of whites in Southern Rhodesia to take practical steps to eradicate the policy of racism when the other two territories were committed to multi-racial coexistence, brought the alliance at loggerheads. Blacks in the three territories resented the fact that the entitlement to vote continued to operate on a racial basis when the federation was built on the concept of multi-racial partnership. In this regard, one author accused whites in Southern Rhodesia of following a 'civilisation policy on paper and reducing it to a farce in practice'.[36] The statement by Sir Geoffrey Huggins, Prime Minister of the Federation, describing the relationship between blacks and whites as a 'partnership of the black (horse) and white (rider)' was seen as proof that whites were not committed to the success of the federation.[37] Moreover, an increase in nationalist activities in all three territories tipped the federation towards the precipice. It was with these issues hanging over the head of the federation that it practically stopped functioning in 1957 with the concurrence

[33] Weyer 2011: 2. See also Chimbwa 2012: 3.

[34] Unlike Southern Rhodesia, which was a self-governing colony, the two colonies were ruled directly from London. See Chaputa 2009: 3.

[35] Palley 1966: 343.

[36] Walker E, 1953: 94. See also King 2009: 51; Wood 1969: 6.

[37] Gwangwava 2013: 4.

of the colonial power, Britain. Following the distribution of the assets of the federation among the alliance members, Britain granted independence to Nyasaland (as Malawi) and Northern Rhodesia (as Zambia).[38]

In so far as the constitution making process is concerned, the Constitutional Commission could be commended for including black representatives who were previously excluded from negotiating earlier constitutions. The inclusion of blacks might suggest that the authorities made an effort to make the institution of constitution-making broad based. However, the endeavour was inadequate. White and black delegates were not equal in number. Neither did the composition reflect the proportion of whites to blacks. As one author wrote, '[t]he inclusion of blacks was symbolic. It was meant to camouflage white domination of the constitution-making'.[39] In addition, representatives of vulnerable groups were excluded, including Asians. Women were also not represented.

It is clear that the process leading to the creation of the federal constitution left a lot to be desired. The constitution was forced onto the ordinary citizens without consideration of their wishes. It was a document that 'was imposed despite the outcry of natives, namely blacks in the three countries who constituted the majority'.[40] As one author argues, the events leading up to the creation of the Federal Constitution 'were nothing but well calculated moves to give legal status to a set-up that entrenched the interests of whites'.[41]

Generally speaking, local involvement in the making of the federal constitution was glaringly absent. Except in the case of Southern Rhodesia, the Federal Constitution was not submitted to approval through referendum. Even in the case of Southern Rhodesia, it was only members of the white community that were allowed to participate in the referendum. What we saw was approval through the British Parliament. In fact, the Federal Constitution was passed as a parliamentary Act of Britain with Queen Elizabeth's consent.[42]

[38] O'Meara 1975: 26. See also McDougal & Reisman 1968: 2.

[39] Oliver 2010: 3. See also Goredema V, 2013:3; North 2013: 5.

[40] Chitande 2011: 6.

[41] Chisora 2011: 5. See also Howard 1970: 3; Rooney 1967: 4.

[42] Howard 1970: 3. See also Mhuka 2012: 3.

## 5. The constitutional conference of 1961

As mentioned earlier, the federation was a short-lived political union. It collapsed in 1957. This prompted the search for a new constitution in Southern Rhodesia. The search for the new constitution was also triggered by political developments that engulfed African states in the 1960s.

The 1960s was a period of decolonisation in Africa. Five British colonies in Africa, (i.e Ghana (1957), Somalia/Nigeria (1960), Uganda (1962), and Kenya (1963)) marched to independence based on universal adult suffrage. As Harold MacMillan, the then British Prime Minister, stated, 'the winds of change were blowing across Africa'.[43] The colonial authorities of Southern Rhodesia sought to enact a new constitution as part of the larger effort to address the question of racial tension between blacks and whites. This led to the creation of a Constitutional Conference in January 1961.

The Constitutional Conference was tasked with negotiating a new constitution. It was composed of delegates drawn from four political parties, namely the United Federal Party, the Dominion Party, the National Democratic Party and the Central Africa Party. The Conference was also attended by representatives of the Coloured and Asian communities. The United Federal Party (UFP) was the ruling party led by Prime Minister Edgar Whitehead. The UFP sought a constitution that would 'secure full independence from Britain by removing the reserved powers which Britain had retained in the 1923 Constitution's granting of limited self-government for Southern Rhodesia'.[44] The Dominion Party (DP) was the official opposition party in Parliament. Led by William Harper, the DP stood for a much more racist political system and was unwilling to make concessions to members of the black community. The National Democratic Party (NDP), led by Joshua Nkomo, was a political party that claimed to represent the interests of the black community. It pushed for a constitution that respected the principle of 'one man, one vote', outlined in its document titled 'The African Case'.[45] It was not represented in parliament. The Central Africa Party (CAP) was a multi-racial liberal party that sought to create a constitution based on liberal values and



[43] Turpin 1967: 126. Prime Minister Harold Wilson made the historic statement about the winds of change blowing across Africa on 3 February 1960 when he addressed the Parliament of South Africa in Cape Town. See also Olsson 2011: 17; O'Meara 1975: 14.

[44] Olsson 2011: 17. See also Day 1978: 223; Bowman 1973: 35.

[45] Olsson 2011: 17.

non-racial standards. The colonial power, Britain, was not represented at the Constitutional Conference.[46]

Chaired by Prime Minister Sir Edgar Whitehead, the Constitutional Conference commenced its deliberations in Salisbury (Harare) in January 1961. The objective of the Constitutional Conference, according to the Prime Minister, was the creation of a constitution that would be satisfactory for blacks, whites and the colonial power, Britain. Delegates were informed that the principles of consensus and co-operation would define the framework for negotiating the constitution. Delegates were also informed that issues which the political parties did not agree on would be referred to the Commonwealth Secretary, Duncan Sandys, who was tasked to come up with a final position on these matters. Accordingly, easier issues were left to the Constitutional Conference while the Commonwealth Secretary was mandated 'to take up and find a solution to' contentious issues.[47]

Five contentious areas were identified and referred to Duncan Sandys for determination. The first issue was whether the Constitution should have a Declaration of Rights or a Bill of Rights.[48] It was determined that a Declaration of Rights should be enshrined in the Constitution. According to Duncan Sandys, the fundamental rights and freedoms were to apply to all without distinction of race, colour or creed. The only exception, however, was an



[46] North 2013: 5 See also Wall 1960: 3.

[47] Zivo 2013: 3. See also Olsson 2011: 25; Brown 1980: 7.

[48] Ndulo 2010: 178. Although often regarded as the same, it is sometimes argued that there is a difference between a Bill of Rights and a Declaration of Rights. A Bill of Rights is a human rights charter that protects the civil, political and socio-economic rights of all people. For example in South Africa, Chapter 2 of the Constitution of 1996 contains the Bill of Rights. The rights in the Bill apply to all law, including the common law, and bind all branches of the government, including the national executive, parliament, the judiciary, provincial governments and municipal councils. Some provisions, such as those prohibiting unfair discrimination, also apply to the actions of private persons. On the other hand, a Declaration of Rights, while it focuses on human rights, tends to have a narrower scope when compared to a Bill of Rights. The phrase 'Declaration of Rights' is widely associated with the Declaration of the Rights of Man and of the Citizen, a document adopted by the French National Assembly in 1789 and used as a preface to the French Constitution of 1791. One of the basic charters of human liberties, it served as the preamble to the Constitution of 1791. Its basic principle was that 'all men are born free and equal in rights,' specified as the rights of liberty, private property, the inviolability of the person, and resistance to oppression. It also established the principle of equality before the law and the freedoms of religion and speech. The Declaration represented a repudiation of the pre-Revolutionary monarchical regime. See also Olsson 2011: 25.

emergency when the State needed to deal with urgent issues relating to defence and public safety, maintenance of law and order and public health and morality. The second area that the political parties sought intervention on was the question of what to do with prevailing discriminatory legislation. Sandys's position was that a Constitutional Council of 12 members be set up to consider every Bill submitted to the Legislative Assembly for discrimination and that if the Constitutional Council considers that any provision of the Bill would be inconsistent with the Declaration of Rights, it should submit to government an adverse report. Aggrieved individuals could apply to the Appellate Division of the High Court for redress.

The third contentious issue, representation in the legislature and franchise, was the most controversial. It almost led to the breakdown of the Constitutional Conference. The political parties' presented diverse positions on this issue. The UFP acknowledged the need to increase the number of blacks in parliament but stressed the importance of not lowering the qualifications for voting. The DP did not wish to see blacks represented in parliament and advised that they be denied any entitlement to the ballot. The CAP wanted to see literacy in English as the primary condition that determined whether or not voting rights were extended to blacks. The NDP insisted on one man-one vote for all citizens without prior conditions. The coloured community insisted on two seats reserved for them in parliament. Finally, the Asian community insisted on being allocated one seat in parliament.[49]



Sandys determined that the size of parliament be increased from 30 to 65 members in order to accommodate more black representatives.[50] 15 seats in the parliament were reserved for members of the black community. The threshold of income as well as the value of property one needed to own in order to be enrolled on the voters roll was reduced to accommodate members of the black community.

The fourth issue pertained to the procedures of amending the proposed constitution. In this regard, it was agreed that basic clauses in the Constitution could not be altered without

[49] Olsson 2011: 25. See also Bowman 1973: 35.

[50] Bowman 1973: 35.

consent or referendum of the four principal races (blacks, whites, coloureds and Asians) voting separately or by consent of the British Government.[51]

Following the resolution of the contentious issues, a document was submitted to the colonial authorities. It contained all the issues that the political parties agreed should form the content of the impending constitution. Shortly afterwards, the British government prepared and published two 'white papers' in Salisbury and London on the constitution. The first paper summarised the changes to the constitution. The second paper summarised the contents of the constitution. Thereafter, the draft was submitted to the Legislative Assembly of Southern Rhodesia and adopted as the Constitution of 1961.[52]

On 26 July 1961, the Constitution was put to a referendum. The question submitted to members of the white community was whether or not they approve the Constitution of 1961 as adopted by the Legislative Assembly. The UFP of Prime Minister Sir Edgar Whitehead encouraged its supporters to endorse the Constitution. The groups that urged a 'No vote' included Ian Smith's United Group and the Rhodesian Vigilance Association.[53] They encouraged the 'No vote' because they were not happy about the 15 seats reserved for blacks under the voters' roll for blacks (B-roll). 65.79% (of the 64 402 who participated) approved the Constitution, while 34.21% rejected it. Based on this, the Constitution was forwarded to the two Houses of the British Parliament and it was enacted as the Southern Rhodesia (Constitution) Act (1961).[54]



[51] Olsson 2011: 25. The final issue referred to the status of the reserve powers which allowed Britain to withhold consent to Bills and to annul Acts already passed by the Legislative Assembly. Sandys advised that the Constitutional Council and the possibility to appeal to the Judicial Committee of the Privy Council (in Britain) over matters of discriminatory legislation provided sufficient safeguards for Britain to relinquish its reserve powers. Following the resolution of contentious issues, the colonial power reduced its powers to revoke or amend the colony's constitution. It confined its powers to amend the constitution to one of the two alternative procedures prescribed for constitutional amendment. The intervention of the British Government was limited to measures deemed inconsistent with the colonial power's international obligations. The British Government stripped itself of the general power to legislate on matters within the competence of the government of Southern Rhodesia. See also Goredema S, 2005: 3.

[52] Reynolds 2012: 6. See also Olsson 2011: 26; Chitate 2011: 5.

[53] Bowman 1973: 40.

[54] Ndulo 2010: 178. See also Flower 1987: 39.

From the foregoing, one of the issues that need closer examination is the composition of the Constitutional Conference. Of particular importance is the extent to which previously marginalised segments of society were represented in the Constitutional Conference. The inclusion of a political party representing blacks and representatives of other minority groups represents a departure from the past where members of the latter groups were totally excluded from the previous constitution-making processes. It is, however, very difficult to agree that the Conference was fully inclusive. The Conference, for example, did not include all political parties.[55] The methods by which the members of the Constitutional Conference were selected were also questionable. The government cherry picked delegates to the Constitutional Conference.[56] The exclusion of groups such as those representing members of the Jewish community and foreign nationals resident in the country, it has been argued, 'painted a picture of a constitution-making process that was not the least informed by the basic norms of inclusion'.[57]

The process leading to the adoption of the Constitution was also problematic. Normal voting requirements were, for example, used in the referendum, resulting in the exclusion of members of the black community.[58] The net effect of this decision was that members of the white community are the only ones that voted in the referendum. This was despite the fact that they constituted the demographic minority. The exclusion of members of the black community undermined the legitimacy of the referendum and its outcome. That is why the assertion that the Constitution received overwhelming support has 'to be taken with a pinch of salt'.[59]



[55] Brown 1980: 6. The African National Congress (Southern Rhodesia), was for example, not represented at the Constitutional Conference. Two of its leaders, James Chikerema and George Nyandoro were at the time being held in detention by the government as part of a wider crackdown on nationalists. Described by many as 'pioneers of the modern nationalist movement in Southern Rhodesia', the exclusion of their political party served to demonstrate that the Constitutional Conference was not inclusive enough. See also Benjamin 1964: 3.

[56] The fact that Joshua Nkomo was invited while the likes of James Chikerema and George Nyandoro were not invited seems to suggest that cherry picking was a big consideration in deciding who was invited to attend the conference.

[57] Chimunhu J, 2009: 1.

[58] To be entitled to vote in the referendum, one needed to own property valued at £500 or more and earn an annual salary amounting to £250 or more. See Chakanyuka 2012: 4.

[59] Benjamin 1964: 3. See also Smith D, 1969: 21; Reynolds 2012: 6.

Generally speaking, the deliberations at the Conference were not informed by the common good. The squabbles that followed the declaration of the so-called contentious issues revealed that deliberations were rather driven by short-term political objectives. The fact that the political parties referred five so called contentious issues to the Commonwealth Secretary to decide suggests that polarisation, divisions, conflict and intolerance dominated the context in which the constitution-making process unfolded.[60] This raises serious questions about the commitment of the political parties to the creation of a constitution that appealed to all segments of society.[61]

## 6. Constitution-making under rebellion (1965)

The 1961 Constitution was as short lived as the federation that preceded it. This had to do with the strained relationship that developed between the semi-autonomous colony of Southern Rhodesia and the colonial power, Britain. At the centre of the tension was the decision of the colonial power not to extend independence to Southern Rhodesia. Following the collapse of the Federation and Britain's facilitation of black majority governments to assume authority in neighbouring Malawi (Nyasaland) and Zambia (Northern Rhodesia) in 1963 and 1964, the political authorities in Salisbury raised the issue of independence for the self-governing colony. They requested the colonial power to unconditionally grant independence to Southern Rhodesia. They argued that Southern Rhodesia was a better candidate for independence as it had over forty years of experience in running its own affairs.

The request was turned down by the colonial power on the ground that the self-governing colony did not meet the conditions for granting independence outlined in the colonial power's new policy of 'no independence before majority rule' (NIBMAR).[62] Southern Rhodesia did

[60] Mafunda 2009: 2.

[61] Bowman 1973: 37. See also Good 1973: 44; Edmunds 1965: 2.

[62] O'Meara 1975: 21. To be exact, the policy did not make the attainment of majority rule a condition for granting independence. It only required the colony to demonstrate progress towards majority rule. The British government NIBMAR principles were: (1) the principle of unimpeded progress toward majority rule; (2) guarantees against retrogressive amendments to the constitution to prevent African advancement; (3) an immediate increase in political representation of Africans; (4) an end to racial discrimination; and (5) evidence to the satisfaction of the British government that any basis of independence was acceptable to the people of Rhodesia as a whole. To these five principles, British Labour Prime Minister, Harold Wilson added a sixth in January 1966: an assurance that, regardless of race, there was no oppression of the majority by the minority or the minority by the majority. See also Smith D, 1969: 21; Good 1973: 44.

not qualify for independence as the reins of power were still in the hands of whites who constituted the demographic minority. The political authorities in Salisbury (Harare) accused Britain of inconsistency, arguing that Malawi and Zambia did not deserve preferential treatment as they were less developed British colonies without comparable experience of self-rule.

Following the rejection of the bid for independence, a watershed election was held in Southern Rhodesia on 14 December 1962. The election was won by the Rhodesia Front, an all-white racist political party that sought to entrench white rule. The election saw the elevation of Ian Smith, a Member of Parliament from Selukwe in the Midlands Province to the position of Deputy Prime Minister to Winston Field.[63] Influenced by Smith, on 2 April 1964, some Ministers called for Winston Field's resignation from office for failing to 'deliver independence to Southern Rhodesia'.[64] The ouster of Winston Field saw Smith being elevated to the position of Prime Minister on 14 April 1964. This development was significant as it changed the trajectory on the narrative of constitutional development in Southern Rhodesia. Prime Minister Smith was the most notable member of the white community who wanted to reverse the rights extended to members of the black community in the 1961 Constitution. He also led the campaign that sought to see Southern Rhodesia gain full independence from Britain.

[63] Chinhange 2013: 3. Born on 8 April 1919, Ian Smith's rise to power is linked to the adoption of the 1961 Constitution. A career pilot in the Royal Airforce of Britain, Smith served in the Middle East during the Second World War. In 1948, he became a Member of Parliament for Selukwe (Southern Rhodesia) representing the United Federal Party. In 1961 Smith criticised plans by the United Federal Party, the then ruling party led by Prime Minister Winston Field. At the centre of the discord were two issues. The first was his opposition to plans by the United Federal Party to appoint Southern Rhodesia's first black Minister should Prime Minister Winston Field be re-elected. Second was the endorsement by some members of the United Federal Party of the 1961 Constitution. Smith resigned from the United Federal Party in 1961. In 1962, Smith, together with Winston

Soon after becoming Prime Minister, Smith issued a statement in which he countered Britain's policy of NIBMAR by outlining five principles that eventually paved the way for the 'Unilateral Declaration of Independence (UDI) and the installation of a constitution that entrenched white rule'.[65] First, he made it clear that Southern Rhodesia was unable 'to accept the principle of unimpeded progress towards majority rule enshrined in NIBMAR principles'.[66] Second, Southern Rhodesia rejected 'the idea of any constitutional safeguard that would prevent whites from changing the constitution to prohibit the 'premature' emergence of African government'.[67] Third, the relaxation of requirements on the voters' roll 'for blacks (B-roll) was the only acceptable measure of realising the advancement of blacks'.[68] Fourth, he reiterated the government's 'unwillingness to take steps to end racial discrimination or the amendment of the Land Apportionment Act'.[69] Finally, the government rejected the idea of consulting the 'opinion of blacks on the status of agreements it reached with the colonial power, Britain'.[70]

Shortly afterwards, on 5 November 1964, Prime Minister Smith organised a referendum that paved the way for the Unilateral Declaration of Independence and set the tone for the creation of a new constitution. The question submitted to the people in the referendum was whether or not they favoured Southern Rhodesia obtaining independence from the colonial power, Britain, on the basis of the Constitution of 1961. The referendum proceeded without the blessing of the colonial power. As a result of stringent qualifications, only white Zimbabweans voted in the referendum. 90.51% voted 'yes' while 9.46% voted 'no'. Using the results of the referendum as justification, Smith issued a Unilateral Declaration of Independence (UDI) on 11 November 1965. The UDI announced that Southern Rhodesia, a British territory in southern Africa that had governed itself since 1923, now regarded itself as an independent sovereign state.[71]

The next major step by the Smith government was the creation of a new constitution. In 1965, the drafting of the constitution began with Prime Minister Smith and his Cabinet tasking

[65] Heldrew 1969: 68. See also Reynolds 2012: 6.

[66] O'Meara 1975: 21.

[67] Wood 1969: 10.

[68] O'Meara 1975: 21. See also Chitande 2011: 9; Barber 1966: 461.

[69] Halkett 2002b: 3. See also Mabwe 2013: 2.

[70] Chisora 2011: 4; Leys 1967: 269; OAU 1965: 10.

[71] Erbmann & Sheen 1974: 99. See also Halpern 1968: 305.

George Smith, the Director of Legal Drafting in the Attorney-General's Office and also legal advisor to the Prime Minister as well as a member of the ruling Rhodesian Front, to produce a constitution that embodied elements outlined in the statement that he issued countering the policy of NIBMAR. It was clear that Prime Minister Smith wielded significant clout on the content and spirit of the constitution. Basically, the Prime Minister directed the drafting process. The process of constitution making sought to reverse all the constitutional guarantees extended to blacks under the Constitution of 1961. Some of the provisions that the drafters amended related to the rights of appeal to the Judicial Committee of the Privy Council, the protection of the constitution from amendment if any one racial group did not agree, the constitutional safeguards for blacks, and the Declaration of Rights.[72]

The British government described constitution-making under the direction of Prime Minister Smith as illegal and amounting to an objectionable amendment of the Constitution of 1961. It emphasised that the Constitution of Southern Rhodesia can be conferred or amended only by Acts of the British Parliament. In addition, the rebellious leaders were informed that, according to the British Act of Parliament of 1961, they were regarded as private persons and could exercise no legal authority in Rhodesia. Any legislation made by them was, accordingly, invalid under British law.[73] The British government regarded the defiance, in the words of Harold Wilson, Prime Minister of Britain at the time, as an 'act of rebellion against the Crown, against the Constitution as established by law and actions taken to give it effect were to be considered treasonable'.[74] Dismissing the actions of the Smith government as null and void, Britain implored Southern Rhodesia to reinstate the Constitution of 1961 as the country was still a colony under Her Majesty.



Despite these objections, a draft constitution was submitted to the Cabinet meeting of Ministers chaired by Smith on 11 November 1965. The cabinet, comprised entirely of twelve Ministers drawn from the ruling Rhodesian Front, approved the Constitution by consensus, paving the way for the unilateral declaration of independence.[75] Shortly afterwards, in a

[72] Wood 1969: 10. See also Hodder-Williams 1970: 218; Higgins 1967: 95.

[73] Chitande 2011: 9. See also Mutisi M.A.B, 1972: 270; Hintz 1972: 179.

[74] Government of Southern Rhodesia 1965: 3. See also Mutisi M.A.B, 1972: 270, Smith D, 1969: 21.

[75] Many believe that the decision to endorse UDI and the Constitution of 1965 was too close to call and not unanimous. For instance, Bowman (1973: 8) postulates that the likely scenario was that of the twelve members in the cabinet, six voted for UDI and six against. Prime Minister Smith then cast a deciding vote for UDI. There

speech to the nation, aired by the Southern Rhodesia Broadcasting Corporation (on 11 November 1965), Prime Minister Smith stated that a unilateral declaration of independence was deemed necessary 'to ensure the survival of a constitutional order significantly different from that envisaged in the Constitution of 1961'.[76] The Constitution was promulgated on 13 November 1965.

The response of Britain was swift. On 16 November 1965, the British Parliament passed the Southern Rhodesia (Constitution) Order. Section 2 (1) of the Order declared null and void any laws passed by the legislature of the renegade government. Section 3 of the same Order suspended the powers of the Legislative Assembly of Southern Rhodesia. Further, the Order empowered the British Parliament to legislate for Zimbabwe and vested executive power in the British Secretary for Commonwealth Relations. The unilateral declaration of independence and the Constitution of 1965 were rejected by the Commonwealth and the United Nations as acts of a rebellious government. This, however, did not force Smith to abandon the UDI.[77]

The validity of the Constitution of 1965 was the subject of contestation in the Rhodesian Legislative Assembly that met on 25 November 1965. Some legislators supported the Constitution while others were against it. For example, one legislator, Ahrn Palley, who represented the Highfield constituency, asked the Speaker of the Legislative Assembly to suspend the sitting of the House since certain Honourable Members had 'torn up the valid Constitution under which this House meets and they have seen fit to produce a document which they have purported to issue as a new constitution for this country'.[78] Ahrn Palley was escorted out of the chambers by the Sergeant-at-Arms at the instruction of the Speaker of the Legislative Assembly. As he walked out, those opposed to the Constitution of 1965 chanted 'Long live the Queen!'[79] Nine black legislators followed him.

Questions of legality continued to dog the Constitution of 1965. For instance, the Constitution of 1965 was the subject of litigation in the case in which Stella Madzimbamuto

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was however no dissent. The information in this thesis is based on confidential government minutes of the period under discussion. See also McDougal & Reisman 1968: 5.

[76] Hodder-Williams 1970: 218.

[77] Hodder-Williams 1970: 218. See also Green L.C, 1968: 221.

[78] Good 1973: 79. See also Cogan 1968: 3; Smith D, 1969: 21.

[79] Good 1973: 79.

challenged the order under which Desmond William Lardner-Burke, then Minister of Law and Order, continued to incarcerate her husband.[80] At the centre of the appellant's submission was the argument that the incarceration was illegal as it was based on constitutional provisions that were themselves the subject of contestation as acts of rebellious political authorities. The courts in Southern Rhodesia rejected the argument. She then took the case to the Privy Council of Britain which declared the Constitution of 1965 illegal on the basis that those who made it lacked the requisite authority. As expected, the government of Southern Rhodesia, under the advice of its Solicitor-General, ignored the ruling.

From the foregoing, it is clear that the 1965 Constitution was the brainchild of Smith and his cabinet. The fact that they were the force behind the constitution suggests that the question of 'institutions of constitution making was accorded secondary significance'.[81] The arrangement that led to the adoption of the 1965 Constitution facilitated a situation in which a few power hungry politicians drafted a constitution that was 'tailor made to acquiesce to the needs of the ruling party and not the broad interests of the generality of the population'.[82] In fact, it is fair to say that the question of separate institutions was sacrificed on the altar of political expediency.

The Constitution was the result of a unilateral action of the rebellious government working in secrecy. The haste with which it was put into force raises 'serious questions of accountability about state-society engagement in constitution making'.[83] It was a 'hurried affair', conceived of in 1964 and executed by 1965. As a result, there is not much of a process of constitution-making to talk about. The process gets the dubious distinction of being directed exclusively by a political party motivated by racial considerations of an extremist nature. In short, the main objective was to entrench white rule.

The creation of the Constitution of 1965 highlights the risks associated with unilateral action. There was little or no ownership of the process by ordinary citizens. It is only when ordinary citizens have played a role in the creation of a constitution that they are in a position to understand, respect, support and live within its constraints. To begin with, questions of

[80] See Stella Madzimbamuto Appellant v. Desmond William Lardner-Burke and Frederick Phillip George Respondents. The High Court judgement was reported as Judgement No. GD/CIV/23/66.

[81] Goredema V, 2013: 4. See also Barrie 1968: 112.

[82] Mavare 2013: 3.

[83] Wollark 1965: 3. See also Cohen 1970: 2.

legitimacy hung over the government that was responsible for spearheading the creation of the new constitution.[84] Members of the black community, who constituted the majority, did not have a hand in electing the ruling party into office. In addition, the process that created the constitution ignored the fact that blacks, who constituted the demographic majority, were not represented at all.

Furthermore, citizens, including members of the white community, were not given the opportunity to approve the constitution. It entered into operation through executive approval, suggesting that the Constitution entered into operation with questions of legitimacy hanging over it.[85] In many ways, this development represented an unacceptable short cut to constitution-making.

## 7. The 1967 constitutional process

Although the 1965 Constitution reversed some of the gains made by members of the black community and entrenched white rule, some members of the white community were still unhappy that the constitution had failed to fundamentally reverse all provisions that extended rights to blacks. Some of the supporters of the Smith government were alarmed that the Constitution of 1965 resembled its predecessor in certain respects.[86] With an election coming in 1970, the ruling party wanted to use the process of constitution making as a platform to appeal to members of the white community. It was against this background that, on 26 January 1967, Smith announced that the government was to appoint a Constitutional Commission 'to advise on a new constitution for the country'.[87]

Shortly afterwards, a five member Constitutional Commission was established under the chairmanship of William Rae Whaley, hence the name the Whaley Constitutional

[84] Bashford 1968: 12. See also Cogan 1968: 3; Green L.C, 1991: 413.

[85] Mambare 2013: 4. See also Plattner 1967: 2.

[86] Chatora 2009: 3. Although the 1965 Constitution provided for racial discrimination, it allowed for blacks to be granted voting rights if they were eighteen years of age and earned an annual income of £265. Alternatively, they could vote if they owned real estate property worth £495. In the 1961 Constitution, blacks could vote if they earned an income worth £528. The amount was reduced to £335 if the citizen had completed a two year secondary education. See also Charlton 1979: 7.

[87] Hodder-Williams 1970: 223.

Commission.[88] Only two of those appointed to the Constitutional Commission were lawyers. The rest were either public servants, politicians or community leaders with views that were sympathetic to the policies of the Rhodesian Front. The Constitutional Commission was mandated to examine the provisions of the Constitution of Rhodesia of 1965 and advise the Government of Rhodesia on 'the constitutional framework which is best suited to the sovereign independent status of Rhodesia'.[89]

In what is a first for Southern Rhodesia in so far as constitution-making is concerned, the Constitutional Commission commenced the constitution making process by embarking on a programme of civic education. Using brochures, booklets, leaflets, newsletters, posters, telephone talk lines, sporting events, radio and dramas, it encouraged people to contribute to the process of constitution-making. The civic education programme was followed by a programme of consultation in which ordinary citizens were encouraged to submit their input for consideration. Citizens, individually or collectively, could address, through letters, the Constitutional Commission on the issues that they wanted incorporated in the constitution. The Constitutional Commission also embarked on outreach consultation.[90] In this regard, it visited Chiweshe Communal Lands and the high density suburb of Mufakose (Harare) to get first hand appreciation of the constitutional preferences of ordinary citizens on the ground. By the time the consultation had come to an end, the Constitutional Commission had interviewed 250 people and had studied more than 650 memoranda.



Following consultation, the Constitutional Commission embarked on drafting. Drafting was influenced by the Constitutions of 1961 and 1965. The drafters used these two constitutions as the initial reference point for coming up with a new constitution. In the spirit of building a compromise document, they borrowed from the Constitution of 1961, provisions designed to entice members of the black and white communities to support the draft. These included the provision that allowed for an increase in the number of legislators representing members of the black community. As part of a compromise, the draft document also included certain provisions associated with the Constitution of 1965. It retained, for example, the distribution

[88] Reynolds 2012: 6. The Constitutional Commission was established on 1 March 1967. Other members of the Whaley Constitutional Commission were, Stanley Ernest Morris. Robert Hepburn Cole, Chief Simon Sigola, Lawrence Charles Mzingeli. See also Rhodesia Government Notice No. 146 of 1967.

[89] Report of the 1967 Constitutional Commission of Southern Rhodesia: 4. See also Makanaka 2012: 3.

[90] Report of the 1967 Constitutional Commission of Southern Rhodesia: 4. See also Rock 1969: 3; Gondo 2009: 2.

of power that was designed to protect the interests of members of the white community. The need to strike a racial balance also influenced drafting. However, no effort was made to ensure that drafting 'tapped into the ideas generated by citizens through consultation'.[91] There were no mechanisms linking the ideas generated through consultation to drafting.

Once drafting was finalised, the Constitutional Commission published its report in April 1968 and submitted it to Prime Minister Smith. According to the report, some representatives of members of the black community in the legislature were to be selected through direct elections while others were to be selected through electoral colleges formed mainly by chiefs and headmen. Of the Lower House's 80 seats, 40 seats were to be reserved for white voters. The Senate was to consist of 31 members of whom 12 were blacks, another 12 were whites and 7 were to be appointed by the Head of State. Half of the representatives of members of the black community in the Senate were to be chiefs. For electoral purposes, the country was to be divided into two provinces (i.e Mashonaland and Matabeleland).[92]

The expectation of the ruling party was that the Constitutional Commission would come up with recommendations that entrenched the interests of the white community. Clearly the expectation was not completely fulfilled. The provisions that sought to increase the number of representatives of the members of the black community in the legislature were considered particularly problematic by members of the white community.[93] They came at a time when the majority of the supporters of Prime Minister Smith sought to further isolate blacks and entrench white superiority. They argued that the recommendations threatened the interests of the white community by accelerating the call for black rule. As a result, the recommendations of the Whaley Constitutional Commission were rejected by the Rhodesia Front Smith Government.

The constitution-making process of 1967 represents a major departure from the past, both in terms of institution and the process used to create the constitution. To begin with, the composition of the Constitutional Commission was, to some extent, broad based. It was

[91] Chipara 2013:4. See also Magure 2009: 3.

[92] Report of the 1967 Constitutional Commission of Southern Rhodesia: 5. See also Zivo 2013: 3.

[93] Chakanyuka 2000: 5. See also Cefkin 1968: 660.

composed of blacks and whites. This represents progress from the past when 'constitution making was the domain of the white minority'.[94]

The same can be said of the process. For the first time in Southern Rhodesia, a constitution-making body made an effort to bring ordinary citizens into the making of a constitution. Its request for citizens to provide written submissions suggests that its work was, to some extent, influenced by norms of participation.[95] The Constitutional Commission must also be commended for undertaking outreach consultation.

Notwithstanding the above, one cannot ignore the limitations of the Constitutional Commission. Although the constitution-making body included, for the first time, black Rhodesians, it 'was not inclusive enough'.[96] Of the Constitutional Commission's five members, only two represented the black community while three members represented the white community. The Constitutional Commission did not, for example, incorporate the voices of other segments in society, such as representatives of members of the Asian community. Closely related to the composition of the Constitutional Commission was the manner in which the Constitutional Commission was composed. Members of the Constitutional Commission were handpicked by Smith. As one author noted, '[e]xecutive preferences dominated the context in which the constitution making body was composed'.[97]



In addition, the fact that the Constitutional Commission undertook only two field trips casts doubt on the extensiveness of the consultation process. The fact that the Constitutional Commission did not have committees and bodies to enable ordinary citizens to follow up their contributions suggests that the views of ordinary citizens gathered through consultation may not have been fully incorporated.[98]

The functional autonomy of the Constitutional Commission was also dubious given that 'its terms of reference and operations were the result of executive action'.[99] The appointing authority (Prime Minister Smith, in this case) came up with the Constitutional Commission's

[94] Halkett 2002b: 3. See also Rock 1969: 1; Doroza 2009: 3.

[95] Report of the 1967 Constitutional Commission of Southern Rhodesia: 4.

[96] Rock 1969: 1.

[97] Goldy 1969: 2. See also North 2013: 5.

[98] Gondo 2009: 2. See also Young 1969: 3; Cogan 1968: 3.

[99] Chakanyuka 2000: 5. See also Pateman 2006: 14.

terms of reference. Eventually, the Constitutional Commission's recommendations were disowned based on the discretion of the appointing authority.

The rejection of the draft constitution by the authorities was telling. It cast doubt on the commitment of the authorities to come up with an acceptable constitution. The unfortunate picture that emerges is of power hungry authorities that set up a Constitutional Commission while deep down they knew that they would not accept its draft as long as it does not reflect their interests. The fact that racial bigotry influenced the rejection of the draft suggests that the authorities were hostile to the idea of a constitution that was acceptable across the racial divide. It was clear that the authorities were only paying lip service to the need to come up a widely acceptable and legitimate new constitution.[100]

## 8. Constitution making and party politics in 1969

Following the rejection of the recommendations of the Whaley Constitutional Commission, the Rhodesian Front parliamentary caucus set up a subcommittee to discuss the content of a constitution that would fundamentally transform the Constitution of 1961. The parliamentary caucus subcommittee was led by Desmond William Lardner-Burke, Minister of Law and Order. At the same time, the Rhodesian Front set up committees within each of its six provincial divisions to consult its supporters on the content of a new constitution. The six provincial committees were chaired by the provincial chairmen of the ruling party.[101]

On 1 May 1969, the Rhodesian Front kick-started its outreach consultation programme in the provinces. Each of the six provincial chairmen coordinated consultation in their respective provinces.[102] To facilitate consultation, they toured their respective provinces, meeting with ruling party members and soliciting their views on the kind of constitution they wanted produced. Consultation took the form of closed meetings. Supporters of other political parties were excluded. The month long consultation ended on 30 May 1969.

Once the consultation ended, the ruling party organised a joint meeting of the parliamentary caucus sub-committee and the committee of provincial chairmen. The joint meeting was undertaken under the leadership of the chairman of the parliamentary caucus of the ruling

[100] Chipara 2013: 5. See also Kuveya 2013: 6; Chigayo 2012: 2.

[101] Mafungo 2012: 4. See also Batta 1979: 4; Lee J.M, 1967: 10.

[102] Chimbwa 2012: 8. See also Windrich 1975: 360.

party, who was tasked with identifying areas of consensus, disagreements and then come up with a compromise position on the content of a new constitution. The meeting started with the provincial chairmen presenting a consolidated report of their findings and recommendations for a new constitution based on the consultations they had held. It was reported that most ruling party activists favoured a constitution that entrenched white interests. In particular, they reported that their constituencies did not wish to see an immediate increase in the number of blacks in the legislature. The report recommended the establishment of three separate legislatures, one for the Shona, another for the Ndebele, and a controlling central parliament composed of whites.[103] It also recommended separate voting rolls for the different races. The demand for black representation in a national parliament was dismissed out of hand.

The report of the parliamentary caucus subcommittee was slightly different from that of the divisional chairmen. The subcommittee recommended constitutional provisions that were more accommodative of members of the black community. It recommended one legislative house made up of an equal number of white and black legislators and one voters' roll for blacks and whites. The provincial chairmen argued that the recommendations did not reflect the positions of Rhodesian Front supporters on the ground.[104]



Following the submission of the two reports, the parliamentary caucus committee took three days to reflect on the different recommendations of the two committees.[105] Eventually, the two reports were put to a vote. The proposals of the parliamentary caucus sub-committee were accepted by a majority of only two votes.

The decision forced a few disgruntled members to resign from the ruling party.[106] Smith pounced on the opportunity presented by the resignation by asking for a vote of confidence in himself and the government before the constitutional proposals were considered by the ruling party's executive committee. He received an overwhelming vote of confidence with 97 votes to 2.[107] Shortly afterwards, the 102-member Rhodesian Front executive committee met to

[103] Hodder-Williams 1970: 227. See also Brown 1980: 7.

[104] Hodder-Williams 1970: 227. See also Chitande 2011: 8; Reynolds 2012: 6.

[105] Chimbwa 2012: 9.

[106] Hodder-Williams 1970: 227. One of the key public figures who resigned was William Harper, then Minister of Internal Affairs. See also Jiri 2001: 12.

[107] Hodder-Williams 1970: 227.

discuss the constitutional proposals agreed with so much difficulty between the parliamentary caucus committee and the provincial chairmen of the party. The issues agreed to in the meeting were set out in a document called the Yellow Page, named after the colour of the paper they were duplicated on.[108]

The executive committee agreed on a number of issues that the new constitution would incorporate. The constitution was to do away with the issue of two voters' rolls (one for blacks and one for whites as was the case at the time) and replace it with a common voters' roll. There was to be a new Declaration of Rights, which was not enforceable by the courts but safeguarded by the Senate. The Senate was to take over the duties of the Constitutional Council, which had previously checked legislation to see whether it was consistent with the Declaration of Rights. The constitution was to protect the land rights of members of the white community. The agreement provided for three provincial assemblies, one for whites, one for the Shona, and the other for the Ndebele. At the national level, there was to be a multi-racial National Assembly. Representation in the National Assembly was to depend on national tax contributions by the provinces on a basis of calculated personal income-tax.[109]

The executive committee presented the proposals to a special congress of delegates from the branches. The issues contained in the agreement were presented to the special congress as recommendations. A call was made for the special congress to adopt the proposals made by the executive committee. The special congress accepted some of the recommendations of the executive committee and rejected others.[110] In the same vein, it accommodated some of the demands made by delegates who did not wish to see a constitution that threatened white interests.[111]



[108] Hodder-Williams 1970: 229. See also Chingwaru 2009: 2; Mwiti 2013: 2.

[109] North 2013: 5; Zelniker 1975: 30.

[110] Hodder-William 1970: 229. The special congress endorsed the idea of an election system that is racially based and a parliament made up of the Upper and Lower Houses. It rejected the idea of one voters' roll for whites and blacks, the idea of a multi-racial National Assembly, the idea of an equal number of white and black members of parliament (then known as the concept of parity), and the idea of lowering qualifications to enable many to vote in elections. See also Chakanyuka 2012: 4; Nemukuyu 2012a: 2.

[111] Gambe 2012: 3. The demands made by delegates included the need to divide the country into two separate areas, one for members of the black community and the other for members of the white community, the establishment of provincial assemblies for Mashonaland and Matabeleland provinces meant catering for blacks in these parts of the country and a racially based voting system. See also Nyerere 1966: 378.

The writing of the document was undertaken by a team of government legal drafters, headed again by George Smith, who was the Director of Legal Drafting.[112] George Smith was an active member of the Rhodesian Front and a legal advisor to Ian Smith. His task involved the translation into legal language of the constitutional ideas already agreed to by the delegates to the special congress of the ruling party. The document produced by the legal drafters was presented to the white minority government and endorsed.

On 20 June 1969, the draft constitution was submitted to a referendum. Only whites participated in the referendum. The question was whether or not they approve the constitution submitted to them. 72.48% of the 76 706 voters who participated in the referendum approved the proposals while 27.52% rejected the proposals. The Constitution was enacted by the legislature following public approval in fulfilment of the provisions of the Constitution Amendment (No. 2) Act of 1969.[113]

From the foregoing, it is clear that the creation of the new constitution offered another opportunity to bring to an end the search for an acceptable and durable constitution. However, it was immediately clear that the institutions and processes used in creating the 1967 constitution did not give much hope in this respect. To begin with, no effort was made to prioritise the use of a credible constitution making body. The making of the 1967 constitution was a ruling party affair. This is problematic. Political parties are not ideal organisations to spearhead constitution-making processes as their policies, programmes and activities are often informed by short term political goals. There is a general tendency for political parties to supplant constitution making objectives with the short term interests of politicians. That was also the case with the RF of Smith. Being a political party that sought to embed racial policies, the RF used the cause of constitution making to advance routine political objectives.[114]

The domination of narrow political objectives was not the only problem. In its attempt to dominate the process of constitution making, the RF deliberately excluded other political parties. The exclusion of other political parties undermined the integrity of the constitution-

[112] Kuseni 2013: 3.

[113] Preamble to the Constitution of 1969. The Constitution Amendment (No. 2) Act of 1969 empowered the legislature to enact such laws as it may deem necessary or desirable to give effect to the wishes of the voters of Rhodesia. See also Halpern 1971: 4.

[114] Nzimbe 2012: 4. See also Walker B, 1970: 4.

making body. It created a situation in which 'political objectives overshadowed the imperatives of good constitution making'.[115] That also partly explains why the 1967 constitution, the product of this partisan constitution-making body, continued to be contested well after the constitution went into operation. The situation would have been different had all political parties participated in its creation.

From a process perspective, one might be tempted to commend the RF for undertaking consultation before drafting. Undertaking consultation before drafting is generally considered a big step in creating a constitution that manifests the preferences of ordinary citizens. However, the consultation that was undertaken by the RF left a lot to be desired. To begin with, it was not extensive. It simply targeted supporters of the RF. It 'excluded other segments of the society'.[116] The consultation can actually be dismissed as being dubious as it simply sought 'to confirm the views of supporters of one political party while side-lining the views of others'.[117] Carried by the two committees of the RF, its task was to confirm the political agenda of the ruling party. The two committees could not be expected to recommend constitutional proposals that were fundamentally different from those sought by the generality of the supporters of the ruling party. To expect otherwise, it was argued, 'would be to defy logic'.[118] The consultation was a side show. The referendum that led to the approval of the Constitution was also problematic. The result of the referendum was illegitimate as it was not validated by blacks who constituted the largest segment of society.[119]



In short, a constitution can hardly be deemed to be legitimate if the methods by which it comes into operation are bigoted, racially biased and exceedingly prejudicial. But those were the circumstances that attended the creation of the 1969 Constitution. Those circumstances partly explain why the search for a new legitimate constitution remained elusive. Importantly, those circumstances explain why the racial tension between members of the black and white community worsened with each unsuccessful attempt at creating a new constitution.[120]

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[115] Walter 1972: 3. See also Mhaka 2012: 3.

[116] Chisora 2012: 6. See also Sibanda T, 2012a: 2; Nzimbe 2012: 4.

[117] Slinn 1976: 185.

[118] Walter 1972: 4. See also Batta 1979: 4; Smith I, 1997: 15.

[119] Chisora 2012: 7. See also O'Meara 1975: 39.

[120] North 2013: 5. See also O'Callaghan 1977: 34.

## 9. The 1978 constitution

The adoption of the Constitution of 1969 and the intensification of racial segregation that came along with it, coupled with Smith's refusal to accept Britain's principle of 'no independence before majority rule', and the persistent installation of constitutions not founded on democratic practices, convinced many blacks that an armed struggle was the only practicable alternative left open to assert their rights.[121] Two liberation movements, the Zimbabwe African National Union (ZANU) and the Zimbabwe United Peoples' Organisation (ZUPO), embarked on armed struggle using Mozambique and Zambia as springboards. Initially, the armed resistance was confined to the rural areas. However, by 1978, the war of liberation had entered the urban areas, including the capital Salisbury (Harare). The liberation war disrupted the peace in the urban areas and made cities unsafe for urban dwellers, including whites. The intensification of the liberation war, the mounting casualties within the civilian population, the cost of financing a war estimated at US$1 million daily and adverse economic conditions prompted Smith to agree to a political settlement with compliant black politicians, paving the way for the foundation of a government of national unity and a constitution that sought to address the new threat to the political order.

The agreement between the Smith government and moderate black politicians, who were opposed to the armed struggle, was concluded on 3 March 1978.[122] The agreement they signed is officially referred to as the Internal Settlement (thereafter to be referred to as IS).[123] In its preamble, the IS firstly identifies an unjust constitution as the reason for the civil war raging inside Southern Rhodesia. It presents the creation of a new constitution that is acceptable to all citizens as the only means to stop the civil war. It declared that 'a Constitution will be drafted and enacted which will provide for majority rule on the basis of universal adult suffrage'.[124] It provides for the establishment of a Constitutional Drafting

[121] Chirevo 2010: 8. See also Sithole N, 1978: 68: North 2013: 5.

[122] Thompson 1985: 39. Moderate black politicians were represented by Abel Muzorewa, leader of the United African National Council (UANC), Ndabaningi Sithole, leader of the ZANU and Chief Jeremiah Chirau of the ZUPO). See also Ngara 1978: 345.

[123] Caute 1983: 173. The agreement was called 'internal' to emphasise that it had been reached with moderate African leaders inside Rhodesia as opposed to the political formations of Robert Mugabe and Joshua Nkomo who were waging a guerrilla war against Smith's white government from the neighbouring states of Mozambique and Zambia respectively. See also Sithole M, 1992: 130: Chitemba 2011: 1.

[124] Internal Settlement 1978: 1. See also Gregory 1980: 12.

Committee. The Committee was tasked with the creation of a constitution that would provide for majority rule on the basis of universal adult suffrage. The Constitutional Drafting Committee was required to come up with a new constitution by 31 December 1978.

The signatories of the IS appointed a seven member Constitution Drafting Committee again headed by George Smith, who was Director of Legal Drafting and Legal Advisor to Prime Minister Ian Smith.[125] Except for the Zimbabwe United People's Organisation (which had one representative), each of the political parties in the Constitutional Drafting Committee was represented by two members.

Although its chairman issued a statement, soon after appointment, requesting ordinary citizens to give oral evidence to the constitution-making body, it was made clear that the constitution making body was not a commission and would therefore not automatically be seeking outside views. The Constitutional Drafting Committee's first move following its appointment was to convene a meeting where it set out areas in respect of which it needed political direction from the signatories of the IS and areas in respect of which it could commence provisional drafting, without relying on the direction of policy makers. After the placement of issues into the two groups mentioned above, the Constitution Drafting Committee began the actual process of drafting. Occasionally, it attached recommendations to the issues it referred to politicians for determination to assist them in making informed decisions. Once the signatories reached consensus, the agreed position was handed to the drafters for incorporation.[126]

The Constitution Drafting Committee worked under great pressure to meet the deadline of 31 December 1978 that was mentioned in the IS as the date on which an election based on universal suffrage was supposed to be held. Even then, the date was not met as politicians could not come to an agreement on certain issues.[127] The Committee finalised drafting on 7 January 1979. On 11 January 1979, it submitted its draft constitution to the signatories of the IS for approval. All signatories to the IS endorsed the document. Once approved, it was sent

[125] Shaw A, 2011: 1. The other members of the Constitutional Drafting Committee were, John Antony Giles, Ahrn Palley Enock Dumbutshena, Edgar Tiyeni Musikavanhu, David Zamchiya and Lindsay Hugh Cook. See also Crisis in Zimbabwe Coalition 2011: 3.

[126] Chitande 2011: 10.

[127] Day 1978: 270. See also Chinhange 2013: 4.

to the legislature for approval.[128] The legislature approved the draft Constitution, paving the way for a referendum. The referendum was held on 30 January 1979. Only members of the white community voted in the referendum. In total, 67 838 whites participated in the referendum. 85.38% of the voters approved the proposals. The constitution was then submitted to the legislature for enactment, thereby, completing its journey before it went into force.

The Constitution of 1978 introduced a power sharing government. It provided for an Executive Council made up of the signatories to the IS. The office of Prime Minister was to be occupied on a rotational basis. The constitution provided for a Ministerial Council comprised of eighteen members representing the power sharing parties. It provided for one white Minister and one black Minister, sharing responsibility for each of the nine departments of government. It provided for one-man-one vote. Yet, twenty-eight seats out of a hundred in the legislature were to be reserved for representatives of the white community for at least ten years. The constitution provided for state institutions that 'were free from political interference'.[129]

The installation of the Constitution of 1978 was followed by an election in which black and white Southern Rhodesians participated as equals for the first time in the history of the racially divided country.[130] Two rebel political formations, ZANU PF and Zimbabwe African People's Union (ZAPU), did not participate in the election as they believed in a military campaign to advance a political settlement. The two political parties condemned the election because of the guarantees extended to whites.[131] The election was held on 25 April 1979 and won by the UANC of Abel Muzorewa. Subsequent to the election, the country dropped the official designation Rhodesia and adopted the name of the Republic of Zimbabwe-Rhodesia.

Most authors who reflect on the process of constitution-making that led to the adoption of the 1978 Constitution praise the IS. This relates to the fact that the IS provided yet another window of opportunity for the creation of a constitution that was acceptable to many people. It is not, however, clear if the IS was an ideal framework for purposes of constitution-making.

[128] Shaw A, 2011: 1. The Constitutional Drafting Committee did not meet its deadline. See also Flower 1987: xviii; Stephen 1978: 4.

[129] Catholic Institute for International Relations 1978: 6.

[130] Shaw A, 2011: 1.

[131] Peters 1979: 1. See also Mugabe 2001: 22.

This is because the power sharing agreement and the drafting of a constitution were combined into one negotiation process. The emphasis was more on the termination of the civil war. Arguably, therefore, both the institutions and processes of constitution-making were ill-suited for the creation of a legitimate and enduring constitution.[132]

The problem begins with the organisation of the constitution-making body. It was basically a forum where the ruling party and major opposition parties came together to avert a crisis. It was comprised of lawyers representing four political parties. The composition of the Committee was not, however, broad based. It excluded other political parties, including ZANU PF and ZAPU. The fact that ZANU PF and ZAPU were not represented in the Constitution Drafting Committee, as argued by one author, indicates that the constitution-making body 'was not inclusive enough'.[133]

The Constitution Drafting Committee was composed based on appointment by the leaders of the political parties in the coalition government. The appointment thus manifested the political preferences of the participating political parties. It made the constitution makers accountable to politicians and not ordinary citizens. The problem with such an arrangement is that it creates an environment in which drafters become 'susceptible to the interests of the elites in society'.[134]



Unlike the constitution-making process that characterised the creation of the 1967 Constitution, drafting was not preceded by consultation with ordinary citizens. In the absence of consultation, elite intervention influenced the activities of the Constitution Drafting Committee. The arrangement gave a blank cheque to the elite to manipulate the constitution-making process for short term political considerations. Of course, some level of citizen participation in the constitution-making process came in the form of the constitutional referendum.[135] It is, however, very difficult to claim that the referendum facilitated the involvement of ordinary citizens. Although the referendum offered ordinary citizens the opportunity to participate in the late stages of the constitution-making process, it was inadequate. The fact that the referendum was only ratified by members of the white community paints a picture of a process that was racially exclusionary. It is difficult to accord

[132] Nash 1978: 6. See also Charlton 1979: 4; Peters 1979: 1.

[133] Charlton 1979: 4. See also Stephen 1978: 4.

[134] Gambe 2012: 3. See also O'Meara 1979: 30.

[135] Batta 1979: 4. See also Irving G, 1979: 2; Mugabe 1983: 30.

legitimacy to a constitution-making process through a referendum that was dominated by whites, who constituted the minority, while the majority 'were deliberately excluded from voting'.[136]

Owing to these shortcomings, the Constitution of 1978 failed to stop the liberation war that was being waged by blacks.[137] It was for this reason that Britain, as the following section reveals, called a Constitutional Conference in London to which the leaders of a few selected political parties were invited to negotiate an acceptable constitution.

## 10. The 1979 Constitution

Following its adoption, two factors immediately suggested that the Constitution of 1978, like its predecessor, was going to be a short-lived document. The first factor relates to the fact that the political situation inside Southern Rhodesia took a turn for the worst. By 1979, insurgent activities had spiralled out of control. The country was in the full grip of a deadly civil war.[138] Insurgents were making military advances at a faster rate than the country's defence forces could contain. With the insurgency growing in strength daily and the ability of the defence forces to contain them reaching a breaking point, negotiating a new constitution started to emerge as the only way out.



The second issue relates to the growing demands for majority rule and the decision of the colonial power to take charge of the search for a new constitution. The colonial power's decision to take charge of the process of constitution-making followed the Commonwealth Heads of Government meeting held in Lusaka, Zambia, from 1-7 August 1979. It was at that meeting that Britain was tasked by the Commonwealth Heads of Government to take charge of the creation of a constitution that was acceptable to a broad spectrum of people belonging to different political, racial and ideological persuasions.[139] The British government was mandated to discuss and negotiate the terms of an independence constitution, supervise elections, ensure that parties settle their differences by amicable political means and that Southern Rhodesia assumes (legal) independence. To give effect to the Lusaka declaration,

[136] Stephen 1978: 5. See also Jackson 1979: 4.

[137] Chalton 1979: 4. See also Brides 1980: 178.

[138] Gregory 1980: 11. See also Jackson 1979: 4; Reynolds 2012: 5.

[139] Lancaster House Agreement 1979: 1. See also Stedman 1991: 176; Zvobgo 1979: 3.

Britain, on 14 August 1979, issued invitations to selected parties in Southern Rhodesia to participate in a Constitutional Conference at Lancaster House in London.

The Conference opened in London on 10 September 1979 under the Chairmanship of Lord Peter Carrington.[140] It was composed of sixty-four participants representing the major political players in Southern Rhodesia. The first delegation, comprised of twenty participants, was headed by Abel Muzorewa (Prime Minister) and represented the Zimbabwe-Rhodesia (read as Southern Rhodesia) government. The second delegation, the Patriotic Front (PF), represented the two rebel movements, ZANU PF and ZAPU, headed by Robert Mugabe and Joshua Nkomo respectively.[141] The third delegation, composed of twenty-two participants, was headed by Lord Peter Carrington, British Foreign and Commonwealth Secretary, and represented the colonial power, Britain.[142] The Conference was supported by a Secretariat comprised of four people, all British citizens. The Conference was described as a final attempt to achieve an enduring settlement of the problem of Southern Rhodesia, which was characterised by the intensification of the war of liberation, loss of innocent lives and the deterioration of racial tensions.[143]

How the Constitutional Conference was going to proceed was succinctly captured by Lord Carrington, the Chairman of the Constitutional Conference. In his opening speech, he stated:



> Many conferences like this have been held in this very building. A great many former dependent territories of the United Kingdom have successfully made the transition to independent statehood on the basis of constitutions agreed here. It is our intention to approach this Conference on the basis of the same principles and with no less strong a determination to succeed than in the case of those other conferences, which resulted in the granting of independence by this country to our former dependent territories. I believe that we can take some pride in the part we have played at conferences held at

[140] Lancaster House Agreement 1979: 4. In the absence of Lord Carrington, Lord Privy Seal, Sir lan Gilmour was Chairman.

[141] McGreal 2002: 1. The first delegation was appointed at the discretion of Prime Minister Abel Muzorewa and former Prime Minister Smith, the leader of the Rhodesia Front. The second delegation was appointed at the discretion of the leaders of the rebel movements known as the Patriotic Front (i.e Robert Mugabe of ZANU PF and Joshua Nkomo of ZAPU). The Patriotic Front comprised a strong team of twenty-two delegates. Similarly, the third delegation representing the British government was appointed at the discretion of the Secretary of the Commonwealth, Lord Carrington. See also Mandaza 1991: 19, Soames 1980: 412.

[142] Sutton-Pryce 1989: 10. See also Ntando 2009: 1; Lord Carrington 1979 3.

[143] Goredema V, 2013: 1. See also Lancaster House Agreement 1979: 4.

> Lancaster House in the process of decolonisation. As Commonwealth leaders agreed at Lusaka, Britain has had no lack of experience as a decolonising power.[144]

A key component of the work of the Constitutional Conference was deciding 'the proper basis for the granting of legal independence to the people of Rhodesia'.[145] In relation to this, the Chairman outlined the six principles laid out by the British government in 1965 as the basis on which it was prepared to grant a new constitution (and legal independence) to Southern Rhodesia.[146] The principles are:

> (a) unimpeded progress to majority rule must be maintained and guaranteed; (b) there must be guarantees against retrogressive amendment to the constitution; (c) there must be an immediate improvement in the political status of the black population; (d) there must be progress towards ending racial discrimination; (e) the constitutional proposals must be acceptable to the people of Rhodesia as a whole; and (f) there must be no oppression of the majority by the minority or of the minority by the majority.[147]

Afterwards, the delegates were given copies of the British Government outline proposals for an independence constitution. The proposals, it was indicated, were prepared based on the views of the major players expressed to the colonial power during consultation. The proposals were presented as a starting point for the negotiations. The Chairman added that the proposals were intended to give effect to the principles which have been accepted by successive British Governments as the proper basis for independence. In addition, it was explained that if any agreement could be reached on alternative proposals, which meet the British Government's criteria, it would be prepared to grant independence on that basis. It was against this background that the negotiations for the constitution began.[148]

The negotiations took place in plenary meetings where delegates engaged each other until a common position was found. In a bid to establish what measure of agreement existed on the outline proposals and where the major difficulties lay, each of the plenary sessions started with the delegates giving their views on the outline proposals made by the colonial power. Thereafter, the discussion, under the chairmanship of Lord Carrington, focused on the

[144] Lancaster House Agreement 1979: 4.

[145] Lancaster House Agreement 1979: 4.

[146] North 2013: 5. See also Irving G, 1979: 2; Cilliers 1985: 33.

[147] Lancaster House Agreement 1979: 6. See also North 2013: 4.

[148] Vollan 2013: 8. See also McGreal 2002: 1.

contentious issues.[149] Delegates engaged on the contentious issues one by one. Only when an agreement was obtained did they move to the next issue. At times, the plenary sessions adjourned early without progress as the discussions became too heated and acrimonious. It was at this stage that Lord Carrington and his men would shuttle backwards and forwards between the delegations, making promises and giving assurances in private. Keeping the parties on track was an enormous 'con job' as it involved Lord Carrington giving verbal assurances and persuading each party to support Britain's constitutional proposals. When persuasion did not achieve the intended goal, Lord Carrington used the 'second option up his sleeve'.[150] In this regard, the Chairman threatened to produce a constitution without the participation of the parties in attendance. Most of the time, the threat of unilateral action induced cooperation and concession. After extracting a concession, Lord Carrington would hastily arrange for a plenary session to officially confirm the agreed position. The Chairman then moved to tackle the next contentious issue.[151] Final agreement on all contentious issues was reached after forty-seven plenary sessions and three months of intensive negotiations.[152] Subsequently, the leaders of the delegations to the conference signed an agreement outlining the general provisions of the impending constitution. The agreement included arrangements for the pre-independence period and a ceasefire agreement signed by the political parties. The signing of the Agreement was followed by drafting, which was undertaken by officials drawn from the Colonial Office and Commonwealth Office. On 14 November 1979, the Parliament



[149] Sutton-Pryce 1989: 9. The contentious issues included the questions of representation of whites in parliament, citizenship, the land question, the nature and extent of executive power, the organisation of the legislature, the composition of the judiciary and the issue of a separate voters' roll for white Zimbabweans. The Constitutional Conference almost failed to reach an agreement due to disagreements on the land question. At the centre of the disagreement was section 16 of the draft constitution, which protected the property rights, including land rights of members of the white community. The Patriotic Front objected to constitutional provisions that retained privilege and perpetuated injustice whilst upholding the status quo on the land question. It was argued that the provisions did not reflect the fact that land was the main reason that the armed struggle was waged. See also Chifodya 2013: 9.

[150] Sutton-Pryce 1989: 9. See also Goredema V, 2013: 1.

[151] Vollan 2013: 8. See also Sutton-Pryce 1989: 10; Zvobgo 1979: 4.

[152] Mamdani 2008: 17. In the final resolution of the contentious issues, the parties agreed to a moratorium of ten years on issues relating to constitutional changes on the rights of whites to land. A moratorium of ten years was also placed on articles relating to emergencies and detention, the Bill of Rights and the rules for changing the Constitution and articles relating to emergencies and detention. Another moratorium of seven years was placed on the composition of the two chambers of Parliament, including the white voters' roll. These could only be amended by an affirmative vote of all members of the House of Assembly.

of Britain passed the Southern Rhodesia Act (Chapter 52), which provided for the coming into effect of the independence constitution.[153]

The Act is divided into three sections. Section 1 of the Act focuses on Britain's power to provide, through an Act of Parliament, Southern Rhodesia's constitution when it becomes independent as a Republic under the name Zimbabwe. It also provides for the repeal of the Constitution of Southern Rhodesia of 1961.[154] Section 2 of the Act focuses on Britain's power through an Order in Council to bring particular provisions of the new constitution into force before the rest of the Act comes into operation.[155] Section 3 of the Southern Rhodesia Act (Chapter 52) focuses on the powers of the British Parliament to make provisions for the government of Southern Rhodesia on a wide range of issues until the new constitution came into effect.

The Parliament of Britain passed the Southern Rhodesia Act (Chapter 52) after which it passed the Lancaster House Constitution and published it on 6 December 1979 as Schedule C to the Zimbabwe Constitution Order (S.I. 1979/1600 of the United Kingdom).[156] The adoption of the Constitution was followed by a general election that was held in February 1980. Supervised by Britain, the election was contested by over ten political parties and won by ZANU PF. Robert Mugabe became the Prime Minister. On 18 April 1980, Britain ceremonially granted independence to Zimbabwe. The Constitution of 1979 came into operation on 19 April 1980.[157]



The creation of the Constitution of 1979 marks a major departure. It represented the realisation of majority rule. This was not a small achievement by any standards as the question of majority rule had dominated public debate for over eighty years. Since then, over fifty thousand people had died in civil war and the country's infrastructure destroyed. The creation of a new constitution increased hope that there would be reconciliation between

[153] Batta 1979: 4. See also Lancaster House Agreement 1979: 1; McGreal 2002: 1.

[154] Parkinson 1982: 9. The Act only refers to the Constitution of 1961 as the British government did not recognise all the constitutions created under rebellion. See also Lancaster House Agreement 1979: 1.

[155] The Order in Council was to be laid before Parliament after being made and was to expire after twenty days beginning the day on which it was made, unless during that period it was approved by resolution of each house of Parliament. See Campbell 2012: 4.

[156] Benomar 2003a: 85. See also Ndulo 2010: 180; Chifodya 2013: 7.

[157] Gregory 1980: 12. See also Herbst 1990: 13.

members of the white and black communities. The fact that the new Constitution was brought about after intense negotiations gave hope that the document would endure.

Composed of representatives of four political parties, the Constitutional Conference included, for the first time, all the major political actors. The participation of the rebel political movements, ZANU PF and ZAPU, signified the fact that the major political formations were now committed to a constitutional settlement. Previously, the exclusion of the two rebel political movements was the major reason why earlier constitutions did not endure. For example, the rebel political movements' rejection of the 1978 Constitution meant that the question of constitution-making was far from being over.

At the same time, it is important to note that the Constitutional Conference was not fully broad-based.[158] It seems that the Constitutional Conference proceeded on the assumption that the political parties that were invited to negotiate a new constitution in London represented citizens from a broad spectrum of the Zimbabwean society at the time. Although the political parties invited indeed enjoyed the support of many Zimbabweans, as shown by the results of the elections of 1980, the exclusion of other political parties from negotiating the independence constitution 'undermined the statement that the Constitutional Conference enjoyed broad representation'.[159] The deficiency of this arrangement is exposed by the fact that as many as ten political parties contested the first democratic elections. As lamented by one author, the selection of members was 'suspect as it was not broad enough'.[160]

The terms under which the Constitution was created were also telling. Being under the direction of the colonial power, the Constitutional Conference, it is often argued, facilitated the creation of a constitution on terms that obnoxiously extended colonial hegemony. The fact that the Constitutional Conference took place in London indicates that colonial priorities were of greater practical significance than the considerations of those whose lives were to be governed under the constitution.[161] The fact that the Lancaster House Constitution traced its

[158] Chifoya 2012: 3. See also Madava 2012a: 2; Sibanda A, 1989: 5.

[159] Chimombe 2001: 2. See also EISA 2002: 1; Sithole & Makumbe 1998: 14.

[160] Chifoya 2012: 3. See also Mwiti 2013: 3; Campbell 2012: 7.

[161] Chimombe 2001: 4.

validity to British legislation, 'confirms that it was British subsidiary legislation called by another name'.[162]

## 11. Conclusion

Constitution-making under the colonial power, Britain, was no different from similar projects under colonial powers elsewhere. The constitution-making project was driven by the need to entrench colonial rule. The creation of constitutions reflected the desire of the conquering power to reproduce itself through hegemony in the conquered territory. As was the case in similar situations, hegemony was buttressed through legislation that elevated the rights of whites over their compatriots. Similarly, segregationist policies were also used to ensure compliance with colonial constitutions.

Obviously, a key characteristic of the project of constitution-making during the era was that it was not broad based. Primarily excluded were blacks who constituted the largest segment of the population. Exclusion took many forms. In some cases, it was blunt. Legislation was used to provide for the exclusive participation of members of the white community in constitutional negotiations and referendums. In other times white rulers used stringent voting conditions that made it impossible for members of the black community to participate in constitutional referendums. Eventually, participation in constitution-making was limited to members of the ruling party.



Little to no involvement was a key feature of constitution-making during this period. Racial considerations were key factors in deciding who participated and who watched the constitution-making from afar. Whereas members of the white community experienced some involvement, members of the black community were largely excluded.

Secrecy was another defining characteristic of constitution-making during this period. Decisions on the procedural design issues and content were dominated by those in the echelons of power and their surrogates. Constitution-making was masked. The deliberations and minutes of the constitution-making bodies were not made available to the public. Members of the media and ordinary citizens were not allowed anywhere near the negotiations of new constitutions.

[162] Rawling 2003: 2. See also Kersting 2009a: 8.

The creation of the Lancaster House Constitution that eventually gave birth to independent Zimbabwe was accompanied by similar institutional and procedural deficiencies. Only a handful of political parties participated in the creation of the Constitution while many were excluded. The legitimacy of the Constitutional Conference was undermined by the fact that it was not arrived at through consultation. The determination of the processes of constitution-making was, by and large, a preserve of the colonial power. Furthermore, the adoption of the Constitution by the colonial power concretised the perception that the Constitution was a document in the service of the interests of the British.

If the quick survey of the successive constitution-making efforts that Zimbabwe went through before independence suggests anything, it is the fact that a constitution that is conceived without the participation of the people for whom they are made will always elicit questions of legitimacy. It suggests that a constitution that is the outcome of a secretive process and that fails to include every segment of society is less likely to endure. It suggests prime importance must be attached to institutions and processes that are used to create a constitution. This is also consistent with the increasing consensus which was emerging as Zimbabwe was moving into the era of independence, i.e. that institutions and processes of constitution-making must be guided by principles that promote inclusion, transparency and participation.



As Zimbabwe was moving to an era of independence with the adoption of a new constitution, we see the emergence of the constitutional principles that guide constitution-making. Widely used starting from the late 1980's, the three principles of participation, inclusion and transparency, emerged as strong standards against which the success of institutions and processes of constitution-making must be assessed.[163] Since then, the principles have been enjoying wider application throughout the world. We thus, for a moment, pause our discussion on the history of constitution-making in Zimbabwe and discuss the development of these principles and their translation into reality through institutions and processes of constitution-making.

[163] We have, in fact, noted some of these principles emerging in constitution-making processes in Southern Rhodesia during the period under discussion in this chapter. The draft constitution prepared by the Whaley Constitutional Commission was, for example, preceded by, albeit limited, a process of consultation (see section 7 of this Chapter). See also Slinn 1991: 5.

# Chapter Three: The principles, institutions and processes for constitution-making

## 1. Introduction

As mentioned in the previous Chapter, Zimbabwe's march to independence coincided with the emergence of constitutional principles as a key feature of constitution-making. Usually negotiated by political parties or, in the context of a country experiencing civil war, determined by the international community, constitutional principles were emerging as the standards that guide constitution-making projects. First introduced in the 1980s, their importance and popularity grew as importance was increasingly attached to the role of institutions and processes of constitution making in creating a legitimate and durable constitution.

Taking this into account, we will now pause the discussion on the history of constitution-making in Zimbabwe and discuss the emergence of these constitutional principles and the different ways in which institutions and processes of constitution-making can give effect to these principles. The objective is to establish the standards against which the constitution-making efforts that came after the independence constitution can be examined.



The Chapter is organised into three main parts. The first part discusses the constitutional principles. We, then, move to institutions of constitution-making and examine how the different institutions that can be used to create a new constitution can give effect to the constitutional principles. Finally, we move to the process of constitution-making. The focus is on how the different stages of a constitution-making project can give effect to the principles of participation, inclusiveness and transparency.

## 2. The standard principles of constitution-making

The origin of constitutional principles can be traced back to the last part of the 20th century. In fact, the introduction of constitutional principles into the making of constitutions is specifically linked to the constitution-making process that led to the adoption of the current Namibian Constitution. During and before the transition to independence, Namibia 'was almost a permanent item on the UNG agenda'.[1] Its transition to independence was ensured as a result of an international peace-making operation. The culmination of the transition to

[1] Wiechers 1991: 5. See also Brooke 2005: 13.

independence began in 1978 with the adoption of the UN Security Council Resolution 435, which provided the basis for the eventual independence of Namibia. The Resolution provided for the elections of the Constituent Assembly and the drafting of the Namibian Constitution. By way of implementation, the UN Security Council adopted 'the Principles concerning the Constituent Assembly and the Constitution for an independent Namibia' in 1982.[2] It was this document that, for the first time, formally introduced the use of constitutional principles to guide the making of a constitution.[3] It provided for a set of 32 constitutional principles. The end product, the constitution, was expected to reflect the Constitutional Principles.

The Namibian experience has inspired the adoption of constitutional principles in other countries. One such country was Cambodia. In 1991, the Comprehensive Cambodian Peace Agreement, commonly referred to as the Paris Agreement, ended the conflict in Cambodia. The Agreement provided for principles to be followed in drafting a new constitution.[4] Derived from a United Nations recommendation for the drafting of Namibia's constitution, a total of six principles, which were endorsed by most United Nations Security Council member countries, provided for the creation of a Constituent Assembly. They also provided guidelines relating to the creation of a widely accepted constitution.[5]

Another country that is prominently known for using constitutional principles for the creation of a new constitution is South Africa. Negotiated by political parties in 1993, South Africa's constitutional principles were contained in the Interim Constitution.[6] There were 34 constitutional principles with which the new constitution had to comply with. As in Cambodia, the constitutional principles mostly addressed content-related issues. But they also

[2] Makwiramiti 2012: 2. The full text of the constitutional principles focusing on the procedure of constitution making is outlined in United Nations Security Council Document S15287 of 12 July 1982.

[3] Some (like Reynolds 2012: 2), however, trace back the use of constitutional principles to the creation of France's 1789 Constitution. According to this view, the organisation and operation of France's Constitutional Assembly reflected an early understanding of the significance of the norms of inclusivity, participation, transparency and ownership. Comprised of 1200 delegates, the National Conference was representative of society. Its deliberations were transparent in that they were widely reported in the media. Through public debate, ordinary citizens could participate and influence the creation of the constitution. As a result of these measures, ordinary citizens identified with the institutions and processes of constitution making as well as the outcome. See also Halkett 2002a: 2; Feldman 2013: 3.

[4] Gava D, 2013: 2.

[5] Brooke 2005: 36.

[6] Ebrahim 1999: 20.

provided for the creation of the Constitutional Assembly whose members were elected based on the PR electoral system.

In Burundi, the principles for drafting a new constitution were derived from the *Arusha Peace and Reconciliation Agreement*, a document that was signed between the government and 16 rebel groups in Tanzania on 28 August 2000.[7] The document was the basis for the cessation of civil war and the search for lasting peace in Burundi. Chapter 1 of the Agreement laid out the substantive constitutional principles with which the new constitution would have to comply with. Seven principles addressed various content related issues. Chapter 2 of the Agreement addressed the procedural aspects to be followed.

More recently, the Constitution of Kenya Review Act (No 9 of 2008) provided for six principles that should guide the Committee of Experts (CoEs) in creating the 2010 Constitution. Negotiated by the ruling party, Party of National Unity (PNU) of President Mwai Kibaki and the main opposition party in Kenya, the Orange Democratic Movement (ODM) of Raila Odinga, the principles mostly addressed process related issues.[8]

From the foregoing, it is clear that the use of constitutional principles in the creation of a new constitution is an internationally emerging trend. There seems to be an emerging agreement that the making of a new constitution must be guided by constitutional principles. The following sections discuss the nature, purpose and effect of constitutional principles as well as their implications for institutions and processes that are used to create a new constitution.

## 2.1 The nature and purposes of constitutional principles

Broadly speaking, constitutional principles serve two purposes. First, they permit the major players, usually political parties, to declare openly their commitment to constitution-making processes that are legitimate. Secondly, they give guarantees that the process will conform to particular standards agreed to before constitution-making gets underway. This helps to prevent the process of constitution-making from degenerating into a mere division of spoils between powerful players.[9]

[7] Brooke 2005: 32. See also Chisora 2011: 3.

[8] Okuku 2005: 2.

[9] Samuels 2005: 8.

Usually, constitutional principles pre-date the creation of constitution-making bodies.[10] They are introduced through a peace agreement or an interim constitution, which lay the groundwork towards the creation of a new constitution as set out in the constitutional principles. In fact, the common practice is that constitutional principles are negotiated by political parties. The negotiations can be inclusive as in the case of South Africa, where almost all political parties were involved, or limited in scope as it was the case in Kenya, which was limited to the ruling party and the opposition. There is also the category best epitomised by Eritrea in which the ruling party was the only group that was responsible for the adoption of the constitutional principles.

In some cases, constitutional principles are prescribed by the international community.[11] The international community here sets and guarantees the constitutional principles.[12] This is usually the case in a context of a peace process that involves the UN. As mentioned earlier, this was, for example, the case in Namibia in 1989. Namibia's constitutional principles were negotiated by the Western Contact Group led by the United States and the Front-Line States.[13] The role of the Namibian political parties was limited to the creation of a constitution that is consistent with the constitutional principles prescribed by the international community.



The status and relevance of constitutional principles differ from one country to another.[14] In some countries, the principles of constitution making are enforced by the courts. This was the case in South Africa, where upon approval by the Constitutional Assembly, the Constitution of 1996 was assessed by the Constitutional Court against the constitutional principles.[15] Only after being deemed to be compliant with the principles was the Constitution allowed to go into operation. However, in other countries, the constitutional principles are treated as general guidelines with limited legal significance. In those cases, the question of enforcement is hard to gauge. There are no mechanisms that are put in place to assess the process against the

[10] Klug 1996: 33.

[11] Erasmus 2013: 1.

[12] Reynolds 2012: 3.

[13] Erasmus 2013: 4. Countries in the Western Contact Group included the United States, Canada, France, Germany, and the United Kingdom. The Front-Line States were those countries neighbouring Namibia, including Angola, Botswana, Mozambique, Tanzania, Zambia, and Zimbabwe. See also Chimbwa 2012: 6.

[14] Zivo 2013: 2.

[15] Ebrahim & Miller 2010: 139.

principles. In particular, there is no constitutional court or another body for that matter that determines whether the process or content of the constitution complied with the constitutional principles. This was the case in Namibia. This has prompted some to question the relevance of the constitutional principles.[16]

There seems to be disagreement on what should be the focus of the principles of constitution making. Some countries emphasise principles of substance; whereas others emphasise principles of procedure.[17] The first type of constitutional principle prescribes the substance of an impending constitution. The essence of substantive constitutional principles is that they offer minimal guarantees as to the outcome. South Africa provides a very good example of a country that adopted principles that stipulated the substance of the Constitution of 1996. The Constitution only came into force after the Constitutional Court had certified that it indeed complied with the principles.[18]

The second type of constitutional principle is procedural.[19] The procedural constitutional principles set down the rules of the process. They focus on critical 'process issues'. They identify the procedural issues that inform the process of constitution-making. These principles guide, for example, issues such as who should participate in constitutional development, when and how. They include providing guidance with regard to the procedure that has to be followed and the timing that has to be adhered to by those in charge of the management of the process. They determine how the tasks are allocated and the sequence in which they are undertaken. Importantly, the form and intensity that civic education, consultation, drafting, adoption and ratification take is also guided by procedural constitutional principles. Unless these issues are dealt with satisfactorily, the prospect of unveiling a widely acceptable constitution is slim. The focus of this Chapter and, for that matter the thesis as a whole, is on the constitutional principles of procedure. Constitutional

[16] Oturu 2012: 4. A related question is whether constitutional principles have a life beyond the formulation of a new constitution. It is often the case that the constitutional principles are incorporated in the final constitution. This, however, is not always the case. It is frequently argued that constitutional principles cease to have any legal significance once the procedural requirements of drafting the constitution are completed. See also Walsh 2012: 4.

[17] Brooke 2005: 13.

[18] Certification of the Constitution of the Republic of South Africa, 1996: 2.

[19] Ghai 2004: 3.

principles are therefore discussed here as guidelines with which the institutions and processes of constitution-making must comply.

There seems to be also a large deal of agreement on the content of the constitutional principles that must guide the processes and institutions of constitution-making. In fact, a brief survey of the literature on constitution making reveals three primary principles that are often identified as the principles that must guide the processes and institutions of constitution-making.[20] The first principle is the principle of participation. The principle of participation emphasises the need to involve ordinary citizens in the different stages of the creation of the constitution. A related but yet distinct constitutional principle is the principle of inclusion, which basically underscores the imperatives of ensuring that all segments of society are represented in the constitution-making body. The third constitutional principle, the principle of transparency, focuses on the extent to which the deliberations on the making of the constitution and their outcomes are visible to the people.[21] In the following pages, a brief description of each of these constitutional principles follows.

## 2.2 The principle of participation in constitution-making

Since the early 1990s, the rise in the number of new constitutions has been accompanied by an increasing belief that the participation of ordinary citizens in a constitution-making process is necessary if the outcome is to be considered as legitimate.[22] Increasing the participation of ordinary members of society in constitution-making processes has thus emerged as one of the guiding principles of the process of constitution-making.[23] This was echoed by Banks when she said that the 'decisive test' of a democracy is its capacity to encourage participatory constitution-making.[24]



[20] Shuro 2010: 2. Hart (2001: 153) also discusses in detail the principle of participation. Ghai (2005b: 21) discusses the principle of inclusivity. Elster (2001: 6) discusses the principle of transparency.

[21] Elster 2013: 6. Some authors discuss 'ownership' as the fourth principle. It is, for example, discussed as a separate principle by Brandt (2011: 10). The discussion, however, reveals that the principle of ownership is, by and large, the function of the other three principles. For this same reason, this thesis does not discuss 'ownership' as a distinct constitutional principle.

[22] Moehler & Marchant 2013: 2. See also Klein 2005: 11; Mabvuto 2007 8.

[23] Ginsburg 2009: 204. There is a general agreement that citizens as individuals, as well as part of the interest groups, must be able to participate. See also Steiner 1988: 78.

[24] Banks 2008: 1043. See also Franck 1992: 11; Green R, 1989: 29.

The emphasis on ensuring public participation in a process of constitution-making represents a departure from the past where 'almost everywhere, politicians have played the decisive, sometimes the exclusive role in constitution making'.[25] It suggests a move away from an elite driven process. Underlying the move towards a constitution-making process that is guided by the principle of participation is the cynicism and suspicion about the motivation of political elites and political parties serving their narrow partisan interests.

It is argued that it is only when people have participated in a constitution- making process that they are prepared to identify with the end result. This is about the honour of legitimacy that a participatory constitution-making process confers on a constitution. As one author noted, '[i]f people have participated, they are more likely to have commitment to it, even if they have not fully understood the process or the constitution, or indeed even if their participation was largely ceremonial'.[26]

There are, of course, those who question the significance of the principle of participation. They, for example, refute the claim that there is a relationship between participation and the creation of constitutions that are durable.[27] According to them, not only do the proponents of the principle of participation exaggerate the benefits of participation, they often paint an over-romantic picture of the participatory process. They point out that the most successful constitutions (and those enjoying considerable legitimacy) since the middle of the last century, including the constitutions of Germany, Japan, India and Spain, were not made with any degree of public participation.[28] In fact, in each case, with the exception of India, 'the process was designed to limit the transparency of the process'.[29] Furthermore, the argument goes, it is methodologically difficult, almost impossible, to demonstrate with certainty that a particular outcome is the result of ordinary citizens participating in a process of constitution-

[25] Ghai & Galli 2006a: 241. See also Gluck & Brandt 2015: 14; Banks 2005: 4.

[26] Gluck & Brandt 2015: 14. Griffiths (2013: 3) also argues that participation fosters the acquisition of knowledge, skills, habits and values that increase the capacity of ordinary citizens to monitor government actions well after the process of constitutional development is over. In addition, it is argued that participatory processes of constitution-making provide spaces in which innovative solutions and approaches to problems can emerge that are qualitatively better than the solutions and approaches developed in elite or exclusive settings. See also Subedi 2011: 140; McCool 2004: 16.

[27] Bannon 2007: 21. See also Hart 2010: 34; Oldfield S, 2007: 489.

[28] North 2013: 3.

[29] Ghai & Galli 2006a: 241.

making.[30] It is also argued that some constitutions that were produced through participation have not been implemented fully even though they were created with the complete support of governments. This, it is argued, is the case with the Constitutions of Eritrea, Uganda and Ethiopia.[31] The point is that participation may not be, after all, the decisive variable that guarantees the creation of a legitimate and durable constitution.

Those who advise caution against over-emphasising the role of public participation in the making of constitutions argue that participation comes with several dangers.[32] They argue that participation facilitates the generation of excessive demands. People are often promised that their voices will be heard and then are ignored. Sometimes the views of ordinary citizens are twisted. Particularly worrying is the fact that the important role of experts may be sacrificed in the euphoria of participation. Besides greatly expanding the scope of constitutions, the populism often leads to an incoherent constitution. They argue that participation often leads to the inclusion of conservative, even intolerant, views when it comes to 'moral' questions, like capital punishment, homosexuality, gay marriages and abortion.[33] Often, public participation may result in the creation of constitutions with little connection to national, international, social or economic realities. The net effect of the process of participatory constitution-making might even be the deepening of social and ethnic divisions as different groups fight for their interests.



Although a participatory constitution-making has its shortcomings, the case for participation remains particularly strong. In fact, the advantages of participation outweigh its disadvantages. More and more research has confirmed the value of participation and the fact

[30] Ghai 2005a: 25. Gluck & Brandt (2015: 15) point out the difficulty of gauging the impact of participation. A point is made that there are no universally accepted standards against which to assess participation. Countries are free to come up with their own standards for assessing the success of participation. What this suggests is that political considerations play a significant role in arriving at the decision of whether participation was effective or not. See also Selassie 2010: 76; Gluck & Brandt 2015: 14.

[31] Ghai & Galli 2006b: 242. For example, Thailand's excellent Constitution of 1977, enacted after perhaps the most participatory process in Asia, has had little impact on the political system; many provisions are ignored, and a politician who regularly criticises the constitution (and violates its spirit) has been elected prime minister on two occasions with impressive majorities. See also Franck & Thiruvengadam 2010: 7.

[32] Mabwe 2013: 2. See also Campbell 2012: 4.

[33] Ghai 2013: 13.

that participation enables ordinary citizens to articulate common popular aspirations.[34] The value of participation in adding legitimacy to the final document is particularly well established. Research findings continue to bolster the argument that participation ensures that new constitutions are viewed as legitimate. The challenge is to organise participatory processes in ways that reduce the risks associated with them in the making of a new constitution.

Even if we agree that the principle of participation contributes a lot towards the success of a constitution-making process, its actual impact depends on a number of factors. It, for example, depends on who participates in the process, the stage of the process that people are able to participate, and the mechanisms that are put in place to facilitate participation.[35] How a country addresses these questions determines whether the implementation of the principle of participation results in the creation of a widely acceptable and hence, legitimate, constitution.

## 2.3 The principle of inclusivity in constitution-making

Unlike the principle of participation, which focuses on the mechanisms by which the preferences of ordinary citizens are realised and given effect in the creation of a constitution, the principle of inclusiveness focuses mostly on how the composition of the body making the constitution reflects the demography of the population for which the constitution is being made. It says that the institutions and processes of constitution-making must be inclusive. A constitution-making process is deemed to be inclusive to the extent that the body charged with the making of the constitution represents all segments of society, such as the poor, the



[34] See Reynolds 2012: 5; Ginsburg 2008: 364; Banks 2008: 1046; Arato 2011: 15; Dann 2011: 3; Moehler 2003: 20; Songmin & Jiang 1992: 15.

[35] Buccus & Hicks 2008: 10. There are disagreements as to when exactly along the process people should participate. Some say participation needs to be limited to the people's role in choosing those who will negotiate constitutional clauses. Others would like to see ordinary people participate in every stage of the process including the approval of the constitution. In the absence of a universal model, there is no consensus on this issue. What is important, some have argued, is not so much the question of when along the process people should participate, but the extent to which the form of participation is likely to influence the outcome. See also Quick 2009: 23.

youth, school-going children, women, the disabled, ethnic, religious, and cultural minorities.[36]

It is often argued that inclusive processes make it easy for all segments of society to negotiate the contents of a constitution. Besides challenging the dominance of the political elite and other powerful groups in society in constitution-making, inclusive processes, many argue, encourage opposing factions to work together. They prevent the process of constitution-making from becoming a division of state resources amongst the powerful players in society.[37] In addition, a study carried out by the International Institute for Democracy and Electoral Assistance (IDEA) found that 'the more representative and more inclusive constitution-making processes resulted in constitutions favouring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms'.[38]

Despite the growing consensus that the criterion of inclusiveness must underlie constitution-making processes, there is little agreement on how the principle of inclusivity can be realised. It is not, for example, clear whether election or appointment should be the basis for realising inclusiveness in the body drafting a constitution. Besides the possibility of creating permanent losers and permanent winners, elections legitimise a situation whereby political parties that emerge as overwhelming electoral winners consider their electoral victories as a license for eschewing in-depth negotiations with other actors and exerting decisive influence over the creation of the constitution. Even assuming that elections are sufficient, there is no easy answer to the complex question of what form the elections should take. The challenge is made daunting by the fact that both proportional representation and 'the winner takes all' plurality systems are accompanied by unintended consequences.[39]

Equally, there is a great deal of disagreement on whether appointing individuals to the body drafting the constitution is a more appropriate method for achieving inclusiveness.[40] In Chapter Two, we saw how the 1961 white minority government with the concurrence of the colonial power, facilitated the appointment of a Constitutional Conference comprised of four

[36] Simeon 1998: 15. See also Kaldur 2007: 2; Irving H, 2011: 25.

[37] Dann 2011:2.

[38] Samuels 2005:6. See also Cornwall 2003: 1330.

[39] Elster 1995: 395. See also Samuels 2005: 6; Zivo 2013: 2.

[40] Brandt 2011: 242.

political parties of which one represented blacks. The inclusive nature of the 1967 Whaley Constitutional Commission, which was constituted based on appointment made by the State President was also suspect as the appointees were sympathisers of the government.[41] The manner in which these bodies were composed raise the appropriateness of appointing members. The concern is that those granted the constitutional and statutory powers to appoint often abuse those mandates by hand-picking people from within their established patronage networks.[42]

From the foregoing, it is clear that the inclusion of various segments of society is an issue that needs to be addressed fully. The inclusion of groups that are usually marginalised in the processes and institutions of constitution-making is particularly significant. Equally important is the inclusion of organisations representing various interests in society, irrespective of their size. But it is not only about who is represented. Equally important is the manner in which the constitution-making body is constituted. The usefulness of an election as a mechanism for identifying constitution makers depends on the type of electoral system and its impact in the particular socio-political setting. Where appointment is used, the challenge is making sure that politicians do not pack constitution-making bodies with their supporters.



## 2.4 The principle of transparency in constitution-making

In contrast to the elite-dominated constitution-making processes, which were characterised by closed conference rooms that were the rule until the 1970s, transparency has become an essential element of a constitution making process. Today, one of the issues that determine the success of constitution-making processes is whether or not the process of drafting is transparent or carried out under the thick veil of secrecy.[43] Unlike the principle of inclusiveness that focuses on the representativeness of the body creating the constitution, the principle of transparency demands that the activities of the constitution-making body be characterised by openness. The constitution must not be negotiated behind closed doors. In

[41] See section 5 of Chapter Two.

[42] Blount 2011: 47. They frequently hand pick people they are confident will support constitutional positions that are in their service. In this regard, for example, appointment to the Rwandese Constitutional Commission of 1993 was reportedly based on the willingness of those so appointed to support the constitutional positions of the Rwandese Patriotic Front (RPF). See also Brandt 2011: 122; Dann 2011: 2.

[43] Moehler & Marchant 2013:16. See also Ghai & Galli 2006a: 243; Stuart 2013: 1.

short, the principle of transparency addresses concerns around the extent to which the deliberations on the making of the constitution and their outcomes are visible to people.

It has been argued that transparency enables people to 'assess the performance and positions of the members (of the constitution-making body)'.[44] It forces those directly involved in constitution-making to 'argue for, defend and justify the positions they take, again, helping to limit the influence of direct self-interest'.[45] In this way, transparency forces delegates to draft constitutions that manifest the preferences of the people they are representing. Not only does transparency increase accountability, it also ensures that questions of legitimacy are fully addressed at an early stage of the process of constitution-making.

Others point to the limitations and problematic nature of transparency. They argue that publicity promotes overbidding and stubbornness, two conditions that threaten to undermine the proceedings of any constitution-making body. The point is that when people negotiate in front of the public media, they tend to grandstand and perform to the gallery in order to please their supporters. This prevents delegates from altering their positions even when convinced of the weaknesses of their view points. As one author observed, '[t]he publicity that surrounds the proceedings tends to make members take strong positions which they consider would please their supporters, and may tend to polarise opinion within the assembly (CA)'.[46] This had led many to vouch for confidentiality. The argument is that when a constitution is negotiated in privacy, there is less need to present one's proposal as aimed at promoting the public good. 'Secrecy', as one author argued, 'tends to improve the quality of whatever discussion does take place because it allows framers to change their minds when persuaded of an opponent's view.'[47] Secrecy, in short, is said to be amenable to hard bargaining, thereby facilitating a consensual process.

The US Philadelphia Convention is an example of a constitution-making body that conducted its deliberations in secrecy. Based on the belief that secrecy facilitates reflection and compromise, ordinary citizens were excluded from the constitution drafting sessions of the US Philadelphia Convention. The Chairman of the US Philadelphia Convention, James Madison, was of the firm opinion that confidentiality enabled delegates to state their opinions

[44] Ghai 2005b: 28.

[45] Simeon 2009: 252. See also Van Wyk 1991: 347; Nyoka 2009: 2.

[46] Ghai 2005b: 28.

[47] Elster 1995: 388. See also Mavare 2013: 2.

freely and to hold onto their positions only so long as they were convinced of their truths.[48] In this regard, deliberations continued until the 'force of the better argument' compelled delegates to accept a particular conclusion as worthy of incorporation. In Africa, the CA of Namibia is a very good example of a constitution-making body whose proceedings were carried out under the blanket of secrecy. On the 16th January 1990, the Constitutional Committee of the CA began to draft the constitution behind closed doors. The deliberations and actual writing of the constitution were shielded from the public eye. The Chairman of the Constitutional Committee, Hage Geingob, believed that working behind closed doors enabled those drafting the constitution to reconsider their preferences and positions in light of the reasons and justifications offered by other participants.[49] It is submitted that confidentiality creates serious problems. This is related to the fact that it tends to shift discussions from impartial to interest-based bargaining.[50] Secrecy tends to facilitate bargaining on terms that benefit those wielding power in society. The brokering of private deals between the elite in society poses risks to the long-term or broader constitutional acceptability of any arrangements agreed to. The fact that a constitution-making body works secretly behind closed doors also does not contribute to its legitimacy. If anything, it contributes to the negative perception that controversial issues were never adequately deliberated.



From the foregoing, it is clear that a constitution-making institution and its processes are transparent to the extent that all its activities are characterised by openness. At the centre of this is whether mechanisms are put in place to facilitate the attendance of the meetings of the constitution-making body by the public. Transparency is also the function of the publication, prior to the final vote, of motions and debates, the publicising of the issue of who voted for or against a given motion and whether the public is informed about how the process will be conducted, methods for selecting delegates, consultation, drafting and adoption. Related to this is the extent to which the deliberations of a constitution-making body, including its minutes, are accessible and meetings open to the press and anyone else who might want to attend.

[48] Brandt 2011: 192. See also Chirevo 2010: 1, Mabwe 2013: 4.

[49] Wiechers 1991: 12. Although the lack of transparency appears not to have adversely affected the outcome, the question of whether the final draft was prepared with a high degree of public contribution ominously hangs over the legitimacy of the process of constitution-making. See also Seidman 1987: 50.

[50] Benomar 2003b: 7. See also Haysom 2004: 6; Makova 2012a: 2.

## 3. The institutions for constitution-making

The constitutional principles discussed above set the parameters and standards around which contemporary constitution-making is evaluated. They must guide the institutions and processes of constitution-making. This segment of Chapter Three focuses on constitution-making institutions and how they can give effect to the principles of participation, transparency and inclusion.

The choice of constitution-making institutions is wide. It ranges from those that construct and adopt their own constitutions, to those that recommend draft constitutions to other bodies.[51] Some may use constitutional assemblies. Others may use constitutional commissions. Yet others might opt for constitutional conferences or roundtables. A country may also use a combination of any of these institutions. In many cases, these constitution- making bodies are complemented by support institutions that provide them with administrative assistance.

The objective of this section is to discuss the salient issues relating to the institutions of constitution-making. The rationale here is not to give a general survey of the various constitution-making institutions. The aim is rather to identify issues that must be taken into account in assessing the institutions of constitution-making that have been used in Zimbabwe. From the outset, it must be noted that there is no universally accepted institutional model of constitution-making. It is up to each country to create an institution that facilitates the adoption of a legitimate constitution. Irrespective of the type of institution established to create a new constitution, however, it must be guided by the principles of participation, inclusiveness and transparency.[52]



### 3.1 Constitutional Assemblies

A Constitutional Assembly (CA) is one of the institutions that is commonly used to create new constitutions.[53] There are, however, a few examples in the world where CAs have been used to amend existing constitutions.[54] In the majority of cases, however, their role has been

[51] Brandt 2011: 232.

[52] Feldman 2013: 4.

[53] It is also known as 'constituent assembly'. Brandt 2011: 233.

[54] Feldman 2013: 2. In Nigeria (1979 and 1999) and Uganda (1995) CAs amended existing drafts. The final act of adoption was carried out by another body. In Cambodia (1993), Timor-Liste (2002), United States (1787),

to establish entirely new constitutions. CAs differ widely in terms of their mandates. Some make the final decisions about the adoption of new constitutions. In other cases, their role is limited to recommending a draft. In such cases, the final act of adoption is usually performed by parliaments or by the people through referendums.[55]

CAs are established under different circumstances. Sometimes CAs are established when part of a State breaks away to establish itself as an independent state and has no institutions of its own to rely on. For example, when East Timor broke away from Indonesia and established its own state, it had to establish its own institutions from the ground, including the establishment of a CA to create a new constitution. A CA may also be established when two or more independent states form a union or federation and want to adopt a new constitution. In such a situation, there is obviously no common institution with authority to adopt a constitution for the new federation, making it necessary to establish a CA or convention, which is given authority by the legislatures of the 'merging' states to adopt a federal constitution. In other situations, they are called to duty when there are no institutions at all, as in the cases of Cambodia and Somalia, where the state has collapsed.[56]

More often than not, however, CAs are established because of the absence of a credible institution that can undertake the task of writing a constitution. This, in particular, relates to the increasing scepticism about the suitability of traditional institutions, such as national legislatures, to spearhead the making of democratic constitutions. It is often argued that national legislatures are necessarily products of temporary electoral choices that depend on the interests and prejudices of the moment, making them unsuitable for the purposes of constitution-making.[57] Further, it is argued that parliaments, by definition, are not inclusive enough to represent, articulate or defend the broad and permanent interests of society that must define the pillars of any democratic and enduring constitution.[58] In Chapter Two, for example, we have seen how the decision of the Ian Smith Government to use a parliamentary caucus to create the 1969 Constitution was motivated by the desire to ring fence the constitution-making project for the purposes of promoting the interests of members of the

India (1950), Vanuatu (1980), Namibia (1990) and South Africa (1996), CAs facilitated the creation of new constitutions. See also Buccus & Hicks 2008: 9; Campbell 2012: 4.

[55] Miller E.L, 2010: 611. See also Colon-Rios 2009: 9.

[56] IDEA 2007: 1. See also Ghai 2005a: 10; Cramer and Goodhand 2002: 889.

[57] Moyo J.N, 2009: 2. See also Colon-Rios 2012: 159; Zambia Ministry of Legal Affairs 1996: 3.

[58] Walsh 2012: 2. See also Makumbe 2004: 20; Pillard 2005: 678.

white community.[59] The failure of parliaments to 'establish a common public interest agenda to define constitution-making beyond partisan interests is also regarded as a problem which undermines their ability to establish legitimate constitutions'.[60] It is, as a result, argued that a CA is better than a legislature for the purposes of creating a new constitution simply 'because it is not the ordinary law making body'.[61]

Of course, there are those who oppose the establishment of CAs in situations where national legislatures are already in existence. They argue that an elected CA is a waste of public funds as it duplicates the task of a parliament that has already been democratically elected and already has the staff, facilities and the experience to undertake the assignment of creating a new constitution. The propensity of conflict between CAs and national legislatures is also often mentioned as a source of concern. The history of CAs in constitution-making is littered with many examples of CAs that engaged in power struggles with incumbent parliaments. For example, in Colombia, the CA ordered the dissolution of parliament and went on to elect an interim legislature from within its own body.[62] Further evidence of confrontation was seen in Venezuela where the CA took it upon itself to 'assume the functions of a legislature'.[63] In Uganda, Kenya and Nigeria, where CAs were established while parliaments were already in existence, there was conflict in which legislatures sought to undermine the activities of CAs by refusing to allocate adequate financial resources.[64]



Despite these concerns, CAs remain popular constitution-making institutions. Not only are CAs deemed to be more representative of all the segments of society, they are suited to promote a type of constitution-making that is deemed to be more participatory. More significantly, delegates to CAs, it is often argued, are not as broadly motivated by interest, passion, and prejudice as law makers.[65] This relates to the fact that delegates to CAs are predominantly elected to serve the singular purpose of constitution-making.[66] Once a constitution is in place, CAs are usually disbanded. For this reason, delegates are likely to

[59] See section 8 of Chapter Two.

[60] Turner 2012: 7.

[61] Brandt 2011: 235.

[62] Chifoya 2012: 3. See also Elster 2008: 9; Chitemba 2011: 2.

[63] Elster 2008: 9. See also Brewer-Carias 2010: 514.

[64] Ghai 2005b: 28.

[65] Chaputa 2009: 1. See also Edrisinha 2011: 135; Kimathi 2010: 9.

[66] Colon-Rios 2012: 159. See also Mbaku 2003: 113.

create a constitution with wide appeal as they are aware that they will not be able to entrench themselves politically using their role in constitution-making. Constitution makers under CAs, unlike those under Parliaments, it is argued, are often 'ignorant about the effects that the constitution they are constructing will produce'.[67]

### 3.1.1 Composition

There is great variation in the composition of CAs and how members are selected. One way in which CAs is composed is through appointment. In this case, appointing authorities, usually politicians, enjoy unfettered discretion in deciding who is appointed onto the CA. In such cases, CAs are composed based on the whims and caprices of politicians. The advantage of appointment, some argue, is that it allows the appointing authority to ensure that all segments of society are represented in the constitution-making body, thereby, allowing for the establishment of inclusive CAs.[68]

The danger is that the appointments might be motivated by short term considerations. The appointments could be, for example, dictated by politicians' concerns for re-election. The fact that appointed CAs are products of patronage compromises their credibility. CAs, which are composed based on the prejudices of politicians, usually perceive themselves as representatives of particular interests. As noted by one author, '[t]heir allegiance is more to those who appoint them than to the ordinary people'.[69]



The shortcomings of appointed CAs have led many to attempt to limit the disadvantage by insisting that nominations based on clear guidelines must form the basis for the composition of CAs. Nominations based on guidelines are deemed to be transparent and ensure the credibility of the constitution-making process. According to Pateman, '[n]ominations that are based on a set of written guidelines contribute towards making the process and its outcome legitimate'.[70] According to this approach, the standards candidates must meet in order to be nominated must be spelt out well ahead of the nominations. This allows ordinary citizens to understand the reasons behind the nomination of certain individuals to a constitution-making body and why certain individuals were left out.

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[67] Ghai 2005b: 28.

[68] Prasai 2012: 2. See also Benomar 2003a: 92; Lee R, 2013: 4.

[69] Pateman 2006: 12. See also Zivo 2013: 2; Banks 2007: 105.

[70] Munroe 2013: 1.

An example of a CA that was composed based on nominations comes from Egypt. Through negotiations, political parties agreed on the composition of a fifty member CA in 2013. The agreement was adopted by parliament. Membership to the CA was to be drawn from different sections of the Egyptian society. The guidelines went as far as specifying how many members each of these groups contributed.[71] For instance, the five women appointed to the CA were drawn from the following organisations: the National Council of Women, National Council for Childhood and Motherhood, National Council for Human Rights, Trade Unions and Public Figures. The single most important factor defining qualification was that one needed to be a member of any of those organisations as well as being an Egyptian citizen. Even then, some still maintain that nominations based on guidelines manifest the preferences of those who compose them. This relates to the fact that the guidelines were the result of an agreement between political parties. It could, therefore, still be manipulated to suit the wishes of politicians.[72] This perhaps explains why Egypt's quest to create a new constitution got off to a false start on two occasions.[73]



[71] Membership to the CA comprised delegates as follows: Churches (3 members), the youth (3 members), public figures (7 members), Al-Azhar (3 members), national councils and human rights organisations (4 members), unions and syndicates (14 members) political parties (6 members) and groups classified as others (3 members). See Lee R, 2013: 4.

[72] Turner 2012: 4. See also Reynolds 2012: 4.

[73] Chinhange 2013: 4. One only has to look at Egypt's attempts at creating a constitution following the overthrow of President Hosni Mubarak in 2011 to appreciate the importance attached to the issues of who was appointed to the CA. Egypt's first one-hundred-member CA was dissolved by Cairo's Administrative Court on 11 April 2012. The court order provided that the CA was unconstitutional as it included members of parliament when it was not supposed to include legislators. Dominated by members of the Muslim Brotherhood's Freedom and Justice Party and the Salafist Party, the CA was deemed to be unrepresentative of the Egyptian people. On 7 June 2012, political parties reached an agreement on the composition of the second 100-member CA. It was agreed that half of the CA's members would be drawn from Islamist parties in parliament and the other half would comprise members representing civil society organisations. The CA was established on 12 June 2012. Although the agreement stipulated the societal groups that would participate in drafting the constitution, the CA encountered problems similar to those experienced by its predecessor. The second CA also included parliamentarians. It was for this reason that a lawsuit was lodged with the Supreme Administrative Court challenging its legality. The Supreme Administrative Court referred the case to the Supreme Constitutional Court. Against the threat of a second dissolution, on 12 November 2012, President Mohamed Morsi, a member of the Muslim Brotherhood's Freedom and Justice Party, issued a presidential decree barring the judiciary from dissolving the CA. On 17 November 2012, a number of groups, political parties and individuals withdrew from the CA. A source of concern for female members, liberals, secular political parties and Christian leaders who

The shortcomings of nominated CAs have prompted some to vouch for an elected CA. Through the election of delegates to CAs, ordinary people, it is argued, are able to influence the constitution-making process. Although the role of ordinary citizens in influencing the exigencies of constitution making carries considerable weight in favour of constituting CAs through election as opposed to nominations, it has to be noted that the effectiveness of election in actually achieving that depends on the type of electoral system that is used to constitute the CA.[74]

The First-Past-the-Post (FPTP) electoral system is one of the electoral systems that is commonly used to compose CAs. Simply put, FPTP is based on the principle of territorial representation. The country is demarcated into comparatively equivalent constituencies.[75] Following an election, one representative is chosen to occupy a CA seat on behalf of a particular constituency. A key advantage of the FPTP electoral system is that it identifies a candidate who the electorate believes is better placed to represent their interests in the making of a constitution. FPTP, thus, ensures that CAs enjoy the same legitimacy as other elected bodies.

The use of the FPTP electoral system in the composition of CAs is not, however, without limitations. A major concern is that it undermines the quest for inclusion. The use of the FPTP allows for the possibility of the winning political party monopolising constitution-making. Furthermore, CAs which are composed based on FPTP elections are often accused

withdrew was the role of Islam in the new constitution. It was this concern which led many to be convinced that more consideration should have been given to the question of the composition of the CA. On 30 November 2012, the CA approved a rushed version of the draft Constitution to avoid dissolution by the Supreme Constitutional Court. The following day, the President ordered a referendum on the draft Constitution. Morsi's declaration sparked mass protests throughout Egypt. The referendum was held between 15 and 22 December 2012. The draft was approved by 68.3 percent of the voters. However, the credibility of the referendum was contested by many. Since only 32.9 percent of eligible voters participated in the referendum, the legitimacy of support was contested. It was against this background that a successor CA was appointed on 1 September 2013. See also Caspin 2013: 2; Maskin 2001: 3.

[74] Benomar 2003b: 8. See also Kuseni 2013: 2; Warioba 2011: 15.

[75] Matlosa 2002: 8. Of significance is that the size of the party's representation is thus determined not only by the number of votes received but also by geographical concentration. FPTP allows candidates that are not affiliated to any political party to contest elections for CAs. See also Miller N.R, 2012: 3; Dow J.K, 2001: 19.

of 'delivering constitutions that manifest the preferences of political parties instead of ordinary citizens'.[76]

The shortcomings of the FPTP election system have led many to opt for the use of the Proportional Representation (PR) electoral systems in constituting CAs. Cambodia (1993), Namibia (1989) and South Africa (1994) are examples of countries that opted for PR in creating their independence constitutions. Under the traditional PR system, the entire country is considered as one single constituency. The number of constitution makers is calculated based on a percentage of the number of votes received by political parties. The allocation of seats is determined by the actual percentage of votes that a party receives in an election. A party's share of the total votes is translated into a corresponding proportion of seats in the CA. The 1996 CA of South Africa is an example of a constitution-making body that was composed on the basis of the PR system.[77]

It is often argued that the PR system guarantees a more representative CA. It is argued that a PR electoral system 'produces a greater degree of convergence between the preference of the voters and the representation in the assembly'.[78] Representation reflects the percentage of national votes received by each political party that participated in the election. As a result, a PR electoral system goes a long way in addressing the demands for broad inclusion.



However, others have criticised PR electoral systems for making it easier for small extremist political parties to gain representation in CAs. The point is that a PR system lowers the threshold for representation. All that extremist political parties need to do is secure a certain percentage of the total vote, no matter how small, to be allocated delegates to CAs.[79] It is, thus, often argued that CAs composed based on a PR system create a situation in which political parties that often act as spoilers are given legitimacy, making the constitution-making process vulnerable to their disruptive actions.[80]

CAs can also be composed based on a combination of elections and nominations. This arrangement, it is argued, is a 'way to combine the credibility of elections with the legitimacy

[76] Chitemba 2011: 2. See also Bobst Centre for Peace 2008: 10; Tran 2008: 2.

[77] Chakanyuka 2012: 3. See also Fessha 2009: 325.

[78] Ghai 2005b: 21.

[79] Chitiyo 2009: 2. See also Goredema S, 2005: 3; Colon-Rios 2012: 163.

[80] Feldman 2013: 4.

conferred by the inclusion of as wide a swathe of people as is practicable.'[81] The argument is that a CA made up of a mixture of partly elected and partly nominated members is balanced and more representative. In addition to being accountable to ordinary people, it is deemed to be more inclusive and participatory.[82] Brazil's CA of 1988 and Uganda's CA of 1993 are examples of CAs that were established based on a combination of elections and nominations. Of the five hundred and fifty nine members of the CA in Brazil, twenty three were appointed and five hundred and thirty six were selected based on elections. Uganda's CA had two hundred and eighty nine members, of whom seventy four were selected based on appointment while two hundred and fifteen were elected. Similarly, Afghanistan's CA, known as the Constitutional Loya Jirga of 2004, had five hundred members, of whom forty were appointed and the remainder elected.[83]

### 3.1.2 Size

In designing a CA, another important consideration is the size of the CA. According to Elster, 'the number of delegates to constituent assemblies varies considerably, with the 1787 Federal Convention (of USA) (55 delegates) and the 1789 Assemblée Constituante (of France) (1200 delegates) being at the two extremes'.[84] It is often argued that the optimal number of delegates to CAs is related to the size and homogeneity of a country. The 'larger and the more diverse the population, the more delegates are needed to ensure a broadly representative assembly'.[85]

It is often argued that a large CA facilitates inclusivity.[86] At the same time, however, the experience of many countries indicates that large CAs are hard to manage. In the case of France, the deliberations of the CA became chaotic at times 'as there were too many delegates competing for the opportunity to speak in the plenary sessions.[87] Not only do bloated CAs present coordination nightmares, they often stretch the administrative capacity

[81] Rox 2011: 1. See also Rosenn 2010: 441.

[82] Lee R, 2013: 4.

[83] Brandt 2005: 9.

[84] Elster 2008: 14. The Federal Convention is often referred in literature as the Philadelphia Convention of 1787 or simply as the CA of America. The Assemblée Constituante of France of 1789 is the CA that created France's constitution. See also Campbell 2012: 3.

[85] Elster 2008: 14.

[86] Sajo & Klein 2012: 423. See also Chakanyuka 2012: 2; Muzenanhamo 2010: 5.

[87] Griffiths 2013: 5.

of constitution-making bodies to breaking point.[88] An added concern is that they make decision making difficult, with the increased risk that 'members will make rhetorical speeches rather than contributions of substance'.[89] Where there are too many delegates attending a constitution- making forum, it is often argued that some will choose not to make any contribution. All they do is agree to the propositions of the most vocal delegates.[90]

Proponents of smaller CAs argue that the 'number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude'.[91] According to this view, smaller CAs are ideal public forums for purposes of ensuring rigorous consultation and discussion. The 1787 CA of the United States, with its 55 delegates, is often mentioned as an ideal constitutional forum for ensuring that all delegates could contribute to the debate on constitution-making.

It might be true that smaller CAs are ideal for the purposes of facilitating successful, smooth and rigorous discussion. But establishing an inclusive CA is an equally important consideration. The key is to come up with an optimum number that does not significantly sacrifice effectiveness and inclusiveness.

### 3.1.3 Decision making



The method by which CAs arrive at their decisions is one of the important elements that must be considered in designing a CA. In some cases, decisions are made through consensus. This entails including as many voices as is possible in decision making. In South Africa the term 'sufficient consensus' was used to refer to how decisions were arrived at in the course of making the 1993 Constitution.[92]

Consensus, it is argued, facilitates a decision making system which seeks not only the agreement of most participants but also the resolution or mitigation of minority objections.[93] In the spirit of give and take, CA members are expected to cooperate with the 'direction of

[88] Chitemba 2011: 2.

[89] Brandt 2011: 239. See also Lee R, 2013: 4.

[90] Makwiramiti (2012: 2) uses the term 'free ride' to allude to the fact that some delegates choose to remain silent rather than make a contribution.

[91] Elster 2008: 14. See also Bobst Centre for Peace 2008: 13.

[92] Kuseni 2013: 2. See also Shuro 2010: 3.

[93] Barrett 2012: 4.

the constitutional assembly rather than insist on their personal preferences'.[94] The problem is that consensus is often the result of tiresome discussions. Moreover, it is not always the case that time will be found to canvass the opinions of all delegates in a reasonably short period of time. Lengthy discussions 'unnecessarily' extend the process of constitution-making well beyond the set timeframes. This is particularly problematic in cases where budgetary issues do not allow the process to go beyond the agreed timelines.[95]

In other cases, CAs follow majority decision making. In this case, a decision is made by the majority of those present and voting. Usually the person presiding over the CA only votes in the event of a tie. Although this is a method usually associated with open democratic societies, some aspects of it have been labelled as problematic. It is often argued that majority decision making promotes competition rather than cooperation as it fosters a situation in which the winner takes it all.[96] Furthermore, members belonging to minority groups often experience a sense of structural exclusion, leading to bitter feelings of discrimination.[97]

### 3.1.4 Preliminary conclusion



From the foregoing it is clear that the inclusiveness of a CA is a function of the manner in which it is constituted. In other words, it depends on whether it is composed based on elections or nominations. CAs can be composed based on the FPTP and PR electoral systems. In the case of appointments, it could be based on guidelines or the whims and caprices of politicians. The discussion has revealed that the choice of either method has intended and unintended consequences. Irrespective of the method chosen, the important point is to ensure that as many voices as is possible are represented in the CAs.

The design of the CA also has an impact on the realisation of the demands of the principles of participation and transparency. The extent to which CAs can facilitate meaningful participation is affected by the size of the CA. The size affects the capacity of CAs to undertake effective deliberations. The manner in which the decisions are made also plays a great role in whether CAs can eventually adopt a legitimate constitution.

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[94] Turner 2012: 6.

[95] Ghai 2005a: 7. See also Brandt 2011: 23.

[96] Dhungel 2012: 2. See also Reynolds 2012: 5.

[97] Tran 2008: 2.

## 3.2 Constitutional Commissions

Many countries have chosen Constitutional Commissions as the appropriate body for purposes of creating a new constitution. The objectives, purposes and functions of Constitutional Commissions are often outlined in terms of reference, which are sometimes set out in a Commission of Inquiry Act.[98] The Commission of Inquiry Act places all power on the project of constitution making in the hands of the few, namely the executive.[99] Constitutional Commissions have also been established through military orders.[100] There have also been cases where law reform commissions served as Constitutional Commissions.[101] It must be added that many African countries have used constitutional

[98] Magure 2009: 3. The usage of Constitutional Commissions is mostly traced back to British colonial legacy in Africa. A Commission of Inquiry Act is statutory legislation used by State Presidents in former British colonies for purposes of institutionalising general enquiries into public affairs. The enquiries cover issues as diverse as the welfare of traditional leaders, economic development, operations of state institutions and corruption by state officials. The Commission of Inquiry Act of Zambia, Zimbabwe and Uganda, all former British colonies, are so identical that one might be forgiven for thinking that they were the result of copy and paste. If anything, the similarities underscore British values and approaches to the institutionalisation of inquiries into public affairs in the colonies formerly under its protection. See also Brandt 2011: 265.

[99] Simutanyi 2011: 33. A common concern in relation to the terms of reference is that they are often used 'to control both the process and outcome of constitution making'. They usually promote a vision consistent with the executive's thinking of how the Constitutional Commission 'ought to go about the business of creating the new constitution'. See also Campbell 2012: 2.

[100] Gava D, 2013: 3. At times the orders are issued as governmental orders. Where the Constitutional Commissions are established through military orders or decrees, there is no public accountability. Nigeria is an example of a country which has established bodies to review the constitution under orders of the military government. In 1988, the military government of General Ibrahim Badamasi Babangida issued an order authorising the establishment of a Constitutional Commission.

[101] In countries that have established a law reform commission, the latter is annually allocated budgets to keep its operations running. Other resources that are often at the disposal of law reform commissions which make them efficient include library infrastructure, dedicated researchers and experienced or knowledgeable drafters. However, it is pertinent to note that one of the disadvantages of law reform commissions is that they are resourced by predominantly legal people. Although this is often presented as one of the strengths of the law reform commissions, it also makes them inept to comprehensively deal with issues of societal and political implications.

commissions for the purposes of either amending a constitution or creating a new constitution.[102]

Generally speaking, Constitutional Commissions facilitate a two-stage process of constitution-making: the drafting and the approval stage. In this regard, the drafting stage which is undertaken by Constitutional Commissions is regarded as a process reserved for professional experts while the debating and adoption process which is usually undertaken by CAs is reserved for politicians.[103] The division of labour between delegates taking part in the two stages, it is argued, affirms not only the wisdom of sharing responsibilities, but also acknowledges the fact that the era of treating constitution-making as the privilege of only a few is no longer an acceptable way of making constitutions in the 21st Century.[104]

Unlike CAs that are general forums for political negotiations, Constitutional Commissions are technical bodies. CAs are composed of ordinary individuals and politicians whereas Constitutional Commissions are composed of experts. That makes Constitutional Commissions specialist institutions in which the enterprise of constitution making is often left in the hands of experts drawn from various academic backgrounds. Compared to Constitutional Commissions, CAs are democratic and representative. Usually the terms of reference of Constitutional Commissions are drawn up by State Presidents while those of CAs are frequently drawn up by the legislature. CAs generate their own proposals while Constitutional Commissions do not. Constitutional Commissions recommend draft constitutions to other bodies for final decision making whereas CAs usually adopt constitutions they drafted. CAs, unlike Constitutional Commissions, are endowed with law making functions. Members of the Constitutional Commissions often disband upon the fulfilment of their tasks while those of CAs may become legislators once the draft is adopted as was the case in South Africa and Namibia. The fact that Constitutional Commissions,

[102] Some authors attribute the use of Constitutional Commissions in Africa to the lack of an organised civil society, which are deemed to result in an uninformed public and few channels for the expression of views. See Selassie 2010: 63.

[103] Griffiths 2013: 2. Constitutions created by Constitutional Commissions often adopted by State Presidents, Parliaments, CAs or referendums. See also Ghai 2004: 6; Dale 1993: 99.

[104] Zivo 2013: 4. Besides constitution making, Constitutional Commissions have also been used to undertake consultation after which another body drafts and approves the constitution. In the absence of a universal model, countries enjoy the discretion to allocate responsibilities to Constitutional Commissions in a manner that best reflects the significance of local conditions. See Suski 2010: 11; Radio Australia 2013: 1.

unlike CAs that are composed of ordinary individuals and politicians, are composed of experts has led many to assume that the creation of better constitutions is indeed possible under Constitutional Commissions.[105]

Constitutional Commissions are specialist institutions. They are committees of experts (most in law, but also economics, political science, and public administration) that are usually appointed by State Presidents.[106] The Committee of Experts of Kenya (hereafter referred to as CoEs) is a very good example of a Constitutional Commission that was entirely composed of experts. Its members represented some of the best minds in the world today in the area of constitutional law and constitution-making.[107]

The use of experts, it is argued, enriches the constitution-making process through the knowledge and experience that they bring along. More importantly, it helps to ensure that the long term interests of society takes primacy over any other considerations. The reason for the optimism, it is argued, relates to the fact that constitution making under experts is motivated more by the common good whereas constitution-making that is led by politicians is often dominated by short term partisan goals.[108]



The role of experts in the creation of constitutions is, however, often contested. Increasingly, many question the assumption that experts are wiser than those for whom constitutions are made. Today, in the face of an increase in the demands for many participants to be involved

[105] Zvorwadza 2009: 2. Despite this similarity, many have singled out the fact that Constitutional Commissions are technical bodies for drafting whereas CAs are bodies for constitutional negotiation as the most single important difference separating the two constitution making bodies. See also Simutanyi 2011: 37.

[106] Eresia-Eke 2012: 78. The Eritrean Constitutional Commission was assisted throughout by a fourteen-member board of foreign experts, lawyers, historians, political scientists, and anthropologists. A special kind of commission was used for the independence constitution of Malaysia, composed entirely of foreign experts. In the case of Kenya, the State President appointed experts who had proven knowledge in one of the following areas: comparative constitutional law, systems and structures of democratic government, human rights, women and gender issues, land and land law, governance, ethics and accountability, public finance and administration; electoral systems and designs for democratic elections; anthropology, mediation and consensus building. See also CoEs 2010: 5.

[107] Brandt 2011: 269. Professor Christina Murray stands out prominently. Prior to the appointment of the CoEs, another high value researcher Professor Yash Ghai advised Kenya on the exigencies of constitutional development.

[108] Chakanyuka 2012: 3. See also Thier 2010: 544; Zhanje 2012: 2.

in constitution-making, the claim that 'experts are better has been broadly rejected, no matter how technically sound the result'.[109]

### 3.2.1 Composition

The common practice is that State Presidents or their equivalents appoint members of Constitutional Commissions through constitutional or statutory arrangements. Other members of the executive, especially government ministers responsible for constitutional development, are also often delegated (by State Presidents) the responsibility of constituting Constitutional Commissions through similar arrangements. In this case, the list of the names of the commissioners that they would like to appoint is submitted to State Presidents for approval. State Presidents can accept the recommendations submitted to them or, alternatively, amend the same, choose to discard the recommendations or replace them altogether with the names of individuals they deem most suitable for the assignment. Their discretion on this matter is often unlimited. Only when State Presidents or their equivalents have approved the appointments, are Constitutional Commissions deemed to have been legally composed. The enabling framework for making the appointments is usually a Commission of Inquiry Act.[110]

From the foregoing, it is clear that the appointing authorities enjoy a wide discretion in constituting Constitutional Commissions. At times, State Presidents have used their discretion to facilitate 'the selection of a broadly representative group of citizens'.[111] Regrettably, that is not the norm. The narrative that one frequently encounters is the story of constitutional commissions that are composed by State Presidents that appoint individuals who are sympathetic to their causes. In Uganda, for example, State President Yoweri Museveni, appointed a Constitutional Commission comprised 'entirely of strong supporters of his political party, the National Resistance Movement'.[112] Similarly, patronage played a strong role in State President Kenneth Kaunda's appointment of the members of the Chona Constitutional Review Commission of Zambia in 1972. Identical considerations were visible in Fredrick Chiluba's appointment of the members of the Mwanakatwe Constitutional Review Commission in 1993 as well as State President Levy Mwanawasa's appointment of the members of the Mungomba Constitutional Review Commission in 2003.



[109] Thier 2010: 544. See also Eresia-Eke 2012: 83.

[110] Eresia-Eke 2012: 83. See also Makwiramiti 2013: 3.

[111] Miller E.L, 2010: 619. See also Muzanenhamo 2010: 5; Zvorwadza 2009: 3.

[112] Simutanyi 2011: 33. See also Miller E.L, 2010: 619.

As a result of the appointment process, the loyalty of members of the Constitutional Commission is to the appointing authorities and not ordinary citizens. In exchange for being appointed, members tend to follow the wishes of the appointing authorities. The nexus between the preferences of constitution makers and those in positions of influence conjures an image of ordinary citizens who are marginalised. Obviously, a constitution that is created under such circumstances can hardly be regarded as the manifestations and embodiments of the preferences of ordinary citizens.[113]

Kenya (2010) and Eritrea (1997) are examples of countries that have attempted to limit the discretion of appointing authorities by introducing guidelines on the basis of which individuals must be appointed to Constitutional Commissions.[114] The presence of guidelines introduces an element of clarity in the appointment of a constitutional commissioner. It promotes transparency in the appointment process. It makes it easy to explain why certain people were appointed commissioners. Importantly, it helps to limit the use of Constitutional Commission appointments by politicians as tools to advance narrow political agendas. In the absence of written guidelines, appointing authorities are granted a blank cheque to appoint whoever they deem is suitable to be a member of a Constitutional Commission.[115]

Generally speaking, the fact that Constitutional Commissions owe their existence to their appointing authorities, often State Presidents, allows the latter to wield a great deal of political clout, raising concerns related to the independence of Constitutional Commissions. Patronage networks, it is argued, play a crucial role in determining who is appointed. The fear is, thus, that those that are usually appointed are associated with the political ambitions of the appointing authority and, as a result, serve at the pleasure of State Presidents. In Chapter Two, it was clear that all five individuals appointed to the Whaley Constitutional

[113] Halkett 2002a: 3.

[114] Reynolds 2012: 6. Article 10 (1) of the Constitution of Kenya Review Act (No 9 of 2008) spells out the professional qualifications for appointment to the Committee of Experts as a member. In addition, according to the enabling framework, of the nine members appointed to the CoEs, three were to be foreign nationals. In Eritrea, the Constitutional Commission was dominated mostly by professionals with a background in law, political science, public administration, economics and related academic disciplines.

[115] Slinn 2004: 34. See also Chinhange 2013: 4.

Commission that produced the 1967 draft Constitution were sympathetic to the policies of the white minority government.[116]

### 3.2.2 Size

The size of Constitutional Commissions ranges from a few to several people. In Fiji, for example, a three-person review commission was appointed to draft a constitution. There are notable advantages associated with small Constitutional Commissions. One key advantage is that coordination is made less difficult. Decision making does not become too cumbersome. Costs are kept to the minimum. It is, however, often pointed out that small Constitutional Commissions undermine the principles of inclusiveness as they make 'wide representation less possible'.[117] In the case of Fiji, given its size, the Constitutional Commission's suitability to facilitate inclusive constitution-making was questioned. For some, the Constitutional Commission's composition was 'not propitious to define national goals and identity'.[118] Some also questioned the three-person Constitutional Commission's capacity to undertake the mammoth task of creating a new constitution.

It is often the case that a country opts to establish a bigger Constitutional Commission.[119] Such Constitutional Commissions facilitate inclusiveness. However, bigger Constitutional Commissions present their own challenges. Bloated Constitutional Commissions are often associated with a considerable decline in the quality of dialogue, consultations and negotiations. They are also associated with problematic administrative problems such as 'overstretched budgets and coordination nightmares'.[120]



In the absence of a widely agreed standard, countries are free to determine the size of their Constitutional Commissions based on what they deem appropriate to their needs. No factor should be regarded as the single most important variable in determining the size of Constitutional Commissions. The challenge is to balance cost, coordination and decision

[116] See section 7 of Chapter 2.

[117] The Economist 2013: 1. See also Hatchard 2001: 210; Walsh 2012: 2.

[118] Miller E.L, 2010: 620. See also Halkett 2002a: 3.

[119] Muzanenhamo 2010: 5. In 1999, Zimbabwe established a Constitutional Commission with 400 members.

[120] Gava D, 2013:3. In Zimbabwe, the Constitutional Commission of 1951 had forty-one members (see section 4 of Chapter Two), while that of 1967 had five members only (see section 7 of Chapter Two). See also Brandt 2011: 270; Goredema V, 2013: 2.

making related considerations against the imperatives of creating an inclusive, participatory and competent constitution making body.[121]

### 3.2.3 Decision making

An important part of constitution-making under Constitutional Commissions is how the draft constitutions created by Constitutional Commissions are adopted. Usually, as noted earlier, Constitutional Commissions present their drafts as recommendations to other bodies. In some cases, the draft constitutions are sent to parliamentary committees for approval. This was the case in Fiji in 1997. In other countries, the draft constitutions were sent not only to the parliamentary committees but also to the Parliament as a whole.[122] This was the case in Eritrea in 1995. In some countries the draft moves from the Constitutional Commission to the CA for consideration and approval. This was the case in Uganda in 1995. In Kenya (in 2010) the draft constitution that was prepared by the Committee of Experts was considered and approved by many bodies including the Parliamentary Select Committee and the National Assembly. In Zambia, a draft created by a Constitutional Commission is submitted to the State President who decides whether to accept or reject the draft.[123]

The independence of Constitutional Commissions, many argue, is further undermined by the fact that State Presidents enjoy unfettered discretion to vary draft constitutions.[124] The State President can object to the entire draft constitution. Using the 'pick and choose method', the executive can amend the draft constitution for short term benefits. In Chapter Two, it was noted how the draft constitution that was produced by the Whaley Constitutional Commission was rejected by Prime Minister Smith.[125] In addition to being undemocratic, the use of the 'pick and choose method' denies ordinary citizens the opportunity to influence the constitutional destiny of their country. In the case of Zambia, it was this concern that led one



[121] Chakanyuka 2012: 3. See also Feldman 2013: 4.

[122] Selassie 2003: 40. See also Brandt 2011: 272.

[123] Griffiths 2013: 3. This was the case with the drafts created by the Mwanakatwe, Mungomba and Chona Constitutional Review Commissions of Zambia. For this reason, Slinn (2004: 31) described constitution making under Commissions in Zambia as 'essentially an exercise in futility'.

[124] Mbao 2007: 4. See also Hatchard 2001: 213.

[125] See section 7 of Chapter Two.

author to describe the use of the Constitutional Commissions in Zambia as 'essentially an exercise in futility'.[126]

### 3.2.4 Preliminary conclusion

As the foregoing discussion suggests, there are many institutional design issues that must be considered in establishing Constitutional Commissions. Constitutional Commissions are usually composed based on a Commission of Inquiries Act that allows domination by State Presidents. The State President decides who is appointed to the Constitutional Commission. Usually experts from various academic backgrounds are appointed to such a Constitutional Commission. In making the appointments, State Presidents enjoy unfettered discretion. Constitutional Commissions derive their terms of reference from State Presidents. It is not unusual for appointing authorities/State Presidents to vary, modify or discard the recommendations of Constitutional Commissions. In cherry picking any of these options, State Presidents may be acting well within their powers but they often abuse the process by pushing through constitutional reforms that respond to short term political considerations.[127]

Despite these objections, it must be noted that a Constitutional Commission still holds considerable sway.[128] The important contributions of Constitutional Commissions in the creation of constitutions in Uganda, Eritrea and elsewhere are well documented. This is not to gloss over the shortcomings of Constitutional Commissions but to suggest that States need to limit the risks associated with the usage of Constitutional Commissions. This relates to how a particular Constitutional Commission is constituted.



## 3.3 National Conferences

Another institution that is widely used for the purposes of making a new constitution is a National Conference (hereafter referred to as the NC).[129] The use of an NC for the purposes of constitution making traces its origins to the États Généraux of France in 1791.[130] The États

[126] Simutanye 2013: 32.

[127] The word cherry picking as used in this thesis refers to the act of selectively choosing people who will attend a conference or meeting. Those who make the choices usually pick people or political parties they know support certain constitutional positions.

[128] Zata 2009: 3. See also Chakanyuka 2012: 3.

[129] Brandt 2011: 249.

[130] Reynolds 2012: 6.

Généraux was an NC called by the King of France to discuss how to tackle the major economic and political crises besetting the French society at the time.[131] The États Généraux was attended by one thousand members representing members of the three houses of the French Parliament, namely the clergy, nobility and third estate.[132]

More recently, in the late 1980s, NCs were frequently established in Eastern European countries to deal with national crises, including deep fiscal and political crises involving the collapse of banks, the inability of the state to pay the salaries of public servants, national strikes, and violent clashes of unions and opposition groups with military forces. During such exceptional circumstances, the use of NCs was deemed necessary because the crises often weakened the ability of the states to resolve the problems using already established state institutions. Furthermore the situation was worsened by the fact that 'political parties had long been banned or were extremely weak, resulting in little support for establishing a new national legislature or an elected constituent assembly as the way forward'.[133]

Constitution-making was not the original preoccupation of NCs. In the early 1990's, however, the use of NCs for the purposes of constitution making started to gain popularity in Africa. Between 1990 and 1993, many French speaking African countries, such as Chad, Madagascar, Democratic Republic of Congo, Togo, Mali, Niger, Republic of Congo, Gabon and Benin, used NCs for establishing constitutions. NCs have also been used to guide constitution-making in non-French speaking countries. They were used in Portuguese São Tomé and Principe. Sierra Leone, Indonesia and Zambia also used the NC to adopt new constitutions.[134]

[131] Baker 1967: 2. The first crisis related to the financial crisis that was characterised by huge budget deficits and deteriorating economic conditions the country was facing. The second crisis was about growing public demands to end the absolute monarchy imposed by Louis XIV. See also Brandt 2011: 249; Doroza 2009; 2.

[132] Elster 1993: 180. The clergy were priests from the French Catholic Church represented in a body called the Assembly of the French Clergy tasked with looking after the interests of the French Catholic Church. The nobles were the titled elite class in France represented in the Nobility chamber. The third estate was a legislative body that represented the bourgeoisie and peasants in France. It functioned as an advisory body to the King on fiscal policy but lacked power in its own right. The King could dismiss it as and whenever he wished. See also Reynolds 2012: 6.

[133] Brandt 2011: 250. See also Reyntjens 1991: 37.

[134] Mintzes 2013: 3. See also Zhanje 2012: 2.

There are a number of issues that need special consideration if NCs are to succeed as constitution-making bodies. These include the question of how big NCs need to be. Also important is the question of how they are composed. Equally important is the time allocated to NCs to come up with new constitutions. Another important issue is the question of the role of NCs. In other words, are NCs put in charge of the entire spectrum of constitution-making or do they need to submit a draft constitution to another body? These issues are explored in great depth in the ensuing paragraphs.

### 3.3.1 Size and Composition

NCs are in general the most bloated constitution-making bodies.[135] The smallest NC was recorded in Niger (Benin), a French speaking African country. It was composed of 488 delegates. The NC with the biggest number of delegates was recorded in the DRC, which brought together about 3000 participants. Other equally big NCs were established in French speaking Africa. These include the NCs of Madagascar, Mali and the Republic of Congo.[136]

A key advantage of NCs is that their unwieldy composition facilitates inclusivity. In many of the French speaking African countries, delegates to NCs are drawn from organisations such as labour unions, students' and teachers' organisations, human rights groups, professional associations, traditional leaders, religious communities, women's and farmers' groups, and educational institutions. Added to this list are 'government representatives'.[137]



The inclusivity of NCs is not, however, guaranteed. Chapter Two, for example, showed that the 1961 Constitutional Conference of Zimbabwe was not inclusive. Of the four political parties, three represented members of the white minority while the fourth represented members of the black community. It was an anomaly that members of the black community that account for the demographic majority of the population were represented by only one political party while the white minority were represented by three political parties. In addition, many political parties were not represented.[138]

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[135] Reynolds 2012: 6.

[136] Chibaya 2012: 5. The NCs of Madagascar, Mali and Republic of the Congo had 1800, 1400 and 1 202 delegates respectively.

[137] Brandt 2011: 249. See also Peace 2013: 5.

[138] See section 5 of Chapter Two.

Furthermore, the principle of inclusion requires one to go beyond the question of who is represented and look at the methods used to constitute NCs. Generally speaking, nomination as opposed to election is the basis upon which NCs are constituted. In the case of Zambia in 2010, for example, all five hundred and forty-two (542) delegates to the NC were nominated.[139] The government identified civil society organisations that must be represented in the NC. Civil society organisations, in turn, submitted the names of people they wanted appointed to the NC. Each organisation was required to appoint two delegates of whom one nominee was a woman. In a situation where an organisation was required to nominate three or more representatives, it was mandatory for thirty per cent of the nominees to be women.[140]

It may, however, not be enough that the NC is composed of representatives of various groups. That may not necessarily mean that the different segments of a particular society are indeed represented. What is equally important is how the groups are selected. One needs to look beyond the composition and examine the process by which the different groups are appointed to the NCs. This is about ensuring transparency in the selection of the groups that are given a place in the constitution-making body. A very good example in this regard comes from Benin. In an effort to make the composition of the NC transparent, the State President of Benin, appointed a diverse preparatory committee. The committee was mandated to identify the groups in society that would be represented in the NC. It also specified how many delegates they would each be allowed to send to the NC.[141] Subsequently, each group based on consultation chose their own delegates. The NC included representatives of all religious leaders, trade unions, women's groups, voluntary associations, a variety of public figures, and several former heads of State.



[139] Report of the 2010 National Constitutional Conference of Zambia: 23. See also Campbell 2012: 4; Chifodya 2013: 2.

[140] Report of the 2010 National Constitutional Conference of Zambia 2010: 23. Upon receipt by government, the names of candidates received were consolidated into a list. Thereafter, the Secretary to the Cabinet confirmed their appointments in accordance with section 4 of the National Constitutional Conference Act No. 19 of 2007. See also Government of Zambia 2010: 5.

[141] Barrett 2012: 4.

The bloated nature of NCs is not, however, without adverse consequences. It makes it a less effective constitution-making institution.[142] The bigger the NCs are, some argue, the less effective they are in executing their mandates.

### 3.3.2 Duration

An important consideration in the designing of an NC is its duration. This is because the amount of time that NCs spend on constitution-making assignments is crucial in determining whether they are able to extensively consult the public. The duration varies considerably from one country to another, ranging from 10 days in Madagascar to seventeen months in the Democratic Republic of Congo.[143]

Some countries prescribe short and strict deadlines for NCs to create constitutions. Short and strict deadlines lead to the timely completion of the constitution-making project. It is argued that it helps to 'avoid the use of political or pecuniary reasons to drag on the process'.[144] At the same time firm but unrealistic time limits tend to reduce 'the opportunity for careful consideration of and negotiation about difficult and divisive issues'.[145] A rushed process denies drafters adequate time to consider the impact of their decisions, which may have unintended consequences. Besides giving an impression of a process that was manipulated, it may also lead drafters to adopt ambiguous or poorly worded provisions. Furthermore, a hasty process weakens the chances of creating a constitution that is intergenerational, a constitution that endures beyond a single generation.



Other countries prescribe long deadlines. The NC of the Democratic Republic of Congo was given seventeen months to create a new constitution. Long deadlines facilitate rigorous public consultation. The drafters and society will have enough time to reflect on the meaning of each provision. The disadvantage is that it may stretch out the process unduly.[146]

It is difficult to state which of the above two options is preferable. A lot depends on the context and constraints of each case.

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[142] Gava D, 2013: 3. See also Zvorwadza 2009: 4.

[143] Brandt 2011:250. The NCs of Chad, Togo, Niger, Mali, the Republic of the Congo, Gabon and Benin are examples of constitution-making bodies that fall within these time limits. See also Chibaya 2012: 5.

[144] Lee R, 2013: 2.

[145] Brandt 2011:250. See also Mhuka 2012: 2.

[146] Sibanda T, 2012f: 4. See also Goredema V, 2013: 3.

### 3.3.3 Decision making

The role of NCs in constitution making is not the same in all countries. On the one hand we have NCs that create and adopt their own draft constitutions. Mali (1991) and Madagascar (1992) are examples of countries with NCs that prepared and adopted draft constitutions. An advantage of this arrangement is that it avoids the risk of a draft being rejected. However, a key disadvantage is that members could possibly create a constitution that reflects narrow interests. This is because members are adopting a draft they created. When members know that another body will adopt the draft constitution, they 'are much more likely to be guided by the common good and not personal considerations'.[147]

On the other hand are those NCs that develop drafts, which are then adopted by bodies such as legislatures and/or through constitutional referendums. In Niger, for example, the NC developed a draft, which was then approved through a constitutional referendum. Separating roles contributes to the possibility that constitution-making is guided by the public interest. This is because there are checks and balances that come with one body drafting and another adopting. However, separating roles increases chances of a constitution not being adopted. By creating two centres of power, conflict is increased. The creation of two centres of power also increases the overhead costs associated with constitution-making. This is a problem in countries that operate on shoe string budgets. It is wasteful, so the argument goes, that money that could be used to fund poverty programmes ends up being used to pay allowances for delegates to the NCs.[148]

### 3.3.4 Preliminary conclusion

As the foregoing discussion illustrates, the suitability of NCs as constitution-making bodies depends on a number of factors. The composition of NCs is crucial. Related to this are the methods by which the delegates are selected. The size of the NCs is equally important as it affects inclusiveness and participation. The duration of the NC is also important. The need to avoid a constitution-making project that is too rushed must be balanced against long deadlines that unduly stretch the process.

[147] Peace 2013: 5.

[148] Gava D, 2013: 3. See also Chadwa 2010: 2.

## 3.4 The Roundtable

The use of what is often referred to as a roundtable (hereafter referred to as RT) for the purposes of constitution-making is a relatively recent development. Before being specifically applied to constitution-making, an RT was held in Poland to negotiate between representatives of the government and the opposition for purposes of reforming the political system.[149] Faced with the collapse of communism in Europe and an economic crisis characterised by persistent labour strikes, members of the ruling Polish Communist Party initiated negotiations with members of the biggest opposition, the Solidarity Trade Union Movement (STUM).[150] To participate in the negotiations, the STUM demanded guarantees of constitutional reform. Once an agreement called the Roundtable Agreement was reached, the two parties began negotiations for constitutional reform. It was following the success of the RT in unveiling a new constitution in Poland that RTs began to be used to undertake constitutional reform in Bulgaria, Czechoslovakia, Eastern Germany, Chile, Colombia, Spain and South Africa.[151] Basically, what an RT does is bring together the ruling and opposition political parties to negotiate constitutional reform. In bringing together elements of the outgoing and incoming regimes to negotiate a new constitution, RTs ensure political stability.[152]



The use of RTs for the purposes of constitution making is not without criticism. While it is good that RTs help to create constitutions that ensure political stability, there is a consensus that constitution-making cannot be about accommodating 'the opaque concerns of politicians organising through political parties'.[153] Constitution-making must be broad based. Without the participation of ordinary citizens, it is likely that RT constitution-making will promote a brand of constitution-making that not only dangerously panders to the narrow interests of the political class of the day but also reflects the self-centred concerns of the few who happen to be politically connected. RTs become forums that are used by political parties to negotiate not just the options of constitutional design but also the question of who dominates power, when and how. The failure of the RTs to cater for broad based constitution-making, it has been argued, raises serious doubts about the extent to which they are ideal institutions for

[149] Garlicki & Garliacka 2010: 392. See also Miller E.L, 2010: 621; Feldman 2013: 3.

[150] Blokker 2008: 7.

[151] Brandt 2011: 262.

[152] Arato & Miklosi 2010: 353. See also Lee R, 2013: 3; Griffiths 2013: 4.

[153] Maturu 2012: 6. See also Doroza 2009: 2; Elizar 2011: 3.

creating a new constitution. This was, for example, witnessed in the making of Zimbabwe's 1978 Constitution.

As discussed in Chapter Two, the 1978 Zimbabwe roundtable fitted the description of an opaque constitution-making body. Convened by political parties that were unpopular, the motivation was to control power through appearing to address the demand for the creation of a widely accepted constitution. At the time the IS, the agreement that was the basis for constitution-making was signed, the political leaders involved could not claim to be legitimately representing the will of the people. Seemingly, political legitimacy lay with the leaders of the rebel movements, explaining why the civil war persisted well after the 1978 Constitution entered operation.[154]

### 3.4.1 Composition

As was the case in Poland, RTs are usually composed of members drawn from the ruling party and the biggest opposition political party. Obviously, neither appointment nor elections are the basis for constituting RTs. Rather, the composition of RTs manifest the discretion of the leaders of the ruling and mainstream opposition political parties. Leaders of political parties appoint people that support their constitutional views.[155] Political considerations feature prominently in the manner in which RTs are constituted. This suggests that the constitutional views that are advanced in this process may not be motivated by the public interest.



Many express misgivings about the fact that the political leaders are not obliged to make the RTs 'as widely representative as is possible'.[156] Added to this concern is the fact that the appointments are not 'subjected to scrutiny and validated by parliament or its equivalent'.[157]

A related question that often arises in relation to the use of RTs for the purpose of constitution-making is the extent to which they stand above the fray of partisan politics. As mentioned earlier, RTs are usually under the stranglehold and direction of political leaders. The leaders of the political parties maintain complete control on constitutional negotiations

[154] See sections 9 and 10 of Chapter Two.

[155] Doroza 2009: 2. See also Garlicki & Garlicka 2010: 392.

[156] Oturu 2012: 4.

[157] Chifodya 2013: 3. See also Dore 1997; 15.

through their representatives.[158] Not only do the leaders of political parties shape the agenda of RTs through their representatives, they equally influence the manner in which the agenda is executed. This is also clear from the fact that delegates extensively consult their political leaders. Working behind the scenes, the leaders of political parties wield absolute power on the decision of what is finally incorporated in a new constitution.

### 3.4.2 Decision making

Secrecy is a key defining feature of RTs.[159] The deliberations of RTs are shielded from public scrutiny. Journalists are often barred from covering the deliberations. Often, there are no arrangements for facilitating the presence of observers to witness the deliberations.

Secrecy, as the cases of Namibia and the US discussed earlier, reveal, is not necessarily a bad thing.[160] It enables delegates to alter their positions when convinced of the weaknesses of their considerations. This is in contrast to a transparent process that often promotes overbidding and stubbornness.[161] When people negotiate in front of the public media, they tend to grandstand and perform to the gallery in order to please their supporters.

The problem is that although secrecy is associated with certain benefits, it is no longer consistent with the demands of transparency that contemporary constitutional development requires. A weakness of secrecy is that it allows a discussion to 'to shift from impartial to interest-based bargaining'.[162] Political leaders under RTs may be less concerned with constitution-making than with the need to entrench themselves politically. Another problem with negotiating a constitution in secrecy is that it might allow politicians to protect self-serving interests under the guise of constitution-making. Politicians are sharing the 'spoils of constitution-making, in the process, covering each other's backs'.[163]



[158] Barnes & de Klerk 2002: 27. See also Campbell 2012: 4.

[159] Arato & Miklosi 2010: 353. See also Hyden 2010: 5.

[160] Elster 2008: 26. See subsection 2.4 of this Chapter.

[161] Van Wyk 1991: 347. See also Elster 2008: 26.

[162] Feldman 2013: 4.

[163] Makwiramiti 2013: 4. See also Walsh 2012: 3.

### 3.4.3 Preliminary conclusion

From the foregoing, it is clear that RTs are established based on political agreements. A key feature of the constitutional negotiations is that they take place between the ruling party and the major opposition party. Delegates to RTs are often appointed by political parties in opaque circumstances. The delegates usually cross refer with their respective political parties and political bosses before undertaking major decisions. They generally lack clout and autonomy. The secrecy with which RTs make their deliberations is of concern as it undermines accountability. In a nutshell, a huge question hangs over the suitability of RTs as constitution-making bodies.

## 3.5 Support Institutions

All constitution-making bodies are supported by administrative management bodies. These bodies come in different names. Some refer to them as the secretariat. Other refers to them as support institutions.[164] This thesis uses the term Support Institutions (hereafter referred to as SI).



### 3.5.1 Constituting Support Institutions

The manner in which SIs are constituted vary from country to country. In some cases, SIs are composed of members drawn from government institutions or their equivalent. In other cases, they are only drawn from the government department responsible for legal drafting. In such cases, the members are seconded to a constitution-making body for the duration of the process of constitution-making.[165] Their support roles are terminated as soon as a new constitution is created and they revert back to their government departments. In Brazil, in 1988, support staff from Parliament was seconded to the constitution-making body.

The second option is one in which staff is hired by the constitution-making body.[166] This was the case in South Africa and Kenya in 1996 and 2010 respectively. The constitution-making bodies advertised the vacancies on offer through newspapers and other media. Under this arrangement, the Director/Coordinator of the SIs was hired first. Once hired, the Director/Coordinator invited suitably qualified candidates to apply for the jobs on offer. This

[164] Wardak 2003: 1.

[165] Brandt 2011: 274. See also Mavare 2013: 2; Chisere 2011: 1.

[166] Reynolds 2012: 6. See also Tsoro 2011: 2.

was followed by a shortlisting of suitable candidates. Thereafter, the constitution-making bodies interviewed applicants. The most suitably qualified and experienced people were hired.

In the face of scare resources, the secondment of administrative staff from government departments might be cost effective. The constitution-making body does not have to be concerned about staff costs as those on secondment will continue to draw their salaries from government. An additional advantage of this arrangement is that these are usually people who are already knowledgeable about how best to offer support services to legal drafters. However, there is a concern that this way of constituting the SI facilitates government intrusion. In such situations, the government, it is argued, is placed in a strong position to manipulate the process.[167] Considerations of cost, effectiveness and the need to avoid undue interference must, therefore, be taken into account in constituting SIs.

### 3.5.2 Functions of Support Institutions

SIs perform a plethora of roles. There is no uniformity regarding the functions allocated to SIs. The functions depend on the context in which the SIs are operating.[168] In some countries, SIs are allocated a broad spectrum of functions. The SI of Afghanistan is an example of an institution that was allocated a plethora of functions. These included functions such as organising meetings, workshops and conferences, documenting minutes of meetings and plenary sessions, procurement, correspondence, logistics, overseeing the distribution, installation, and maintenance of computers and computer-related equipment in the office, and the development and implementation of financial management policies. In the case of Kenya, the SI was allocated a few functions. These pertained mostly to documenting minutes of meetings, logistics, financial management and procurement.

For some, the number of functions allocated to SIs is not relevant. What is important is the extent to which they are able to enhance the operations of constitution making bodies through the competent execution of the functions they are allocated. Others argue that the number of functions allocated to SIs matter.[169] As the example of Kenya teaches us, SIs that are

[167] Nzimbe 2012: 2. See also Gwangwava 2013: 2.

[168] Halkett 2002a: 4. See also Chimbwa 2012: 5.

[169] Mavare 2013: 2. See also Brandt 2011: 277.

allocated only a few functions do a much better job of accomplishing their assignments than those that are saddled with many tasks.

### 3.5.3 Reporting lines

A smooth operation requires clear reporting lines between the Directors of SIs and the leaders of constitution-making bodies. The common practice is that the Directors/Coordinators of SIs typically report to the leaders of the constitution-making body. In some cases, they do not report directly to the constitution-making body but to government. This raises questions about the independence of SIs.[170]

There are also cases where the Directors/Coordinators of SIs double as Directors of constitution-making bodies, making the reporting lines blurred.[171] For example, Kenya's Director of the SI was also the Director of the CoEs (Committee of Experts). Similarly in Eritrea, the Director of the SI also doubled as the Director of the Constitutional Commission. This type of arrangement raises issues of independence and accountability.

There are problems that are often experienced when the reporting lines are poorly defined as the case of Timor-Leste illustrates. It was not clear whether the Director of the SI reported to the President of the CA. There was also a lack of clarity on the extent to which the Director of the SI could make decisions without referring to the President of the CA. It was this lack of clarity that saw the President of the CA terminate the employment services of the Director of the SI on the accusation that the Director made decisions that should have been referred to the CA for a final decision.[172]

### 3.5.4 Preliminary conclusion

SIs are an important component of the constitution-making process. They are responsible for support functions that make it easy for constitution-making bodies to focus on the business of constitutional development. An important fact is that they report to the constitution-making body. Depending on design, they report to the government as well. This may affect the autonomy of SIs. Significant is the existence of clear reporting lines between constitution-making bodies and SIs.

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[170] North 2013: 4. See also Barrett 2012: 4.

[171] Maturu 2012: 4. See also Oturu 2012: 3; Mafungo 2012: 2.

[172] Turner 2012: 6. See also Brandt 2011: 276.

### 3.6 Preliminary concluding remarks

The principles of participation, inclusion, and transparency ought to guide the design of constitution-making institutions. How these constitutional principles are implemented differ from one country to another. What this segment of the Chapter attempted to do is identify the issues that must be considered in the design of a constitution-making institution that facilitates inclusiveness, participation and transparency.

## 4. The process of constitution-making

The foregoing discussion has underscored the importance of institutions of constitution-making. It has also revealed the extent to which the different institutions of constitution-making give effect to the principles of inclusion, participation and transparency. However, it is not only institutions that determine the realisation of the constitutional principles. Equally important is how the institutions go about creating the constitution. This is about the process of constitution-making.

The process of constitution-making is as important as the institution that is vested with the responsibility to create a new constitution. In fact, it is now generally accepted that the process is as important as the 'ultimate content of the final constitution'.[173] That is why more time is often spent negotiating the process than the content. In the creation of the Constitution of South Africa, for example, '[t]he most vigorous opposition, disruptions, and disturbances took place in support of demands relating to the process of drafting the constitution'.[174]

This segment of Chapter Three discusses the salient features of a typical process of constitution-making. The objective is to identify the issues that must be considered in assessing the processes of constitution-making that have been followed in the creation of the successive constitutions of Zimbabwe. The segment commences the discussion by focusing on civic education, which usually marks the commencement of the process of constitution-making.

[173] Aucoin 2004: 3. See also Hart 2003: 12; Turner 2012: 3.

[174] Hussein 1999: 25. See also Mafungo 2012: 2; Ndulo 2001: 105.

## 4.1 Civic education

Civic education refers 'to programs that introduce knowledge and ideas to the ordinary citizen'.[175] From the outset, it must be emphasised that civic education in constitution-making processes is not the same as schooling or formal education. The objective of formal education is normally to impart skills needed to succeed in life. The objective of civic education, on the other hand, is very specific. It aims at educating ordinary citizens about a wide range of issues pertaining to the creation of a new constitution. Formal education is usually accompanied by an examination. In civic education, people are not usually tested to determine whether they understood the role they can play in the process of constitution-making.[176]

### 4.1.1 When is civic education carried out?

The timing of civic education is not something on which there is consensus.[177] Some argue that civic education needs to be carried out before consultation gets underway. Others insist that civic education needs to be carried out after a draft constitution has been produced. Yet others maintain that civic education needs to be undertaken before a referendum and after a constitution goes into effect. As the following discussion will show, the point in time that civic education is undertaken informs the objectives of civic education.



A number of countries provided civic education *before* constitution-making got underway. The CA of South Africa is an example of a constitution-making body that provided civic education before the process of constitution-making was undertaken. It established a community liaison department to take charge of civic education. The community liaison department was mandated to prepare ordinary citizens for consultation as well as participation in the remaining stages of constitution-making.[178] The department sought to draw ordinary citizens from all walks of life into the process of constitution making through meetings with civil society organisations, civic education workshops, media campaigns and advertising. It provided civic education through messages such as 'It's your right to decide your constitutional rights' and 'You've made your mark' (meaning 'You voted; now have

[175] Brandt 2011: 351.

[176] Skjelton 2006: 77. See also Marks 2010: 213; Dann 2011: 2.

[177] Chibaya 2012: 2. See also Skjelton 2006: 35.

[178] Turner 2012: 4. See also Nemukuyu 2012a: 2.

your say').[179] Media campaigns included a weekly CA newsletter, *Constitutional Talk*, with a circulation of 160,000, 'a weekly radio programme with 10 million listeners; colourful ads on buses; talk lines; and an open phone line and website'.[180] The civic education programmes reportedly reached 73 percent of adult South Africans.[181]

As the South African example shows, the objective of civic education that is conducted before drafting gets underway is to prepare ordinary citizens to participate in the process of constitution-making. It is to clarify the roles that ordinary citizens can play in the process and how they can participate. This includes educating ordinary citizens on the objectives of the process of constitution-making. It also includes providing people with information of how the process is structured and conducted as well as the procedures of the body designated to draft the constitution. The hope is that this enhances their knowledge of the process of constitution-making as well as facilitates the understanding of the role of the constitution.[182]
It is now generally accepted that limiting civic education to the period preceding drafting is not sufficient.[183] Chapter Two has underscored the deficiency of this approach when it discussed constitution-making under the Whaley Constitutional Commission which limited the provision of civic education to the period that preceded drafting.[184] It is emphasised that it is also important to inform ordinary citizens about the contents of the proposed constitution. It is for this reason that civic education is also undertaken after the preparation of a proposed constitution. In such cases, the aim of civic education is to enable ordinary citizens to evaluate constitutional proposals. It also gives constitution-making officials the opportunity to explain to ordinary citizens the reasons why some of the contributions made through public consultation were incorporated and others were left out.[185]



[179] Brandt 2011: 93.

[180] Hart 2010: 38. See also Skjelton 2006: 2.

[181] Reynolds 2012: 6. The community liaison department was not, however, the only entity undertaking civic education. The media department of the CA also fulfilled a similar task. See also Benomar 2003b: 8.

[182] Campbell 2012: 4. See also Nemukuyu 2012a: 2; Griffiths 2013: 3.

[183] Ghai 2004: 8. See also RTT News 2012: 2.

[184] See section 7 of Chapter Two.

[185] Hart 2010: 38. Civic education following drafting prepares ordinary citizens to comment on concrete proposals. It entails assisting people to be ready for consultation. People are 'educated' about how prior consultation informed drafting. They are 'taught' how to assess what is in the document that was prepared following consultation and what was incorporated in the draft constitution. They are also 'taught' about how to lobby so that their constitutional preferences are incorporated in the final document. Also highlighted, is how

In some cases, civic education is also undertaken just before a referendum is held on a new constitution.[186] This is based on the premise that people need to make informed decisions about the consequences of either accepting or rejecting the draft constitution as the supreme law of the country. Key to the success of a referendum is the level of information that citizens have about the content of the constitution before voting. The provision of civic education just before a constitutional referendum is held, it is contended, enables ordinary citizens to vote wisely in a constitutional referendum.[187]

The Legal and Constitutional Commission of Rwanda offered civic education before a referendum was held on a proposed constitution.[188] Two years of civic education preceded the adoption of the Constitution of 2003. During that time, there was a notable civic education drive to prepare ordinary citizens to vote in the constitutional referendum. Exhaustive efforts were made to reach groups that are normally excluded in such activities, such as those who do not read or write. The CoEs of Kenya is another constitution making body that undertook civic education just before a referendum. Before the referendum was held, the CoEs published the draft constitution and carried out civic education under the Kiswahili slogan JISOMEE (read for yourself). JIAMULIE (decide for yourself). JICHAGULIE (choose for yourself). The slogans encouraged ordinary citizens to read the draft constitution for themselves rather than rely on the explanations of the political leaders.[189]



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they can organise to maximise chances of their constitutional preferences being included. Understanding the procedures to follow when seeking to change provisions they are not happy with is also a component of civic education after a draft constitution is created. One can therefore argue that the purpose of civic education after a draft constitution is produced is to prepare ordinary citizens to understand institutions and processes of constitution-making and review the content of a draft constitution before finalisation. All this feeds into the realisation of participatory constitution-making in line with the principles discussed in the earlier Chapters of this thesis. See also Hart 2010: 37.

[186] CoEs 2010: 40. See also Kiss 1996: 4.

[187] North 2013: 5. See also Reynolds 2012: 6; Nyika 2012: 3.

[188] Hart 2008: 1045.

[189] Mbaru 2010: 3. Civic education does not end with the adoption of the constitution. Well after the constitution has been adopted, there is a need for civic education. The objective is to inform ordinary citizens about the contents of the constitution. The other goal is to inform the people about how the constitution affects them. This includes explaining how they can access certain rights and the responsibilities of various government departments in implementing the provisions of the constitution. The CA of South Africa is an example of a

### 4.1.2 Who provides civic education?

Although most civic education programmes are conducted with good intentions, their neutrality is often questionable. Civic education programmes are often driven by the intentions of those involved in the constitution-making process. Civic education programmes are also often influenced by the agenda of foreign donors who seek to promote their systems of government as the system to emulate.[190] That is why choosing the body responsible to carry out civic education is crucial. Equally important is regulating the body undertaking civic education.

Civic education is often undertaken by the constitution making body itself. The Constitutional Commission of Eritrea is an example of a constitution-making body that also undertook its own civic education to prepare ordinary citizens for consultation.[191] The Constitutive Act of the Constitutional Commission expressly obliged it to conduct civic education. Consequently, the Constitutional Commission created seventy-three local committees as well as a number of provincial offices. It trained four hundred instructors responsible for the provision of civic education to rural and urban communities. The Constitutional Commission used a number of mechanisms to foster civic education including poetry, comic books, mobile theatre groups, songs, radio and concerts dealing with constitutional themes. Using these various methods, the Constitutional Commission was able to reach more than 500 000 people.[192]

Allowing a constitution-making body to assume responsibility for civic education has its own advantages. It ensures better co-ordination. It also allows the body drafting the constitution to

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constitution-making body that carried out civic education after the Constitution of 1996 came into operation. In this regard, civic education was accompanied by the distribution of four and a half million copies of the Constitution. Under this arrangement, twelve million copies of the Constitution of 1996 were dispatched through the mail for free. In addition, the CA distributed copies of the final constitution through taxis, schools and other infrastructure. The CA made available Braille versions and recordings of the final constitution as well as comic-book versions of the Bill of Rights. To sustain civic education, it created and distributed to schools for free teaching aids on the final constitution during 'National Constitution Week'. See also Aucoin & Brandt 2010: 247; Tribe & Landry 1993: 629.

[190] Chigayo 2012: 3. See also Halkett 2002a: 4.

[191] Campbell 2012: 4. The CoEs is another example of a constitution-making body that undertook its own civic education. See also Selassie 2010: 63; Miller E.L, 2010: 631.

[192] Brandt 2011: 91. See also Mhuka 2012: 2.

remain engaged throughout the process.[193] Another advantage is that it is cost effective, in particular for countries running on a shoe-string budget. The spectre of institutional conflict is also reduced when the constitution-making body assumes responsibility for civic education. The reason, according to Walsh, is that members in the constitution-making body are motivated more to see the civic education exercise succeed than fail.[194] People working in a group, it is often said, become more responsible and accountable when they assume responsibility for all the stages of a project of constitution-making.[195]

There are, however, those who doubt the suitability of the constitution- making body to undertake civic education. They argue that constitution-making bodies lack the capacity to undertake civic education as they are usually composed of members appointed based on patronage rather than merit. Members of appointed constitution-making bodies are bound to be driven by a particular agenda and, as a result, 'most stages of the process will be used to produce results that support that agenda'.[196] In addition, burdening a constitution-making body with too many tasks, it is argued, renders the implementation of a successful civic education programme an unlikely outcome. A constitution-making body's administrative capacity would be stretched to breaking point.

Others have opted to assign the responsibility of civic education programmes to experts contracted by the body drafting the constitution. Under this arrangement, the constitution-making body signs a contract with people with relevant skills and experience to undertake civic education. Under this model, the constitution-making body is not directly involved in the provision of civic education. It delegates the responsibility to another body, which remains accountable to the constitution-making body. Although delegated, full responsibility for civic education, thus, remains with the constitution-making body. The use of experts, some argue, protects the credibility of civic education. The assumption is that experts are not likely to undermine civic education for short term gains.[197]

There are also countries that have opted for an arrangement that allows for a significant involvement of civil society organisations in undertaking civic education. Under this

[193] Thornycroft 2009b: 4. See also Makwiramiti 2013: 2; Mataza 2012: 2.

[194] Walsh 2012: 2.

[195] Griffiths 2013: 2.

[196] Reynolds 2012: 6. See also Chifodya 2013: 5; Halkett 2002a: 3.

[197] Burnell 2008: 13. See also Mafungo 2012: 3.

arrangement, civic society organisations provide civic education that complements those provided by the constitution-making body. The Uganda Joint Christian Council and the National Organisation for Civic Education and Election Monitoring (NOCEM) are examples of two NGOs that supplemented the civic education carried out by the Constitutional Commission of Uganda in 1995.[198] Some have argued that civic society organisations offer better civic education programmes. As civic society organisations are community based, more people are likely to identify with civic education programmes they initiate.

Irrespective of the institution assigned to conduct civic education, what is equally important is the regulation of the body that offers civic education. Many insist on the adoption of a code of conduct that all organisations involved must sign before civic education is undertaken. NGOs undertaking complementary civic education in Uganda, South Africa and Kenya were, for example, required to sign a code of conduct. Generally speaking these are a set of regulations that obliges those providing civic education to refrain from manipulating it for their short term gains.[199] The code of conduct obligates the civic educators to deliver civic education in a neutral way. It also prevents biases associated with civic education such as manipulation, provocative lobbying, extreme propaganda, and incitement.

### 4.1.3 Methods of civic education



Now that we have identified the bodies that can be responsible for providing civic education, the next task is to look into the different methods used to undertake civic education.[200] As the following paragraphs show, there are various methods that can be used to undertake civic education.

One of the methods that is commonly used to provide civic education is the radio. The CA of South Africa is an example of a constitution-making body that used national radio to promote civic education. It ran an hour long daily show on the process of constitution-making. Organised in eight languages, the radio show provided vital information to over ten million citizens every week.

[198] Mbaru 2010: 3. See also Zivo 2013: 3.

[199] Chisora 2013: 1. See also Okumo 2011: 2.

[200] Okumo 2011: 2. See also North 2013: 5.

The significance of radio as a vehicle of civic education lies in its capacity to offer wide area coverage, both in urban and rural areas. It, in particular, relates to its capacity to reach the remotest parts of the country.[201] This is not, of course, always guaranteed. Coverage is obviously a function of whether people are able to connect to the electricity grid or able to use alternative sources of power, including solar. In communities where the national radio does not offer national coverage, the use of community radio stations and their capacity to reach rural communities becomes particularly crucial.

Television is another method used to create awareness and educate people on the process of constitution-making. Television has been used to offer civic education through the use of dramas, songs, interviews and discussion shows. The CoEs of Kenya used television to prepare ordinary citizens for consultation. The CoEs's pre-recorded civic education messages were aired through national television stations such as the Kenya Broadcasting Corporation, Family TV and K24TV.[202] The CA of South Africa also ran a weekly television programme called *Constitutional Talk* that promoted debates on various constitutional issues. Compared to the radio, the use of television has limitations given that many people, particularly those residing in the rural areas of developing countries, do not own television sets in their homes.[203]



Another method that is used to prepare ordinary citizens for the consultation stage is printed media, i.e magazines and newspapers. This media is often used for purposes of notification about forthcoming civic education meetings in communities, as well as the names, venues and times for civic education meetings. In some cases, supplements are used in newspapers. Where supplements are used, they provide detailed information, including on issues such as the purpose of civic education, duration of civic education as well as how and when ordinary citizens are granted an opportunity to influence the drafting. In addition to providing information on how ordinary citizens can participate in the constitution making process, illustrations, such as cartoons, are used to raise awareness. To be useful in preparing the people to participate and own the process of constitutional development, printed material needs to explain issues such as the questions to be posed at the consultation stages as well as

[201] Ebrahim 1999: 20. See also Campbell 2012: 4; Veritas 2012a: 2.

[202] Nyika 2012: 3.

[203] Chitemba 2012a: 2. See also Moehler 2003: 30; Brandt 2011: 93.

detailing how the input of ordinary citizens will find its way back into the decision making processes of constitution-making.[204]

The CA of South Africa used printed material as part of its civic education programme. The CA provided civic education on the process and on constitutional issues through the use of posters, brochures, leaflets and a biweekly constitutional newsletter called 'Constitutional Talk'. 160 000 copies of the constitutional newsletter were distributed each week. In addition, the CA distributed booklets such as 'You and Building the New Constitution,' and comic books.[205] The civic education programme is credited for its achievement in increasing the awareness of citizens in how they can participate in constitution-making.

Increasingly, constitution-making institutions are also making use of websites to offer civic education. Besides providing civic education information, websites are also used to provide information concerning forthcoming meetings, times and venues of meetings.[206] The effectiveness of this mechanism is a function of how regularly the website is updated and maintained. Of course, it also depends on internet accessibility.

Irrespective of the method employed to offer civic education, the language chosen as a means of communication is also crucial. The language used to provide civic education is important as it determines which sections of the population can access the information. In this regard, the use of vernacular languages in civic education programmes is particularly important. Communities derive maximum benefit from a civic education programme that is conducted in their own language. The CoEs of Kenya used vernacular languages in its civic education programmes. Besides making use of the English language, the CoEs used Kiswahili, a language widely spoken by people in Kenya, to disseminate its message on civic education.[207]

A common challenge in relation to the implementation of civic education is the availability of financial and human resources. The lack of resources limits the reach of civic education. This is particularly the case in reaching disadvantaged groups in society. This was the case, for example, with nomads in Eritrea. The CA in that country had to go 'to great lengths to

[204] Haysom 2004: 9. See also Kuseni 2013: 3.

[205] Brandt 2011: 93.

[206] Ebrahim & Miller 2010: 135. See also Bannon 2007: 1847; Haysom 2004: 9.

[207] Chifodya 2013: 5. See also CoEs 2010: 147.

organise meetings and provided food and water for weeks so that the nomads could stay in one place and talk to constitution makers in their own language'.[208]

### 4.1.4 Preliminary conclusion

From the foregoing, it is clear that there are a number of issues that determine whether a civic education programme is going to be effective or not. This begins with identifying the institution(s) responsible for undertaking civic education. Equally important is the issue of whether the body undertaking civic education possesses the requisite capacity needed to provide effective civic education. The methods used to offer civic education are also important. Related to the foregoing is the issue of whether arrangements are in place for stamping out biases such as manipulation, lobbying, propaganda and incitement which threaten the effectiveness of civic education.

## 4.2 Consultation

The common practice is that civic education is followed by consultation. Unlike civic education that is aimed at information sharing, consultation is a means of information gathering. It provides elites and ordinary citizens an opportunity to voice their preferences, expectations and likely outcome of the constitution making process.[209] As opposed to civic education that basically regards the people as passive recipients of information, consultation

[208] Makwiramiti 2013: 5. See also Brandt 2011: 106.

[209] Blount 2011: 46. There is an increase in the number of researchers in the field of constitution-making linking the right to participatory consultation in public affairs to constitution-making. Franck & Thiruvengadam (2010: 5) argue that there is increased recognition and acceptance of the right to participate in democratic governance of which constitution-making is an aspect. The recognition, she contends, comes in the form of the United Nations Declaration of Human Rights of 1948, International Covenant on Civil and Political Rights (ICCPR) of 1976, African Charter on Human and People's Rights (1981), Asian Charter of Rights (1998), Inter-American Democratic Charter (2001) and the Commonwealth's Harare Declaration (1991). Mbao (2007: 4) turns to the emerging jurisprudence from the South African Constitutional Court. Mbao (2007: 5) argues that the Constitutional Court of South Africa addressed the constitutional duty to facilitate participatory consultation in relation to law making in the cases brought before it. These cases have now found wider application in the discipline of constitution making. They include *Doctors for Life v The Speaker of the National Assembly and Others, Matatiele Municipality and Others v President of the Republic of South Africa, Merafong Demarcation Forum and Others v President of the Republic of South Africa and Minister of Health and Another No v New Clicks South Africa (Pty) and Others (Treatment Action Campaign and Another as Amicus Curiae).* See also Blount 2011: 46.

encourages ordinary citizens to come forward with submissions they would prefer to see incorporated in the constitution. Procedurally, it entails an interaction in which the organisation that is granted the mandate to create the constitution engages ordinary citizens to solicit their input and make decisions based on their contributions and other factors. It is the most significant form of popular participation. In short, consultation paves the way for drafting.

### 4.2.1 Who is the target group of consultation?

Consultation must target all segments of the society for which a new constitution is being written. It is only when ordinary citizens are consulted that the constitution is deemed to manifest their preferences.[210] A particular effort must be made to include marginalised and vulnerable groups in the constitution making process, such as women, children, the sick and so on. The point is that all segments of society need to contribute towards the creation of a new constitution.

### 4.2.2 Who engages in consultation?

An important factor that affects the quality and effectiveness of consultation is the suitability of the body that is tasked with the duty of facilitating consultation. There are various bodies that can do so. Some bodies are deemed to be better at providing effective consultation than others.[211]

One of the bodies that can provide consultation is the constitution-making body itself. The 2001 Constitutional Commission of Kenya is an example of a constitution-making body that engaged in consultation. It established consultation teams that visited every constituency in the country. The teams were composed of members that were drawn from political parties and civil society organisations. Those so appointed became part of the constitution-making body for the duration of the consultation.[212]

Consultation that is undertaken by a constitution-making body, it is contended, is less likely to be 'manipulated to advance certain agendas'.[213] Members of a constitution-making body

[210] Chifodya 2013: 2. See also Selassie 2003: 39 Ottoway 2003: 317.

[211] Chinhange 2013: 3. See also Cottrell & Ghai 2011: 125.

[212] Nyika 2012: 3. See also Maingi 2012: 65.

[213] Chipara 2013: 4. See also Colon-Rios 2012: 12.

tend to be more accountable than people assigned the task of undertaking consultation in an ad hoc manner.[214] However, this arrangement, others contend, 'increases biases such as provocative lobbying, extreme propaganda, and incitement'.[215] The conflation of roles promotes a situation in which those in charge of the consultation may end up seeking to manipulate the consultation through lobbying, propaganda and incitement in order to realise a certain outcome.

Other countries have opted to place the duty of facilitating consultation in the hands of a body other than the constitution-making body. In some of these countries, a delegated body undertakes consultation on behalf of the constitution-making body. In Afghanistan, the 2003 Constitutional Commission was responsible for consultation on behalf of the Constitutional Lorga Jiga (equivalent of CA), the body that was mandated to draft and approve the constitution. The expectation is that a delegated body, like the Constitutional Commission, would spearhead a more comprehensive consultation than would have been the case had the consultation been conducted by the constitution-making body itself. As a body that is usually composed of experts drawn from various academic disciplines, constitutional commissions, it is argued, are in a better position to undertake consultation with greater objectivity.[216]

Where the responsibility for consultation is delegated to another body, the general practice is that the consultation is carried out within the framework of a 'curriculum' that is developed and approved by the delegating body. The body undertaking consultation is accountable to the delegating authority in respect of its mandate, objectives, implementation, monitoring, and evaluation. Besides undertaking its own consultation campaigns, the 1988 Constitutional Commission of Uganda delegated consultation to non-governmental organisations.[217] This was also the case in Kenya in 2010 when the CoEs delegated the consultation function to some civil society organisations. In both cases, those delegated authority remained accountable to the delegator in respect of the consultation campaign's mandate, objectives, implementation, monitoring and evaluation.

[214] Bell 2012: 2.

[215] Chatora 2009: 3. See also Garlicki & Garlicka 2010: 395.

[216] Aucoin & Brandt 2010: 258. See also Makwiramiti 2013: 3.

[217] Chibaya 2012: 4.

### 4.2.3 How is consultation conducted?

A typical consultation process begins with the body creating the constitution establishing teams of people who then go out into communities to consult. Once in the communities, the teams ask ordinary citizens what they wish to see incorporated in the constitution. At times people are consulted through seminars held by the constitution making body. The consultations are normally held at the local government level. At these gatherings, the representatives of organisations and opinion leaders in each district are given an opportunity to contribute ideas that would shape drafting.[218]

The 1988 Constitutional Commission of Uganda is an example of a body that toured the country gathering the views of ordinary citizens on what they wished to see incorporated in the constitution. In some cases, both closed-ended and open-ended questionnaires were used to consult the people. In addition to the use of the questionnaires, ordinary citizens were invited to make written submissions. These written submissions took the form of letters and emails. Seminars were also conducted at 870 sub counties around Uganda.[219] The views of ordinary citizens were considered before drafting commenced. However, the constitution-making body was not obliged to incorporate any of the views submitted.



### 4.2.4 When is consultation undertaken?

The timing of consultation is significant. This is about whether consultation is undertaken before or/and after drafting. When consultation is undertaken before drafting, ordinary citizens have a real opportunity to influence drafting by lobbying for ideas that they believe need to be incorporated into the constitution. Those mandated with drafting have an opportunity to take into account public comments before finalising the document.[220] Uganda, Ethiopia, Eritrea, and Kenya are examples of countries that sought public opinion before drafting.

When consultation is undertaken after drafting, it represents a limited opportunity for ordinary citizens to influence the ideas that will end up being incorporated in the constitution. Nonetheless, it is often argued that consultation after drafting gives ordinary citizens an

[218] Bannon 2007: 1861. See also Campbell 2012: 4; Mambare 2013: 4.

[219] Ebrahim & Miller 2010: 135.

[220] Share 2012a: 3. See also Ebrahim & Miller 2010: 135; Klein & Sajo 2012: 46.

opportunity to comment on concrete constitutional proposals. The general consensus, however, is that it is only when people are consulted before drafting that they are able to enrich the drafting process. It is only then that the drafting would be broadened by responding to the needs and aspirations expressed by the people.[221]

Although a strong case can be made for the importance of conducting consultation prior to drafting, there is no guarantee that the consultation will actually influence the text of the constitution. Constitution-making bodies must put in place mechanisms that ensure that the suggestions and information received through public consultation are organised, summarised, digested, verified and filtered through the official decision making process. This is especially important considering the fact that institutions that conduct consultation often receive more submissions than they have the capacity to process. The CA of South Africa, for example, received two million submissions for consideration. Most constitution- making institutions end up not processing significant portions of the submissions they solicited through consultation. In the case of Nepal (in 2009), due to the absence of a prior arrangement for incorporating the contributions of ordinary citizens, only a few submissions were scrutinised. Of the 50 000 surveys administered by the Rwanda Constitutional Commission of 1993, only 7% were examined. This has led one author to claim that, '[consultation] was primarily a means for the regime to solicit elite opinion'.[222]



It is also, of course, important to note that the receipt of comments does not imply an obligation of incorporating it into the constitution. The body drafting the constitution enjoys the discretion to accommodate or reject the input of the people. For example, the recommendations of the Mwanakatwe Constitutional Commission in Zambia were rejected by the Movement for Multi-Party Democracy (MMD) Government of Zambia despite the fact they were the product of extensive public consultation. This has led some to argue that consultation is educative rather than a sincere effort to solicit feedback and collaboration.[223] Often elite interests dominate the context in which decisions are made about what to do with the ideas generated through consultation, making the consultation process a top-down educative affair in the hands of the elite. At the same time, one must also acknowledge the

[221] Samuels 2005: 13. See also Feldman 2013: 6.

[222] Blount 2011: 47. See also Brandt 2011: 141; Shuro 2010: 2.

[223] Shuro 2010: 2. See also Makanaka 2012: 3.

challenge of transforming a purely information gathering mechanism into a decision-making one.

Increasingly, consultation is carried out even after a draft constitution is produced. That is in addition to initial consultation conducted before the drafting of the Constitution. In such cases, consultation takes place on the basis of a draft constitution prepared by a team of experts. The objective here is to give ordinary citizens an opportunity to comment on concrete and comprehensive proposals. The point is that the public should be afforded an opportunity to comment on the draft constitution before its adoption, even if it was prepared after the initial consultation.[224]

The common practice is that delegates representing various segments of society are asked to comment on the draft. The assessment is usually facilitated through a conference. Delegates point out the provisions that they like and dislike in the draft constitution. The contributions of the delegates are presented as recommendations.[225] The constitution-making body is not obliged to include in its final draft all the suggestions made by the delegates.

Despite the criticism, consultation after drafting, as mentioned earlier, provided ordinary citizens an opportunity, albeit limited, to influence the final constitution. It also accords ordinary citizens an opportunity 'to assess for themselves the extent to which their views are incorporated'.[226] There is, however, a perception that consultation after drafting 'exaggerates ordinary citizens' influence in constitution-making'.[227] The reason for this is that at this stage, the draft would have been made after lengthy negotiations and difficult compromises, making it 'neither sensible nor possible to reopen the package'.[228] This, according to some, makes consultation after drafting 'a conduit through which the elite reveal their deliberations to ordinary citizens in an effort to solicit feedback and support for a draft constitution'.[229]



[224] Ginsburg 2008: 362. See also Ghai 2004: 6.

[225] Mhlotshwa 2012: 2. See also North 2013: 5; Klugs 2006: 16.

[226] Chifoya 2012: 3.

[227] Gava D, 2013: 2. See also Ebrahim & Miller 2010: 135.

[228] Ghai 2005b: 27. See also Fleiner 2002: 310.

[229] Turner 2012: 3.

### 4.2.5 Preliminary conclusion

From the foregoing, it is clear that there are a number of issues that determine the effectiveness of consultation in a constitution-making process. One of the issues is the question of who is responsible for undertaking consultation. Equally important is the timing and the manner in which the consultation is organised. The importance of putting in place mechanisms that help to integrate the views of the people gathered through consultation into the decision making system of the constitution-making body also cannot be discounted.

## 4.3 Drafting

Consultation is followed by drafting, a technical function through which the constitutional preferences of ordinary citizens are transformed into legal language. Drafting refers to '[t]he expert task of putting constitutional ideas into precise legal language that those who will employ the constitution, including the courts, are able to interpret.'[230] In this regard, one must distinguish between the process in which policy decisions are made on the text of the constitution and the process of drafting, which is fundamentally driven by professional judgement. Whereas political orientation shapes the content, drafting is a technical exercise that is largely informed by legal considerations. The quest for the common good usually drives policy decisions on content. Drafting is, however, all about proficiency.



Put simply, the constitution needs to be written in a language that is easily understood by the people for whom it is being written. A constitution needs to be clearly written as it is not only a law but a supreme law that forms the basis of other laws. The courts must be able to 'interpret the provisions of the constitution consistently'.[231] Poorly drafted constitutional provisions, it is argued, create a paper constitution, resulting in the non-enforcement of some or all provisions of the constitution. This is why great emphasis is put on finding the most competent individuals for the job, making the question of who is appointed as legal drafters all the more important.

### 4.3.1 Who is appointed as legal drafters?

Although the common practice is for drafting to be undertaken by lawyers, identifying competent legal minds is not a simple task. Often, political factors play an important role in

[230] Brandt 2011: 354. See also Princeton 2012: 5; Tierney 2009: 361.

[231] Klein & Sajo 2012: 434. See also Barnes & De Klerk 2002: 7.

the appointment of legal drafters. This mainly explains why countries use different methods in appointing legal drafters.[232]

One option is to appoint legal drafters already in government service. In Chapter Two, we have noted that Zimbabwe has repeatedly used legal drafters already in government service to draft a number of its constitutions. George Smith, who was the Director of Legal Drafting in the Attorney-General's Office and legal advisor to the Prime Minister, drafted the 1965, 1969 and 1978 Constitutions,[233] Zimbabwe is not, however, the only country that used legal drafter already in government service to draft its constitutions. In 1991, for example, the Movement for Multi-Party Democracy (MMD), the ruling party in Zambia at the time, established a seven person task force comprised of members already in the public service. Situated within the Ministry of Legal Affairs, the taskforce was chaired by the Attorney-General. In many ways, the legal drafters are usually not only at the peak of their careers but they are the best that the country can offer in terms of cutting edge drafting skills.[234] The legal drafters are usually familiar with how to handle complex assignments. The concern is that the legal drafters might come under the influence of government ministers who have an interest in the outcome.

In other cases, a constitution-making body assumes responsibility for drafting. This was the case, for example, in Brazil when it adopted its 1988 constitution. The CA of Brazil at the time adopted what one author called 'a decentralised system of drafting',[235] in which drafting was undertaken by the thematic committees. The internal rules of the CA stipulated that all 559 members of the CA must divide themselves into eight thematic committees. Each of the eight thematic committees was to be made up of sixty-three members of the CA and a corresponding number of substitutes who were also CA members. In turn, each committee was divided into three thematic sub-committees with twenty-one members each. Each sub-committee drafted a chapter after which it submitted its work to its parent committee. A special systemisation committee integrated the final reports of the eight thematic committees into a consolidated draft and submitted it to the entire CA.

[232] Griffiths 2013: 5. See also Partlett 2011: 19.

[233] See sections 6 and 9 of Chapter Two

[234] The Economist 2013: 1.

[235] Rosenn 2010: 445. See also Miller E.L, 2010: 617; Gondo 2009: 2.

Making the constitution-making body take charge of drafting a constitution in the manner discussed above increases the participation of a broad section of the people in the drafting process as CAs are, often, broad-based institutions. It ensures that the final document is based on wide consultation and reflects the views of a broad section of people. However, it is often argued that the temptation to allow members of the CA to draft the actual text should be resisted. This is because drafting is not a suitable task for an organ that is comprised of a large number of people.[236] There is also a danger that constitution makers might end up seeking to influence the drafting for short term benefits. This is especially the case where elected politicians double as constitution makers responsible for drafting as was the case in Brazil.[237]

Whereas making a constitution-making body take charge of drafting is important, so is the manner in which the drafting is organised to realise successful drafting.[238] This is about the relationship between the committees involved in drafting. The point is that the relationship has to be well organised and coordinated for drafting to proceed smoothly. While there is obviously 'no model which fits all', the CA of South Africa offers a good lesson about how drafting can be organised to increase effectiveness. In South Africa, the development of drafting articles commenced at the thematic committees.[239] Thereafter, the draft articles were submitted to the lead drafters for standardisation. After that, the draft articles were submitted to the Constitutional Committee for preliminary consent. Once initial approval was granted, the draft provisions were lodged with the CA for final approval. Incorporation of additional articles into the draft only took place after authorisation by the CA.



### 4.3.2 Foreign experts assume responsibility for legal drafting

In some cases, foreign experts have been appointed as legal drafters. The drafting of Japan's 1946 Constitution was carried out by a small group of bureaucrats from the US. More recently, the drafting of Namibia's 1989 Constitution was largely undertaken by foreign experts. Under the auspices of a CA, Namibia appointed three prominent South African legal

[236] Chitande 2011: 3. See also Moyo J.N, 2009: 2.

[237] Twomey 2008: 4. See also Carson 2010: 314; Mambare 2013: 3.

[238] Ghai 2005b: 31. See also Walker & William 2010: 490.

[239] Ebrahim & Miller 2010: 127. There were six thematic committees responsible for the character of a democratic state, the structure of the government, the relationship between the levels of government, fundamental rights, the judiciary and the legal systems, and specialised structures. See also Skjelten 2006: 28.

drafters, namely, Arthur Chaskalson, Gerhard Erasmus and Marinus Wiechers.[240] The three lawyers were deemed suitable on the ground that they were already familiar with the interconnectedness of the constitutional laws of South Africa and Namibia.[241]

It is often argued that foreign experts bring with them the advantage of comparative constitution-making. They provide comparative information about a variety of constitutional models. In addition, their engagement is said to encourage a more analytical, empirically based discussion on what must be incorporated in the constitution.[242]

However, assigning the function of drafting to foreign legal drafters also has its own drawbacks. Questions are often asked about the moral justification of the involvement of foreign experts in the affairs of another people. The involvement of foreigners, it is argued, often leads to the creation of constitutions that borrow extensively from the constitutions of the countries from which they come. By insisting that drafting be based on models with which they are familiar, they facilitate a large-scale institutional transfer.[243] The tendency by foreign drafters to reproduce aspects of the constitutions of countries they are from leads to the creation of constitutions that are the products of foreign experiments. For example, a point is frequently made that American scholars are often seduced by the mythology of their constitution as a document that can and should be reproduced around the world.



In addition, it is argued that international experts are usually not familiar with the conditions under which drafting takes place. Not only are foreign experts ignorant about many aspects of the environment in which the constitution will operate, they are often uninformed about many of the effects that it will produce. These concerns have led some writers to argue that the role of international experts needs to be limited to advice giving and the facilitation of precise drafting. Limiting their role to that of technical advisors ensures that drafting remains at all

[240] Wiechers 2010: 80. See also Van Wyk 1991: 347.

[241] Wiechers 2010: 80. By choosing South African legal drafters, the CA, it was argued, sought to create legitimacy for the drafting process, especially among white Namibians. The suitability of the three was further concretised by the fact that South Africa's judicial system had a profound influence on Namibia's laws. Being a satellite territory of the former, Namibia's laws mirrored those of the South African legal system. In many ways, the legal systems of the two countries were entangled. Also see Barnes & De Klerk 2002: 7.

[242] Aucoin 2004: 2. See also Hatchard 2001: 212.

[243] Morrow 2010: 584. See also O'Brien 2010: 336; Bannon 2007: 1865.

times in the hands of local drafters who are connected through citizenship to the constitution that is being created.[244]

As noted, some doubt the wisdom of limiting the task of drafting to foreign experts. They rather opt for a model that makes use of both local and foreign experts. In drafting the Constitution of 2010, for example, Kenya made use of a combination of local and foreign drafters.[245] The combination has its advantages. By making use of both local and foreign experts, a country, it is argued, combines unique attributes and skills that are bound to improve the quality of drafting. Local drafters are able to evaluate local conditions and institutional needs with greater objectivity. Their understanding of the environment is facilitated by the fact that they are 'attuned to local circumstances'.[246] Their involvement ensures that the process is perceived as materially 'home grown'.[247] Foreign drafters complement the contribution of local drafters by addressing the lack of meaningful knowledge of comparative constitution-making on the part of the latter. The combination ensures that drafting benefits from best practices. It is also believed that the involvement of foreign lawyers enhances the independence of the legal drafters. Perhaps the challenge for this arrangement is to convince sceptical segments of society that the foreign experts will not use their rich international experience to unduly influence the drafting of the impending constitution.[248]



### 4.3.3 How are drafters recruited?

The recruitment of legal drafters takes many forms. In some cases, legal drafters are handpicked from government departments. This was the case in Zambia in 1991.[249] In this

[244] Klein & Sajo 2012: 420.

[245] Oturu 2012: 6. The requirements, in terms of experience and qualifications that applied to foreign experts were also demanded of local experts. To be appointed, the drafters had to prove knowledge and experience in at least one of the following areas: comparative constitutional law; systems and structures of democratic government; human rights; women and gender issues; land and land law; governance, ethics and accountability, public finance and administration; electoral systems and designs for democratic elections; anthropology; or mediation and consensus building. See also Berns 1988: 10; Maoulidin 2011: 2.

[246] Brandt 2011: 284. See also Battista 2004: 170.

[247] Bannon 2007: 1865. See also Fleiner 2002: 310; Campbell 2012: 4.

[248] Aucoin 2004: 2.

[249] Reynolds 2012: 6. See also Banks 2007: 103.

particular case, the drafters were chosen exclusively from the Attorney-General's Office.[250] As mentioned earlier, the advantage of this method is that the constitution-making body is recruiting legal drafters who are often already endowed with vast experience. Of course, there are pitfalls associated with recruiting from government departments. Some doubt the impartiality of government officers. The argument is that legal drafters can be put under pressure by government ministers with an interest in the outcome. Not only does this undermine the credibility of drafting, it also weakens the legitimacy of the final constitution. It is this fear that makes many lose faith in the use of legal drafters seconded from government departments, including the Attorney-General's Office. In the case of Zambia referred to above, the opposition political parties mobilised public opinion successfully against the use of legal drafters from the Attorney-General's Office. Only then did the government abandon the idea. Given the fact that Zambia has a long and torturous history of politicians abusing the process of constitution-making to entrench themselves politically, the fears may not have been unfounded.[251]

In other cases, people submit application letters in response to a newspaper advertisement. Following short listing, suitable candidates are invited for interviews. The successful candidates are then informed and a contract signed. This was the case in Kenya in 2010. An advantage of this method is that it promotes transparency. Anybody can apply as long as they meet the attributes specified in the job description.[252] A disadvantage is that the method creates a huge administrative burden as the constitution-making body may be inundated with poor quality applications. The method burdens the constitution-making body by opening the door for 'an avalanche of applications that barely meet the attributes required for one to succeed as a legal drafter'.[253]



### 4.3.4 Preliminary conclusion

From the foregoing, a number of issues that determine the success of the drafting process have emerged. A critical issue is the question of who is appointed as a legal drafter. It has emerged that the use of foreign experts is also something that deserves attention. Equally

[250] Slinn 2004: 30. The common practice is that government's Director of Legal Drafting is part of the Attorney-General's Office. See also Zhanje 2012:6.

[251] Makanaka 2012: 4.

[252] Makau 2012: 8. See also Chipara 2013: 8; Nyika 2012: 3.

[253] Nyika 2012: 3. See also Campbell 2012: 4, Zhanje 2012: 3.

important is the manner in which legal drafters are appointed. The organisation of the drafting process and, in particular, the link and interaction between the drafting committee and other committees is crucial in facilitating a smooth drafting process.

## 4.4 Adopting the draft constitution

Drafting is followed by adoption or rejection. Adoption refers to the process whereby a final decision is made to accept the draft constitution. It entails the formal acceptance of a draft constitution. The adoption of a constitution precedes the implementation of the document as supreme law of a country. At the same time, adoption is not always followed immediately by implementation.[254] This is usually the case in countries with constitutional or statutory stipulations that provide that constitutions must be accepted through referendums even if they had already been adopted through a traditional body such as parliament. In such situations, adoption is an act that precedes a constitutional referendum.

### 4.4.1 Who adopts the draft constitution?

Identifying the body that adopts the draft constitution is crucial as it affects the acceptability of the constitution. It is often the case that a single constitution-making body is responsible for both drafting and adopting a constitution. A Parliament or a CA could, for example, adopt a document it drafted. The CA of South Africa is an example of a constitution-making body that adopted a draft Constitution it created.[255] This arrangement is commended for its cost

[254] Suski 2010: 24. See also International IDEA 2008a: 58.

[255] Klug 1996: 32. Chapter 5 of the South Africa Interim Constitution (hereafter referred to as IC) headed 'The Adoption of the New Constitution', placed the responsibility for adopting the Draft Constitution in the hands of the CA. (Section 68 of the IC of South Africa) Chapter 5 of the IC begins by providing for the institutions of constitution making as follows, 'The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly.' In terms of IC 68(2), read with IC 68(3) and IC 73(1), the CA had to commence its task within seven days from the first sitting of the Senate. It was expected to draft and adopt a new constitutional text within two years of the first sitting of the National Assembly. Section 73(2) of the IC stipulated that adoption required a majority of at least two-thirds of the full membership of the CA. In terms of the succeeding subsections of IC 73, if the requisite majority is not obtained, two alternative mechanisms would be activated sequentially. First, a panel of constitutional experts appointed by the CA would be set up to resolve deadlocks within thirty days. Secondly, in the event that the draft text unanimously agreed upon by the panel of constitutional experts was not adopted by a two-thirds majority then the CA could approve any draft text by a simple majority of its members. Nevertheless, the new text would have first of all to be certified by the Constitutional Court, after which it would be submitted to a national referendum, requiring

effectiveness. It also reduces the risk of members calling for the rejection of the constitution at the adoption stage on the ground that it does not reflect the views of the major stakeholders. This result is avoided because the people who 'negotiated the constitution are the same as those approving the constitution'.[256]

However, it is also contended that allowing the body that created a draft constitution to adopt its own document increases the prospect of shoddy work.[257] Given that members are adopting a document they created, complacency and self-gratification might dominate the process of adoption. Allowing the same constitution-making body to adopt a constitution it created makes it also possible for members, who have a vested interest in the outcome, to escape scrutiny by ordinary citizens for whom the constitution is being created. It also undermines public accountability. The reason for this is that they are having a final say in the adoption of a document that they created. According to one author, this allows the constitution-making body to 'act as judge in its own cause'.[258]

In some cases, the body that adopts the constitution is different from the one that drafted the document. In terms of this arrangement, a CA or the legislature could adopt the draft constitution created by, for example, the Constitutional Commission. In the case of Kenya in 2010, for example; the draft constitution prepared by the CoEs was adopted by the National Assembly. The fact that the two bodies focus on different aspects of the process of constitution making appears to 'solve the problem of conflict of interest'.[259] It is also



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ratification by at least sixty per cent of all votes cast. In the event that the text failed to obtain sixty percent ratification, the President was empowered to dissolve Parliament and call a general election for a new CA. The new CA would have one year to pass a new constitution. However, in this case, the majority required for passage of the new constitution would be reduced from two-thirds to sixty percent. The alternative mechanisms were not activated as the CA opted to renegotiate the contentious issues until the required two-thirds majority could be attained. On the 8th May 1996, 86% of the membership of the CA adopted the proposed constitution (NT). Acting in accordance with rule 15 of the Rules of the Constitutional Court, the chairperson of the CA, submitted the draft to this Court, certifying that it had been adopted by the requisite majority and that it complied with the 34 constitutional principles. Concurrently, a request was made to the Court to perform its certification functions in terms of section 71(2) of the IC. See also Strand 2001: 22; Kuveya 2013: 2.

[256] Kangare 2013: 1. See also Makwiramiti 2013: 6; Rosenn 2010: 465.

[257] Ghai 2004: 7.

[258] Brandt 2011: 235.

[259] Elster 1995: 374. See also Mugwenyi 2012: 12.

contended that making one institution propose a constitution and another adopt is important in increasing public scrutiny and transparency.[260]

### 4.4.2 How are draft constitutions adopted?

An equally important consideration in the drafting of a constitution is how constitution-making bodies go about adopting draft constitutions. This is about the procedure that is followed in adopting a draft constitution. It is also about the level of support required to adopt a draft constitution.

The procedures for adopting a draft constitution are normally set out in legislation and vary from country to country. In some countries, every provision in the draft constitution has to be adopted individually. In other countries, the adoption focuses on the document as a whole.[261] Despite its shortcomings, adoption through parliamentary procedures appears to be the most commonly used method of adopting a draft constitution. Under age-old parliamentary procedures of approval, the proposed constitution typically goes through three 'ancient ritual' readings. As in the case of general legislation navigating through parliament, the first reading introduces the proposed constitution. Open debate on the proposed constitution is officially allowed in the second reading. The proposed constitution is brought back for a third reading where no debate is allowed and members are asked to vote. It is at this stage that a decision has to be made on adopting the draft constitution.[262]



### 4.4.3 Preliminary conclusion

From the foregoing, a number of critical issues relating to the adoption of a draft constitution arise. An important question in this regard is whether allowing the body that drafts *and* adopts the constitution is a preferable model. Related to this is the question of who adopts a draft constitution. The procedure is equally important. Should every provision of a draft constitution be adopted separately?

[260] Blount 2011: 51. Where there is deep mistrust of politicians, parliament is often not deemed to be a suitable institution for adopting the constitution. In the same vein, where a people-based process is not trusted, the CA is frequently not deemed by politicians to be an ideal body for adopting the constitution. See also Klug 1996: 43.

[261] Haysom 2002: 230. See also Gumbo 2012a: 3; Mhlotshwa 2012: 2.

[262] Oturu 2012: 3. See also Blount 2011: 49.

## 4.5 Ratification of the constitution through a referendum

The adoption of a constitution is usually followed by a referendum. This is a process through which ordinary citizens are involved directly in the approval of a draft constitution. The approval of a constitution through a referendum is called ratification.[263] It is the final validating act of a constitution. It represents a process of public endorsement.

Although the terms 'adoption' and 'ratification' are often used interchangeably, they do not necessarily mean the same thing. While adoption refers to a process in which one body accepts a document written by another body, ratification is a process in which ordinary citizens approve a constitution through a referendum. Ratification refers to a process in which ordinary citizens are asked to vote on the acceptability of a draft constitution in a referendum after it has been accepted by another constitution-making body. A constitutional referendum is undertaken well after a draft constitution has been adopted, usually by a legislature or its equivalent. In this case, authorities submit the document to ordinary citizens to determine whether or not they accept the draft constitution as the supreme law of the land.[264]

A referendum is based on the principle that '[t]he acceptance of a constitution requires confirmation by the majority of ordinary citizens before it assumes the force of law'.[265] It is based on the premise that ordinary citizens, as the true source of sovereignty, should have the final say. This makes a constitutional referendum a legitimising devise. A referendum, as one of the most transparent practical devices, helps to democratise the process of constitution-making as well as facilitating the culture of consultation based on the normative values of democracy.

The benefits of referendums are not always agreed upon. Some question the benefits of referendums. Although a referendum is the sole method by which ordinary citizens can directly participate in the approval of a constitution, according to some, it comes too late. It is contended that those casting their votes often have a poor understanding of the referendum

[263] Parkinson 1982: 6. There are variations on the question of mechanisms for regulating constitutional referendums. In some countries they are pre-regulated by constitutional rules. In other countries, legally prescribed norms suffice. Still in other countries, the rules to be followed are ad hoc as they are specified at the time the referendum is called. See also O'Brien 2010: 537.

[264] Campbell 2012: 4. See also Kuveya 2013: 3. See also Beramendi 2008: 17.

[265] International IDEA 2008a: 58. See also Sen 1999: 15; Elkins 2008: 11.

question on the ballot paper. A consideration that weighs in on the decision making processes of ordinary citizens is, it is argued, the question of the popularity of the government at the time of the referendum.[266] Questions are also often asked about the usefulness of referendums particularly in a situation where people who were passive in the preceding stages of constitutional development, endorse the constitution as meeting their expectations. One author specifically singles out the DRC in 2005 as a notable example of a country in which the voters overwhelmingly ratified a constitution they had not contributed in creating. It seems that the votes were motivated primarily by the hope that the approval of the constitution would bring an end to the civil war and foster peace.

Some argue that constitutional referendums are not always necessary. This is especially the case, they argue, in cases where a constitution-making body is fully representative. As argued by one author, a referendum often jeopardises what was agreed on following consultative engagements. According to this view, it is unwise to put what has been achieved to risk.[267] Not only do referendums produce fresh divisions, they also increase tensions in society. Reference is often made to the spike in the level of inter-ethnic violence as Kenyans drew closer to the constitutional referendum held in 2010. In one incident, four people were killed when supporters of the proposed constitution tried to disrupt a rally held by those calling for the rejection of the proposed constitution. In Iraq, an increase in sectarian violence was reported during the constitutional referendum of 2005 amongst the Shia, Sunni and Kurdish communities.



A referendum ensures that a draft constitution is scrutinised by ordinary people before it is adopted. Although a referendum could increase tension in society, this can to some extent be avoided if consideration is given to the manner in which it is organised.[268] Important is the need to ensure that the organisation of a referendum manifests the principle of transparency.

### 4.5.1 Who participates in a referendum?

A critical issue that determines the legitimacy of a ratification process is determining those that are eligible to participate in a constitutional referendum. As the discussion in Chapter Two has revealed, this is crucial. The Zimbabwean experience indicates that the use of a

[266] Blount 2011: 49. See also International IDEA 2008a: 56; Suski 2010: 8.

[267] Ghai 2013: 16. See also Doughman & Shiundu 2010: 1.

[268] Turner 2012: 4. See also Makwiramiti 2013: 3.

referendum does not necessarily facilitate the participation of the majority in confirming constitutions. In the case of Zimbabwe, they facilitated the participation of members of the white minority in confirming a constitution. The demographic majority were mainly excluded on the ground that they did not meet the stringent requirements expected of one to vote in the referendums. The net effect of this was that members of the black community did not participate in the constitutional referendums held in 1953, 1961, 1964, 1969 and 1978.[269] This clearly shows that the rules that determine eligibility to participate in a referendum must be given serious attention.

In some countries, only people whose names are entered on the voters' roll are eligible to vote. This is a qualification that people who voted in the 2010 constitutional referendum in Kenya had to meet. This raises the question of whether such stringent qualifications are necessary in order to determine those eligible to vote in a constitutional referendum. Some countries stipulate that all citizens that enjoy the full rights of nationality can cast a vote. Where this is the case, voters are only required to produce identity cards as proof that they are full citizens to vote in the referendum. Some argue that this is a better method for determining who votes in a constitutional referendum. As a constitution is a document that affects people's lives, they argue, voting qualifications need to be relaxed.[270]



### 4.5.2 Who sets the referendum question?

A referendum on a proposed constitution is, as a rule, conducted by authorities responsible for elections.[271] In some countries, the setting of the question is also the sole responsibility of the electoral authorities. In other countries, the framing of the question is the joint responsibility of the body that drafted the constitution and the electoral authority. Joint responsibility, it is contended, facilitates the implementation of the procedural constitutional principles of participation and transparency.[272] According to Walsh, not only does joint responsibility facilitate openness, it also ensures that ordinary citizens, through their representatives in the constitution-making body, are involved in 'setting the referendum

[269] See sections 4, 5, 6, 7 and 9 of Chapter Two.

[270] Phillipson 2013: 2.

[271] Shongore 2013: 3. See also Brandt 2011: 219; Oturu 2012: 7.

[272] Mwiti 2013: 2.

question'.[273] This point is echoed by Lee who argues that joint responsibility is 'in keeping with the principle of participation'.[274]

### 4.5.3 Campaigning before a referendum

Constitutional referendums are usually preceded by campaigns. The groups campaigning for and against the adoption of the draft constitution ought to be given an opportunity to appeal to the public. Many, however, have reservations about the usefulness of campaigns. They discount the role of campaigns in promoting public debate.[275] Referendum campaigns are said not to promote robust public debate. This is because those who are campaigning usually emphasise winning the contest and not fostering a healthy debate. They are not trying to help create an informed public but to win a victory for their point of view. The credibility of referendum campaigns, some contend, is 'compromised by their close association with routine elections'.[276] Also of concern is the fact that referendum campaigns are often accompanied by 'intimidation'. In the case of Rwanda, for instance, the government was accused of using the threat of genocide to intimidate people into ratifying the draft constitution. The fear of a 'second genocide' was evoked by the government in the event that the constitution was rejected. It is often said that constitutional referendums are less effective than public participation at earlier stages. The argument is that asking people to indicate 'yes' if they support the adoption of the constitution and 'no' if they reject the constitution as the supreme law of the country without giving them an opportunity to state in concrete terms the reasons for their answers undermines the usefulness of constitutional referendums. Whereas ordinary citizens may agree and disagree with many aspects of the constitution, the fact that their answers are reduced to a choice of two words casts doubt on the significance of the process. This is an issue which referendums do not address comprehensively despite their much acclaimed status as final acts of validation that cultivate a sense of public ownership.

Despite the criticism levelled against the use of referendums, they still hold traction in constitution-making. According to Suski, towards the end of the 1980s, 'the constitutional referendum constituted a decision making mechanism in around 30 per cent of the written constitutions' around the world. Between 1998 and 2007, 70 per cent of the referendums

[273] Walsh 2012: 4. See also Dow J.K, 2001: 111.

[274] Lee R, 2013: 4. See also Adelman 1998: 75.

[275] Griffiths 2013: 3. See also Ndlovu-Gatsheni & Brueton 2011: 2.

[276] Chinhange 2013: 5. See also Shongore 2013: 3.

carried out around the world were constitutional referendums.[277] The trend suggests an increase in the use of referendums in approving constitutions. The fact that constitutional referendums held in Zimbabwe, Cyprus and Kenya did not result in the adoption of a constitution suggests that they are indeed valuable instruments for ensuring that the will of ordinary citizens is given effect.[278] It also suggests that constitutional referendums are not only here to stay but that they will continue to give traction to the narrative on constitution-making.

### 4.5.4 Duration of campaigning

When campaigns are held, however, '[s]ufficient time should be devoted to a referendum campaign that allows for public education and debate'.[279] For example, many have expressed the view that the two weeks set aside for campaigns by the Government of Rwanda before the constitutional referendum of 2003 was insufficient to appeal to voters. More time was needed to enable people to familiarise themselves with the provisions of the constitution before they decided its fate. As a document that is supposed to endure well into the future, people need more time to reflect on a draft constitution before they can vote. More time is also needed to ensure that people 'digest' the implications for their lives of accepting or rejecting the constitution. When people are rushed, there is often little time to consider the effect that accepting or rejecting the constitution will have on future generations. There is also the danger that politicians seeking 'spurious legitimacy' will manipulate the referendum to promote elite interests and not the common good.[280]

### 4.5.5 How do people vote in a referendum?

Of equal significance is the manner in which a constitutional referendum is organised.[281] The general practice is that a constitutional referendum is conducted throughout a country in one day. In a federative state, however, each of the provinces or regions separately casts a vote on the draft constitution. This was the case in the US in 1787.

[277] North 2013: 2. See also International IDEA 2004: 5.

[278] Turner 2012: 3. The referendum of Zimbabwe was held on 12 February 2000, that of Cyprus on 24 April 2004 and that of Kenya on 21 November 2005. See also Aucoin 2004: 3.

[279] International IDEA 2008a: 56. See also Klug 1996: 20.

[280] Brandt 2011: 302. See also Turner 2012: 9.

[281] Laycock 2011: 5. See also Kuseni 2013: 2.

Voting as a rule takes place at designated polling stations. Upon verification of personal details, voters are given a ballot paper with two choices. Thereafter, they enter the polling booth. On the ballot paper, voters answer 'yes' if they accept the proposed constitution as supreme law or 'no' if they reject the draft constitution. This was the case, for example, in Kenya in the constitutional referendum of 2010.[282]

In some countries, a shaded ballot paper is used to decide the referendum question.[283] This was the case in the constitutional referendum of Benin in 1990. In this regard, a white paper signified acceptance of the entire draft constitution. A green paper signified acceptance of the draft constitution but without a presidential limit and a red paper signified rejection of the draft constitution. A red ballot paper was also understood as supporting the semi-presidential executive system. The use of colours assisted illiterate voters. For the constitutional referendum held in Kenya in 2010, two colours were used to assist illiterate voters. Green meant voters accepted the draft constitution while red denoted rejection.

### 4.5.6 Thresholds for constitutional referendums

The thresholds for ratifying draft constitutions, which are often stated in either a constitutional or statutory framework for a referendum, vary from one country to another.[284] It is also difficult to indicate the ideal threshold required for ratifying a constitution. A lot depends on the context and constraints of each case.



In some countries, a simple majority suffices to ratify a constitution. Uganda is an example of a country where a simple majority sufficed as the basis for ratifying a constitution. A key criticism of the simple majority is that it 'does not give enough protection to minorities'.[285]

In other countries, a two-thirds majority is required to pass a constitution. Other countries require both an overall national majority of the votes cast and a majority in at least three quarters of the states. Australia is an example of a country where passage requires both an overall national majority of the votes cast and a majority in at least four of the six states.[286] In the case of Kenya, to be passed, the constitutional referendum of 2010 'required a simple

[282] Makau 2012: 6.

[283] North 2013: 5. See also Zhanje 2012: 3.

[284] Haysom 2002: 230.

[285] Campbell 2012: 4. See also Shongore 2013: 3; Nyika 2012: 4.

[286] IDEA 2007: 2.

majority over-all and at least twenty-five percent of the votes in five of the country's eight provinces'.[287] With regard to the Iraqi referendum of 2005, 'the requirement was both a majority of 'Yes' votes nationwide and that not more than two governorates (out of eighteen) have a 'No' vote by two-thirds or more of the registered voters'.[288]

### 4.5.7 Preliminary conclusion

From the foregoing, it is clear that a number of issues determine the success of a ratification process. A key issue is the question of who votes in a referendum. This is about voting requirements. There is also the issue of who sets the referendum question. The relevance of campaigning during a constitutional referendum deserves attention. The threshold for ratifying a constitution is equally crucial. At the end of the day, the question is whether and to what extent the ratification process allows for the manifestation of the views of the broader community.

## 4.6 Endorsing the constitution

Although not always the case, ratification is followed by a process of endorsement. Endorsement entails a process in which the text of the constitution is tested against the principles that were agreed to by the major parties as forming the basis for drafting. Only when the text has passed the test does the constitution get confirmed. Usually it is a body that did not participate in the drafting of a constitution that endorses a constitution.[289] The most common example is South Africa.

In South Africa, the Constitutional Court endorsed the Constitution that was created by the Constitutional Assembly in 1996.[290] The endorsement of South Africa's Constitution of 1996

[287] Oturu 2012: 4. See also Reynolds 2012: 6.

[288] Brandt 2011: 328. The governorates are the equivalent of provinces/states.

[289] Kuveya 2013: 2. See also Klein & Sajo 2012: 436.

[290] Ebrahim & Miller 2010: 139. The Constitution Court of South Africa is a supreme court established by the 1996 Constitution of South Africa. It was originally the final appellate court for constitutional matters. Since the enactment of the Superior Courts Act, the Constitutional Court has jurisdiction to hear any matter if it is in the interests of justice for it to do so. The court was first established by the Interim Constitution of 1993, and its first session began in February 1995. It is also tasked with certifying provincial constitutions. On 2 September 1997, the Constitutional Court refused to certify the text of the proposed Constitution of the Western Cape as some of its provisions were deemed to be inconsistent with the provisions of the national Constitution. The Constitution was referred back to the Western Cape provincial legislature to correct the impermissible sections,

can be traced back to the Interim Constitution (hereafter referred to as the IC) of 1994. Section 71(1) of the IC read with section 71(2) of the IC, provided that the South African Constitution of 1996 would only come into force after complying fully with the 34 constitutional principles that formed the basis for its creation and after being certified by the Constitutional Court. In interpreting the constitutional principles and determining the validity of the final text before it, the Constitutional Court enjoyed absolute discretion. Its decisions were final. Section 71 (3) of the IC provided that '[a] decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof'.[291]

In its first certification judgement on 6 September 1996, the South African Constitutional Court rejected the Constitution as not being in conformity with a number of the 34 constitutional principles set out in Schedule 4 of South Africa's 1994 IC. Consequently, the Constitution was referred back to the CA for further review. The CA amended the document to bring it into compliance with the constitutional principles. The CA adopted the amended text on 11 October 1996.[292] The Constitutional Court certified the 1996 Final Constitution of



and an amended bill was passed on 11 September 1997. It was certified by the Constitutional Court on 18 November 1997. On 15 January 1998, the Constitution was signed by the Premier and came into effect on the following day. On 6 September 1996, the Constitutional Court refused to certify the text of the proposed constitution of Kwazulu-Natal as it was deemed to contain provisions that were inconsistent with the national constitution. The Constitutional Court consists of eleven judges who are appointed by the President of South Africa from a list drawn up by the Judicial Services Commission. The judges serve for a term of twelve years. The court is headed by the Chief Justice of South Africa and the Deputy Chief Justice. The duty of the judges is to uphold the law and the constitution, which they must apply impartially and without fear, favour or prejudice. The constitution requires that a matter before the court be heard by at least eight judges. In practice, all eleven judges hear almost every case. Decisions are reached by a majority vote of the judges sitting in a case. Each judge must indicate his or her decision, and the reasons for the decision are published in a written judgment.

[291] Brooke 2005:6. In Burundi, constitutional principles were drawn from the Arusha Peace and Reconciliation Agreement. The Agreement provided for a parliament composed of a national assembly and a senate as the body that would draft the constitution. The draft would then be assessed by the Constitutional Court which would assure its compliance with the constitutional principles. In the event that it was certified, the document would be submitted to a constitutional referendum. Only after being ratified by ordinary people would it become the constitution of Burundi.

[292] Certification of the Constitution of the Republic of South Africa, 1996: 18.

South Africa on 4 December 1996. The full order of the Court in the Certification of the Amended Text of the Constitution of the Republic of South Africa on 4 December 1996 reads as follows:

> We certify that all provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in Schedule 4 to the Constitution of the Republic of South Africa, 1993.[293]

There are obvious advantages in making a constitutional court confirm a constitution. The fact that an unelected body, the constitutional court, is mandated to review the decisions of a democratically elected body (the CA in the case of South Africa) represents a great leap of faith in a country's legal system. This is because a constitutional court 'enforces political agreements that usually accompany constitution making'.[294] The use of a constitutional court to confirm a constitution reflects a 'lingering respect for the law as a means of dealing with conflict'.[295] It is also an indication of a 'country's strong legal tradition'.[296] More importantly, it ensures that the process of assessing the text against the principles 'reflects the same open manner as the drafting'.[297] Using a constitutional court to confirm a constitution helps strengthen constitutional democracy. Being in general a respected institution, the involvement of a constitutional court could increase the credibility as well as the public acceptance of a constitution.

Of course, the involvement of the judiciary in the endorsement of a constitution is not without controversy. There are also those who question the suitability of a constitutional court to

[293] Certification of the Constitution of the Republic of South Africa, 1996. The Constitution came into force on 7 February 1997. See also Benomar 2003a: 94; Chifodya 2013: 1.

[294] Miller E.L, 2010: 627. The common practice is that constitution-making is preceded by an agreement by political parties. Sometimes the political agreements are given legal effect but in the majority of cases they are not. Recently, constitution making in South Africa, Namibia, Kenya and Nepal was preceded by an agreement signed by political parties. In the case of South Africa, by endorsing/certifying the 1996 Constitution, the Constitutional Court effectively enforced a political agreement that was dominated by political parties, including the ANC and the NP. See also Centre for Constitutional Dialogue 2009: 11.

[295] Miller E.L, 2010: 627.

[296] Chifodya 2013: 3.

[297] Ebrahim & Miller 2010: 140. See also Kurehwa 2013: 2.

confirm a constitution.[298] In the context of South Africa, the major concern was that the issues that the South African Constitutional Court was asked to assess were predominantly value laden political choices. They were the upshot of 'values that are themselves heavily contested'.[299] Moreover, the constitutional principles against which the text was legally assessed were essentially political agreements concluded among political parties bringing an end to conflict.[300] The argument is that the process of constitution-making is manifestly political and a constitutional court is not an appropriate site for political struggles. It is argued that such a process 'legalises' the constitution-making process, which, according to some, aggravates deep social divisions by finding for one party when what is needed is a compromise. The point is that the issues that need assessment 'are less legal than political'.[301]

In some cases, the endorsement of a constitution is left to international actors or the international community.[302] This option has been used in countries where international actors



[298] Miller E.L, 2010: 627.

[299] Campbell 2012: 4.

[300] As argued by some, '[w]hichever way it decided, the court [i.e. the South Africa Constitutional Court] risked jeopardising the credibility it had established as well as public acceptance of the outcome.' See Kurehwa 2013:2. See also Elster 1995: 366.

[301] Kurehwa 2013: 2. See also Brooke 2005: 14; Maturu 2012: 2.

[302] Brandt (2011: 175) defines the 'international community', in this context, as a collective term that refers to the broad range of countries and other international actors that may influence, directly or indirectly, a constitution-making process. She identifies at least six main categories of international actors that may make up the international community in any post conflict context. Category 1 comprises international, regional, and multilateral organisations, such as the United Nations, the African Union, the European Union, the League of Arab States, and the South Pacific Forum. Category 2 is made up of international agencies, such as United Nations agencies, most often the United Nations Development Programme; the United Nations Development Fund for Women; the United Nations Children's Fund; and the Office of the United Nations High Commissioner for Human Rights. Category 3 comprises individual countries that may have a direct interest in a constitution making process and provide diplomatic influence or skills, technical assistance, or resources. The individual countries may be from the region or beyond it. In the past, they have included countries and organisations such as Australia, Denmark, Norway, Canada, Switzerland, the United States and the United Kingdom, the Australian Agency for International Development, the Department for International Development, and the Office of Transition Initiatives of the United States Agency for International Development. Category 4 comprises domestic organisations from one country that take an interest in another country's constitution-making affairs. For example, in 2010, churches from the United States funded parts of the 'No' side in Kenya's constitutional campaign (primarily because of the abortion issue). Category 5 comprises individual advisors who

were involved in a constitution-making process. Afghanistan's Constitution of 2004 falls in the category of a constitution that was endorsed under a high degree of external involvement, direction, guidance and supervision. Other countries that fall in this category include Cambodia, East Timor, Bosnia and Namibia.

The practice of endorsement through international actors is appealing in cases where there is no legitimate and impartial institution locally to undertake the task of endorsement. It, however, brings its own challenges. Its application begs the question of the appropriateness of the international community getting too involved in the creation of constitutions, creating fear that constitutions might be imposed on sovereign countries. The fear is that the international actors' influence 'tends to undermine national ownership of the process'.[303] Without the endorsement of ordinary citizens, the legitimacy of the constitution becomes debatable. It raises the question whether it is even appropriate that a constitution should still go into operation when those for whom it was meant did not have a say in its endorsement. Endorsing a constitution through international actors seems to fall in the category of models in which 'constitutions are gifted'.[304]

From the foregoing, a number of key issues that determine the success of an endorsement process emerge. The significance of an independent and impartial body to assess the draft constitution against agreed principles cannot be discounted. The challenge is identifying the body that is most appropriate and perhaps legitimate to endorse a constitution. This applies to the use of a constitutional court but more importantly to the involvement of international actors. Who should be responsible for endorsing a constitution? Equally important is the issue of protecting the decision of the body endorsing a constitution.

## 4.7 Assent

Endorsement paves the way for the assent of the constitution. This is where the head of state or government, as the case may be, signs the constitution into law. This arrangement is

are often provided and remunerated by a particular international institution or government but generally do not represent them. See also Bonime-Blanc 2010: 419; Elkins 2012: 1145.

[303] Brandt 2011: 321. See also O'Brien 2010: 345.

[304] Walsh 2012: 5. When constitutions are gifted, ordinary citizens do not have a say in how they are conceived. Politicians or rulers decide the content. The rationale, it is argued, is that politicians or rulers are endowed with the knowledge of what is good for the society. The constitution is presented as if it was a gift to ordinary people. Such constitution making is inconsistent with the 21st century as it is elite driven. See also Brandt 2011: 13.

provided for in the constitutions of most countries. Portugal and South Africa are examples of countries that require the signature of State Presidents on new constitutions.[305]

Although an important part of a constitution making process, there is not much significance attached to assent. This is because it is largely a symbolic and ceremonial act, devoid of any practical significance.[306] The assent is a formal act.

The main highlight of assent is the State President signing the constitution into law. Usually, this is an event that is attended by dignitaries such as representatives of other countries and is televised.[307] Often, a question is asked about what happens, for example, should the head of state or government, as the case may be, refuse to sign the constitution into law for one or another reason. As mentioned earlier, the act of assenting to a constitution is a formal gesture meant to uphold a certain tradition. The refusal of State Presidents or their equivalents to sign the document, it seems, has little material effect on the coming into effect of the constitution. At the time of the assent, the constitution would have already been adopted and ratified. Based on this view, many have argued that once a constitution was adopted and ratified, it can still come into effect even if State Presidents or their equivalents refuse to assent.[308]

It can, indeed, happen that a State President can refuse to sign into law a constitution that was duly adopted by a constitutional body.[309] That happened in Eritrea. In 1997, a draft was produced by a Constitutional Commission and ratified by a CA. The draft constitution was then submitted to State President Isaias Afewerki for his assent. In a bid to consolidate his grip on power, the State President refused to assent to the Constitution. The net effect of this is that Eritrea is today the only African country with a ratified constitution that is not operational.[310]

[305] Chifodya 2013: 2. See also Berns 1988: 10; Lee R, 2013: 3.

[306] Turner 2012: 8. See also Aucoin 2004: 4.

[307] Makwiramiti 2013: 8. See also Zhanje 2012: 4.

[308] Mambare 2013: 2. See also Nandlall 2013: 2.

[309] Medhanie 2008: 24. See also Selassie 2010: 73; Goredema V, 2013: 5.

[310] Walsh 2012: 4. The refusal by State President Isaias Afewerki to grant presidential assent caught both researchers and practitioners by surprise. At the time, no one imagined the possibility of the State President refusing to bring the constitution into operation. The fact that the government had supported the constitution-making process gave many the impression that the State President would assent. Added to this was the fact that a duly appointed CA and National Assembly had endorsed the constitution. It is against this background that

### 4.8 Promulgation

The presidential assent is usually followed by promulgation. Promulgation is the official publication of the constitution in a Government Gazette, a publication where government announcements on appointments and new laws are made.[311] In some countries, the constitution is made public in a ceremony attended by the executive, the leaders of the opposition political parties and other important dignitaries that are invited.

Usually, promulgation signifies the coming into effect of a constitution, marking the end of a long and tedious process.[312] But in some cases, aspects of the constitution may not come into effect immediately as implementation may be postponed until a later date. Usually, the date of coming into effect might be deferred until the government has attended to certain issues. However, in some cases, the constitution comes into effect without delay.

## 5. Concluding remarks

From the foregoing, it is clear that the process of constitution making is as significant as the content. An understanding of the process of constitution-making is important in installing constitutions with longevity. As the case of South Africa teaches us, perhaps as much time and energy needs to be spent 'negotiating the process of arriving at the final constitution than on negotiating the substance of it'.[313]



This Chapter has not presented a model constitution making process. Neither has it presented a model constitution-making body. That was not the aim. The aim was to provide a survey of issues that often arise in relation to constitution-making efforts. What this Chapter has tried to do is identify the relevant issues that must be considered in evaluating the making of a

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there is currently a debate about whether constitutions should have express provisions compelling State Presidents to sign them into law even if State Presidents do not necessarily agree with some of the contents in the constitutions submitted to them. Looking backwards, Professor Bereket Habte Selassie, Chairman of the Constitutional Commission that drafted the 1997 Eritrean Constitution, recently wrote, 'It was a mistake not to fix an effective date, or at least specify a period after which the constitution would come into full force and effect'. See Selassie 2003: 312 and Selassie 2010: 76. If these issues had been specified, the constitution would have come into effect by default.

[311] Selassie 2010:74.

[312] North 2013: 5. See also Chisora 2013: 2; Brandt 2011: 220.

[313] Hussein 1999: 25.

constitution. It is against this background and using it as a template that we now proceed to examine the successive constitution-making projects in Zimbabwe.

# Chapter Four: Constitution making in the era of constitutional principles: The history of constitution-making in Zimbabwe from 2000 to 2007

## 1. Introduction

In view of the development of the constitutional principles discussed in Chapter Three, it is clear that the successive constitution-making projects in Zimbabwe discussed in Chapter Two were far from being inclusive, participatory and transparent. As many of the constitution-making efforts that the country saw before independence did not allow for the representation of black Zimbabweans in the constitution-making bodies, they were patently non-inclusive. The 'privilege' of participating in the processes that led to the adoption of the successive constitutions was also largely limited to members of the white community. In some cases, not even all members of the white community were allowed to participate in the constitution-making project as the latter was reduced to the affair of the ruling political party. Furthermore, transparency was not the defining characteristic of the institutions and the processes that helped to create the successive constitutions. Often, the creation of a new constitution was characterised by secrecy.



By the end of the 1990s, the deficiency of the institution and process that led to the adoption of the successive constitutions, including the Lancaster Constitution, and their contents were becoming a major political and constitutional issue in Zimbabwe. The eradication of racial discrimination and the achievement of equality was no longer a major constitutional issue.[1] With well over 90% of the population wallowing in abject poverty and with no prospect of improvement in their material well-being, citizens started to question the meaning and value of independence. Increasingly, questions of social justice entered the public discourse triggering a call for a new constitution that would help to transform the Zimbabwean society.

Inspired by developments related to the emerging constitutional principles, civic society organisations started to lobby for constitutional reform. Increasingly, civic society organisations and the State were on a collision course. Those in control of the state favoured incrementally amending the constitution, while civil society organisations wanted a complete

[1] The coming into effect of the 1980 Zimbabwe Lancaster House Constitution saw the eradication of most laws that were considered to be unjust. It also saw full voting rights being bestowed on previously excluded segments of the population. Importantly, it ushered in nation building based on the equality of citizens.

transformation through a new constitution that would be created by a body over which the State has little or no influence. With government developing cold feet on the matter, the stage was set for a confrontation. With every election held being disputed and the economy showing no signs of improving, civil society organisations intensified the call for the creation of a new constitution. Eventually, the state succumbed to the idea of creating a new constitution. However, there was no agreement on how the constitution should be created.

Chapter Four assesses the institution and processes of constitution-making during the period between 2000 and 2007. It does this by analysing the institutions that were used to create new constitutions and each stage of the constitution-making process. The aim is to ascertain the extent to which the institutions and processes used to create the various draft constitutions were inclusive, participatory and transparent.

The quality of constitution-making might have varied in the period under discussion. Nevertheless, a central finding of this Chapter is that the successive constitution-making bodies failed to generate legitimate and durable constitutions. At the centre of this is the fact that the institutions and processes of constitution-making were not able to transcend everyday politics. As the discussion in this Chapter shows, the history of constitution-making was characterised by processes and institutions that made the creation of legitimate constitutions impossible.



## 2. The 2000 constitutional process

Since its enactment, nineteen amendments had been effected to the Lancaster House Constitution.[2] This led civil society to argue that the piece-meal constitutional changes have transformed the Lancaster House Constitution such that it no longer bore any resemblance to the original constitution, which was negotiated and consented to between Britain and the major political actors in 1979.[3] Members of civil society also pointed to the limitations of

[2] The last amendment was effected in 1998. It was Constitution Amendment No. 15 which changed government financial year from 1 July to 1 January.

[3] Kagoro 2004: 240. There were many reasons given for wanting to replace the Lancaster House Constitution. Some of the reasons involved objecting to the amendment of the Constitution at the instigation of the ruling party for political reasons. Some of the amendments were objectionable as they sought to reverse judicial rulings which had set standards for constitutional conduct by the state. Others facilitated a direct assault on the very liberties espoused in the Constitution. On the other hand, however, some authors argued that some of these amendments were necessary and therefore unavoidable. Some of the constitutional amendments such as those

constitutional amendments in responding to the demand for broad-based and inclusive consultation with all stakeholders. The offensive piecemeal constitutional amendments were, therefore, cited as a reason for demanding the establishment of another constitution.

On 26 April 1999, under pressure from ordinary citizens, the State President, Robert Mugabe, appointed, through Statutory Instrument (138A of 1999) a 500 member Constitutional Commission.[4] Of the 500 commissioners, 150 were elected Members of Parliament and 350 were ordinary citizens drawn from outside of state institutions. Those appointed included members drawn from civil society; they were sworn in on 21 May 1999.

The State President appointed his acquaintance, Justice Godfrey Chidyausiku, the then Judge President of the High Court, who is currently the Chief Justice of Zimbabwe, to chair the Constitutional Commission.[5] He was assisted by three deputy chairmen: Professor Walter

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on the acquisition of land and abolition of the twenty seats reserved for white Zimbabweans were deemed necessary as they dealt with age-old issues. Some of the amendments were not surprising since the Lancaster Constitution of Zimbabwe was a 'ceasefire document' conceived during peace talks to protect selected interests. There are other reasons, though, besides those outlined above which were often presented as legitimate for replacing the Lancaster House Constitution. These relate mostly to shortcomings with respect to institutional design and the procedures behind the creation of the Lancaster House Constitution. The combining of peace agreement and drafting of the constitution resulted in a constitution which entrenched disagreements and contained unsavoury provisions. The constitution-making process was not based on the right to participative engagement. Another reason pertained to the fact that the Constitution entrenched the colonial legacy as some of its provisions promoted the status quo. The constitution did not facilitate changes in the economic and political structure of society. Further, it did not create a legitimate framework for transforming the colonial state from one which promotes economic disparities to one that focuses on the equitable distribution of national resources. The Constitution was also criticised for protecting the land rights of white Zimbabweans, on the one hand, while failing to extend the same protection to the rights of their black counterparts on the other. The land tenure system is ranked as one of the top grievances which prompted nationalists to wage an armed struggle against colonial rule. See also Kersting 2009b: 7.

[4] Miller E.L, 2010: 620. Zimbabwe's Commissions of Inquiry Act (Chapter 10: 07) of 1996 provides for the creation by the State President of Commissions of Inquiry to investigate aspects of a public nature including the creation of a constitution. Section 2 of the Act empowers the State President to appoint members of Commissions of Inquiry. It also directs the State President to come up with the terms of reference of the Commission. Commissions submit their reports as recommendations to the appointing authority - the State President - who can, either accept, vary, amend or reject the report. See also Government of Zimbabwe 1999a: 3; Blair 2002: 52.

[5] Three people have been appointed Chief Justices since Zimbabwe attained majority independence in 1980. Justice Enock Dumbutshena, the first black Chief Justice, served from 1984 to 1990. He was replaced by

Kamba, who, at the time, was Dean of the Namibian Law School and former Vice-Chancellor of the University of Zimbabwe; Reverend Bishop Jonathan Siyachitema of the Anglican Church; and Mrs Grace Lupepe, a prominent citizen. In addition, the President appointed Charles Utete, Chief Secretary to the President and Cabinet, as the Secretary of the Constitutional Commission.[6]

The Constitutional Commission was assigned one broad mandate. In the words of President Mugabe, the Commission was tasked to 'review the Lancaster House Constitution, as amended, and to appreciate the functions and powers of the three principal pillars of state (that is, the Executive, the Legislature and the Judiciary) and the extent and scope of the Bill of Rights…..'[7] It was given unlimited authority to design its procedures and modalities for establishing a new Constitution including convening plenary sessions and such other sessions as it deemed necessary. It was also granted authority, where necessary, to create such necessary committees and subcommittees as it deemed expedient for the purpose of collecting evidence relevant to ascertaining the wishes of ordinary citizens.

The Commission was divided into nine thematic committees. The thematic committees were categorised as committees dealing with: (a) executive organs of state; (b) citizenship, fundamental and directive rights; (c) separation of levels of government; (d) public finance



Anthony Gubbay, a white Zimbabwean, who served in the position from 1990 to 2001. Accused of holding out against the Executive, Anthony Gubbay was forced to take early retirement. His departure should be read and understood in the context of the politics of the day. The courts had ruled government's fast track land resettlement programme illegal as it was done with gross disregard for the rule of law. The ruling prompted the government to hasten the transformation of the complexion of the bench which was largely white and male and did not reflect the country's demographics. Anthony Gubbay's forced resignation saw Godfrey Chidyausiku, the Judge President of the High Court, being appointed Zimbabwe's new Chief Justice. Chief Justice Godfrey Chidyausiku read law at the University of Rhodesia Law School (now University of Zimbabwe Law School) from 1968 to 1972. Upon graduating, he went into private legal practice. In 1980, Godfrey Chidyausiku was elected to Parliament on a ZANU PF ticket. Later that same year, he was appointed Deputy Minister of Local Government and Housing and of Justice. He served in that capacity until 1982 when he was appointed as Attorney-General. He was later promoted to be a Judge. Godfrey Chidyausiku went on to serve as Judge President of the High Court until March 2001 when he was appointed acting Chief Justice. His appointment as Chief Justice was confirmed in August 2001.

[6] Hari 2013: 2. See also Hatchard 2001: 210.

[7] Government of Zimbabwe 1999b: 2. See also Thornycroft 2009a: 1; Hatchard 2001: 211.

and management; (e) customary law; (f) independent commissions; (g) separation of powers among the three branches of government; (h) transitional arrangements; and (i) legal matters.[8]

Following the composition of the thematic committees, the Constitutional Commission created outreach consultation teams. These were groups of people who would tour the country holding meetings with people on what they wished to see incorporated into the new constitution. Ten consultation teams were created, each comprising forty-three commissioners. Members to the consultation teams were drawn from the thematic committees listed above. Each thematic committee included members from each of the nine committees. The commissioners from each thematic committee ensured that ordinary citizens were fully consulted on the issues, which the thematic committees were created to oversee. It was the duty of the representatives in the outreach teams to report back to their respective thematic committees about the contributions made by ordinary citizens.[9]

Each of the ten provinces was assigned its own consultation team. To assist structured consultation and 'promote public discussion and debate', the Constitutional Commission produced a document termed a 'List of Constitutional Issues and Questions'.[10] This was followed by a structured consultation programme designed to solicit the views of ordinary citizens on the new constitution.



Although the teams were dispatched to the provinces, in reality consultation took place at the district level.[11] The team moved from one district to another undertaking consultation until all residents of that province were afforded an opportunity to give 'their views on the contents of the new constitution'.[12] The Commission held 4321 meetings that were attended by 706 276 people throughout all the districts of Zimbabwe. The consultations took the form of public

[8] Veritas 2011a: 2.

[9] Chimbwa 2012: 4. See also Mandaza 2012: 3.

[10] Dorman 2003: 850.

[11] Hari 2013:1. Zimbabwe is divided into ten provinces of which two (Harare and Bulawayo) are metropolitan provinces. Provinces are bigger than districts. Each province is made up of districts. The number of districts varies in relation to the size of the province. Some provinces thus have more districts than others. Districts are in turn, divided into wards. A ward is made up of villages or neighbourhoods. The size and number of wards vary in relation to the size of the district. A village or neighbourhood is the smallest local government unit. The Constitutional Commission ensured that consultation was brought closer to where people live. See also Kuveya 2013: 4.

[12] Hatchard 2001: 211.

hearings and oral submissions. Citizens were encouraged to make written submissions to the Constitutional Commission. They were also encouraged to submit their views on the Constitutional Commission's website. In total, 7000 written individual submissions were made. Through 158 radio and television programmes, the Constitutional Commission engaged ordinary citizens on their constitutional preferences. Civic society organisations and experts contributed ideas mainly through oral submissions.[13]

Following the consultations, the Constitutional Commission held a one day plenary. It was at this plenary that the provincial consultation teams reported back their findings. The report back session was broadcast live on radio and television. Once the provincial consultation teams had finished tabling their reports, political parties submitted their reports and then interest groups followed suit. The following day, the print media published the provincial reports.[14] In some cases, this was followed by an analysis of the provincial reports. Once the results of the consultation were in the public domain, the Constitutional Commission tasked the thematic committees with categorising the views generated through consultation. The data was uploaded onto the computer servers of the Constitutional Commission leading to the next stage in the process, namely drafting.



The drafting stage of the process started with the Constitutional Commission inviting potential drafters to submit their curricula vitae, indicating professional qualifications and experience. Potential drafters were interviewed by the Constitutional Commission. Consequently three drafters were deemed suitable and contracted: Moses Chinhengo, a former High Court judge in Zimbabwe and Botswana, Brian Desmond Crozier, a former director of legal drafting in the Attorney-General's Office and law lecturer at the University of Zimbabwe and Priscilla Madzonga, a partner of Costa and Madzonga Legal Practitioners.[15]

The process of drafting was carried out under the direction of the thematic committees of the Constitutional Commission and scarcely took into consideration the significance of already existing constitutions.[16] The thematic committees 'distilled issues'. The 'distilled issues' were handed to the Constitutional Commission as recommendation. Once considered and approved, the recommendations were then submitted to the drafters for incorporation.

[13] Mandaza 2012: 2.

[14] Reynolds 2012: 10. See also Veritas 2012a: 3; Chifamba 2013: 2.

[15] Campbell 2012: 8.

[16] North 2013: 4.

Operationally, the drafters referred their work to the Constitutional Commission for assessment and approval. Often, the drafts came back with instructions indicating provisions that the Constitutional Commission wanted modified. The communication between the two sides, mediated through the Chairman, continued until the Constitutional Commission was satisfied with the product.[17]

Once a draft was in place, the Constitutional Commission called for a second plenary. The objective of the second plenary was to afford members an opportunity to react to concrete constitutional proposals in the draft Constitution. The plenary started on 15 November 1999 and was scheduled to last one day. However, because the debate was heated, it spilled over into 'Day 2' and 'Day 3' before the Chairman of the Constitutional Commission intervened by halting the debate. Even then, it was clear that the commissioners were far from coming to an agreement. To the surprise of many, the Chairman of the Constitutional Commission, however, went on to declare that the draft constitution is duly adopted 'by acclamation'.[18]

The startling declaration drew wide criticism. Some pointed to the fact that '[t]here were a number of members who stated publicly that there was a huge discrepancy between the views of ordinary citizens and the final draft'.[19] Others, however, argued that the procedure that the Chairman used to adopt the draft constitution was well within the Commission's broad terms of reference. The modalities for adoption were not specifically outlined in the commission's terms of reference or the enabling legislation. In the absence of formal procedures for voting, including the necessary majority needed to adopt the report, the Chairman, so went the argument, was within his rights to act in the manner he did, however inappropriate it may appear.

[17] Nyaira 2010: 3. See also Chibaya 2012: 3; Nemukuyu 2012b: 4.

[18] Gava D, 2013: 3. Acclamations are often accused of being tantamount to rule by the mob in which dissenting voices are ignored. Also known as a 'voice vote', 'oral vote', or 'enthusiastic vote of approval' an acclamation is not a formal vote. The voting group is asked who favours the draft constitution and who opposes it. People show approval either by loud shouting, cheering, applause, clapping of hands and other demonstration of agreement. In the event of no or little opposition, the draft constitution is deemed to have been passed through acclamation. Acclamation expedites the approval of a draft constitution. It is also cost effective. However, an acclamation suffers from a number of shortcomings. A major weakness relates to its organisation and execution. Its informal nature makes it very vulnerable to manipulation. In the absence of firm procedures, it often facilitates an outcome that is not only contested but is polarising as well. See also Slinn 2004: 32; Chitwa 2009: 3.

[19] Mapara 2004: 3. See also The Standard 1999: 2.

Soon after adoption, the draft constitution was submitted to the State President. Upon consideration, the State President personally made alterations to the draft constitution. The draft constitution was endorsed by the cabinet on 19 November 1999. On 30 November 1999, the draft constitution was published in the Government Gazette. On 19 January 2000, under the heading 'Corrections and Clarifications', the government again published in the Government Gazette, the final draft constitution.[20] In total, forty amendments were made to the draft constitution adopted by the Constitutional Commission under the guise of 'corrections and clarifications'.[21] The executive justified the amendment of the document through a statement published in the national media:

> It is common cause that any draft is by definition subject to improvement by way of grammatical and factual corrections as well as linguistic clarifications in order to avoid any doubt about the meaning of what is in the draft. The corrections and clarifications below were done on the basis of the records of the Commission's Committee minutes and published in the Commission's 1437 page Social Report. It's all there for the asking and there is nothing new because the record is public and therefore speaks for itself. Only people with literacy problems or hidden political agendas will find it difficult to tell the otherwise clear difference between corrections and clarifications on the (sic) one hand and amendments on the other. Don't be misled.[22]



Many were not convinced by the response of the executive. In fact, some members of the Commission approached the High Court, challenging the validity of the draft Constitution that the State President now planned to submit for referendum. The challenge was based on four grounds. First, it was argued that the undemocratic manner in which the draft was rushed through the third plenary session renders the document unacceptable. Second, it was argued that commissioners had not robustly debated the draft prior to adoption. Third, it was

[20] Kagoro 2004: 247. See also Shaw N, 2000: 5; Gumbo 2012b: 2.

[21] Reynolds 2012: 8.

[22] Hatchard 2004: 12. The draft constitution provided for an Executive President when, during consultation, ordinary people had indicated that they preferred a ceremonial President. Although it established the Prime Minister as the Head of Government, the Executive President enjoyed wide discretion in who was appointed Prime Minister. The Executive President could appoint as Prime Minister any person who was a Member of the National Assembly. If parliament passed a vote of no confidence in the government, the Executive President was to remove the Prime Minister and every Minister from office within 14 days and appoint a new Prime Minister. Farmers whose land was acquired by the government for purposes of resettlement were not to be compensated. During consultation, however, ordinary citizens had overwhelmingly indicated that such farmers should be compensated.

maintained that the unilateral amendment of the draft by the State President is objectionable. Fourth, it was argued that there is a clear disparity between the content of the draft constitution and the views submitted through consultation.[23] Based on these and other arguments, the dissenting commissioners approached the High Court and challenged the State President on the document he planned to submit to citizens for a referendum.[24]

Justice David Bartlett dismissed the challenge, declaring that the State President had authority to make 'any corrections, clarifications, alterations or amendments to the draft constitution he so wishes'.[25] The judge added that the State President 'could even have discarded it completely and put his own draft before the electorate'.[26] According to the judgment, there was nothing unlawful about the amendments to the draft constitution and how the draft constitution was adopted:

> The president is not in my view required to put before voters a constitution approved by the Constitutional Commission. He is entitled to put forward any draft constitution he so wishes to ascertain the views of voters. It may or may not be considered unwise to make changes to a document produced by a body specifically set up to produce a draft constitution but it is certainly not unlawful.[27]



The decision of the High Court opened the door for the commencement of the next stage, namely submitting the draft Constitution for a referendum. The referendum was preceded by campaigns which were meant to assist ordinary citizens make informed choices before the referendum. Campaigning for a 'yes vote', the government and the Constitutional Commission launched their public campaign with a two-page newspaper advertisement entitled, 'The New Democratic Constitution .... And a Few of the Questions That You Might Be Asking'. Using a question and answer format, the advertisement addressed the issues of what the Constitutional Commission was, and how commissioners were chosen. In addition to the newspaper advertisement, the Constitutional Commission campaigned through radio and television. The 'no vote' campaign, on the other hand, was spearheaded by civil society

[23] Jiri 2001: 3. See also Mapara 2004: 3; Gambe 2012: 2.

[24] See Justice Bartlett's High Court of Zimbabwe judgement in Mushayakarara v Chidyausiku 2001 (1) ZLR 248. See also IOL 2000b: 3.

[25] Hatchard 2001: 214.

[26] IOL 2000a: 1.

[27] Slaughter & Nolan 2000: 4. See also Hill 2003: 104; Walsh 2012: 5.

organisations. Well-funded by western donors, civil society organisations released advertisements that urged ordinary citizens to reject the draft Constitution.[28]

It was against a background characterised by political polarisation that the draft Constitution of 2000 was submitted to a referendum.[29] The result was clear. Simply put, it was snubbed by ordinary citizens. Of the 1 312 738 votes cast in the constitutional referendum, 54.7% rejected the document while 45.3% approved it. The results of the referendum represented the first significant national snubbing of a major political programme institutionalised by ZANU PF, the ruling party. In the context of a national president whose stature was declining, the result was an annoying and crushing defeat for a State President who had used statutory authority to significantly amend the draft constitution. The 'no' vote also signified the opposition to the awkward manner in which the government-appointed Constitutional Commission had organised and managed the process of constitution-making. The State President was, however, gracious enough to publicly accept the results of the referendum as binding, noting that 'the people had spoken'.[30] However, the State President was quick to exonerate government by putting the blame for the rejection of the draft Constitution of 2000



[28] Dorman 2001: 40. See also Cauvin 2000: 2.

[29] Blair 2002: 58. The Constitution was submitted to a referendum in terms of the Referendums Act (Chapter 2:10 of 1999). The Act provides for the holding of referendums to ascertain the views of citizens on any questions or issues. It is divided into 11 sections: short title, interpretation, referendum proclamation, referendum to be held on appointed day, question or issue to be stated on ballot-paper, persons entitled to vote at referendum, majority of voters to decide question at referendum, declaration of the result of the referendum, appeals, application and regulations. The Referendums Act (Chapter 2:10 of 1999) is an Act under the administration of the State President. See also Blair 2002: 58; Onslow 2011: 9.

[30] Cauvin 2000: 3. See also Blair 2002: 58; Sokwanele 2012: 11. Following the announcement of the results of the referendum, the groups that had campaigned for the rejection of the draft Constitution took the ruling party, ZANU PF, to the cleaners, gaining enormous political mileage. Civil society organisations said the rejection was a clear vote of no confidence in the government. They charged that Zimbabweans were fed up with ZANU-PF rule and called on the State President and his Government to resign. The leader of the labour backed Movement for Democratic Change, Morgan Tsvangirai, said, 'In a normal democracy when a sitting government suffers such a defeat, the honourable thing is to resign.' The president of the Zimbabwe Union of Democrats, Margaret Dongo, said by voting 'no' people were making a statement that they were sick and tired of ZANU-PF rule. She said people were not only voting against the draft Constitution but also expressing dissatisfaction with the government which they blamed for all the hardships they were facing such as the rising cost in living, shortages of fuel and other essential commodities. See also North 2013: 5; ZNLWVA 2000: 2.

on the door steps of hostile foreign governments, white farmers and the black urban middle class elite.

From the foregoing and in view of the discussion in Chapter Two, it is clear that there are a number of institutional design issues that were handled better when compared to previous constitution making efforts.[31] One of the issues is that the Constitutional Commission had more members when compared with its predecessor, the Constitutional Conference of 1979. Commendable is the fact that the Constitutional Commission was led by a senior jurist, increasing the credibility of the constitution making body. The inclusion of legislators meant that the Constitutional Commission possessed, to some extent, the credibility of an elected body. Its inclusion of academics indicated that it was not in short supply of wise counsel.[32]

There were, however, a number of concerns in relation to the manner in which the Constitutional Commission was organised and discharged its responsibilities. To begin with, the inclusive nature of the Constitutional Commission can be questioned. The fact that many segments of society were represented may suggest that the Constitutional Commission was inclusive. In fact, until one closely analyses the composition of the Constitutional Commission, it is easy to declare that the Constitutional Commission was inclusive enough. However, such a conclusion would be wrong as the Constitutional Commission was largely loaded with supporters of the ruling party. The composition of the Constitutional Commission was not based on a neat set of guidelines but the whims and caprices of the State President. The State President was unilaterally responsible for composing the Constitutional Commission. Membership 'was based on political patronage'.[33] In the words of one author, '[t]he membership of the Constitutional Commission emphasised the intention of the President to maintain control of the whole process'.[34]

It is also not clear if the Constitutional Commission enjoyed autonomy. An autonomous institution is one that enjoys full control of its agenda. Unless a constitution-making body is autonomous, it could be manipulated by politicians for short term goals.[35] The Constitutional Commission fits the description of a constitution making body that was not autonomous. Its

[31] See section 10 of Chapter Two.

[32] Chifodya 2013: 5. See also Slaughter & Nolan 2000: 2.

[33] Mamombe 2012: 3. See also Hill 2005: 9.

[34] Hatchard 2001: 211. See also Miller E.L, 2010: 619; Ndulo 2010: 186.

[35] See subsection 3.2.1 of Chapter Three.

activities reflected the preferences of its composers. They were moulded in the image of the appointing authority, the State President. Perhaps it was for this reason that it was argued that unless a Constitutional Commission is demonstrably independent, its membership fully representative of civil society and its deliberations transparent, the drafting process is susceptible to manipulation and can easily result in 'the imposition of the President's (or government's) preferred constitutional model under the guise of being an autochthonous document'.[36] Given that the Constitutional Commission was accountable to the State President, it was not autonomous. The fact that its members served at the pleasure and discretion of the State President highlights its lack of autonomy.

One of the major developments that were brought about by the Constitutional Commission was extensive consultation. Drafting was preceded by consultation that solicited the views of the people through seminars, colloquiums, country tours, ward meetings, questionnaires, radio and television programmes. Attended by over half a million people, the consultation was extensive, something that the Constitutional Commission rightly deserves an accolade for. The shortcoming in this regard is that consultation was not undertaken again after the drafting of the constitution was finalised and before being submitted for adoption. The fact that ordinary people were not given an opportunity to comment on the draft Constitution before its finalisation was not in tandem with contemporary constitution making practices outlined in Chapter Three.[37] As mentioned in Chapter Three, the practice today is that draft constitutions are submitted to the public for general comment even if they were prepared after initial consultations.[38]



It was also not clear how the input received from consultation influenced the contents of the final draft. As argued in Chapter Three, unless there is a mechanism for linking the ideas generated through consultation to the decision making processes of a constitution-making body, the constitution risks being biased in favour of the political elite.[39] Unfortunately, that is exactly what happened eventually. In the absence of a mechanism, such as a special committee, that functionally linked ordinary citizens' public input to the decision making system of the Constitutional Commission, the consultation undertaken before drafting was

[36] Hatchard 2001: 211.

[37] See subsection 4.2.4 of Chapter Three.

[38] See subsection 4.2.4 of Chapter Three.

[39] See section 4.2.4 of Chapter Three.

nothing but a charade. As noted by one author, '[t]he State appointed a Commission that was sent out to hear the views of the nation only to have those views distorted in the final draft in a way that would have perpetuated the rule of the Zanu PF elite'.[40] Disguised as 'Corrections and Clarifications', the draft was loaded with views which the executive and its surrogates in the ruling party found to be politically correct. This prompted one author to note that the constitutional reform process initiated by government, and conducted under the auspices of the Constitutional Commission from 1999 to 2000, 'was inherently flawed in that it was specifically designed to ensure presidential control'.[41]

The major lesson is, however, the fact that the process demonstrated that a referendum can be used as a deterrent against government efforts to force through constitutional reforms that manifest the short term interests of those holding the reins of power. It confirmed that a referendum, as argued in Chapter Three, is one of the most transparent practical devices for democratising the process of constitution making as well as institutionalising the culture of consultation based on the normative values of democracy.[42] By rejecting the draft Constitution, ordinary citizens amply demonstrated that constitutional referendums can play a key role in ensuring that the aspirations of the political elite remain subordinate to those of the people.[43]



## 3. The 2001 constitutional process

The rejection of the draft constitution of 2000 did not mark the end of Zimbabwe's tortuous search for a legitimate and durable constitution. Instead, it triggered a new round of ambitious constitution-making. What makes it unique, however, is that, this time, the process was undertaken under the auspices of civil society organisations. Increasingly sceptical of government's willingness to create a new constitution, civil society organisations coalesced under an umbrella organisation, namely the National Constitutional Assembly (NCA), to spearhead another round of constitution-making.[44]

[40] Cross 2009: 2. See also Gomba 2009: 1; Chipara 2013: 4.

[41] Dzinesa 2012a: 2. See also Makova 2012a: 2.

[42] See subsection 4.5 of Chapter Three.

[43] Reynolds 2012: 8.

[44] Veritas 2009c: 2. The NCA was established in 1997 before the 2000 and 2001 constitution-making processes. Before spear-heading the creation of the 2001 draft Constitution, its role was mainly confined to teaching citizens on how they could enjoy the rights in the Constitution. See also Lumina 2009: 3.

Comprising eight hundred civil society organisations such as human rights groups, women's groups, business associations, media bodies, academic institutions, trade unions, grassroots structures, professional associations, and religious groups, the NCA was basically a non-governmental organisation. The civil society organisations that constituted the NCA voluntarily came together with the objective of bringing about a new constitution. The general consensus was that it was only through the NCA taking charge of the business of constitutional development that the creation of a new constitution would, in fact, become a realisable goal.[45] It was against this background that the NCA convened an extraordinary general meeting on 31 March 2001. Attended by all affiliate members of the NCA, the objective of the meeting was to consider the way forward as far as the creation of a new constitution was concerned. Following a much heated debate, the members resolved that the NCA convenes an All-Stakeholders' Constitutional Conference. The objective of the Constitutional Conference was to facilitate a forum for the purpose of formally asking its members for a mandate to create a constitution for the country.[46]

The All-Stakeholders' Constitutional Conference was held in Harare. It was attended by over 7000 delegates representing various segments of society such as women, students and the youth. Many of the delegates were from Bulawayo and Harare. Given that most of the civil society organisations are based in Bulawayo and Harare, it was not surprising that the majority of delegates to the Constitutional Conference were drawn from the two metropolitan cities.[47]



It was at this Conference that the NCA asked delegates for a mandate to draft a new constitution for Zimbabwe. The matter was put to a vote and was backed by all delegates. Following the unanimous endorsement, delegates to the All-Stakeholders' Constitutional Conference were asked to identify issues that were considered to be key to the success of a constitution making process.

The NCA outlined the process to be followed in creating the constitution. It was stated that a programme of civic education would be followed by consultation after which a constitution would be drafted. Thereafter, the constitution was to be submitted before a Constitutional

[45] Zhanje 2012: 3 See also Mabwe 2013: 3; Veritas 2011d: 2.

[46] North 2013: 5.

[47] Kagoro 2004: 244. See also NCA 1999: 12; Chitande 2011: 3.

Conference to enable delegates to engage in a discussion on its contents. Subsequently, it would be submitted to a referendum after which it would be presented to government with the demand that it be enacted.[48] The NCA was to publish the first draft Constitution by 30 September 2001.[49] It emphasised that constitution-making under its charge is based 'on the unfettered golden rule that it is an inalienable right of the people to initiate their own constitution'.[50]

Following the mandate it received from the All-Stakeholders' Constitutional Conference, the NCA initiated a programme of civic education. The objective of the civic education was to equip ordinary citizens with the knowledge to enable them to participate in the constitution-making process. The civic education focused on issues such as the objectives of the process of constitution-making, how the process was structured, how public input was to be solicited as well as the procedures of the body designated to draft the constitution.[51] The NCA passed information on to ordinary citizens through mechanisms such as billboards, radio, newspaper, and television advertisements. To supplement its tools of civic education, the NCA used drama groups, rallies and marches.

Civic education was followed by consultation. The consultation aimed at giving ordinary citizens an opportunity to influence ideas that would be incorporated in the constitution. It included a community outreach programme. Under this arrangement, the NCA made use of specially trained facilitators to get insight into the constitutional preferences of ordinary citizens.[52] The facilitators went out into communities and engaged ordinary citizens on the views they sought to see incorporated into the constitution. In addition, the NCA elicited the views of ordinary citizens through workshops and seminars, supplementing the consultation that was carried out by the facilitators in rural and urban communities.

Literature at hand scarcely provides insight into the identity of those within the NCA who were bestowed with the responsibility of transforming the constitutional preferences of ordinary citizens into written script. In the absence of verifiable documents in the public

[48] NCA 1999: 12. See also Chisora 2012: 6.

[49] NCA 2001: 1. See also Ngarande 2012: 2; Chakanyuka 2012: 4.

[50] NCA 2001: 2.

[51] Gava D, 2013: 4.

[52] Feldman 2013: 4. Those appointed as facilitators were drawn from communities based on their willingness to participate in this exercise. See also Chibaya 2012: 2; Zivo 2013: 4.

domain, the speculation is that Professor Lovemore Madhuku, the self-styled Chairman of the NCA, dominated the context in which the drafting of the Constitution of 2001 unfolded. At the time drafting got underway, Lovemore Madhuku, was a senior lecturer at the University of Zimbabwe Law School.[53]

The NCA published its first draft Constitution on 28 September 2001. During the period between October and November 2001, members of the public were allowed to study and debate the draft Constitution. Using its member organisations, the NCA facilitated debate on the document. The debate took place at the ward levels. The meetings took the form of community meetings in which people exchanged views on the draft.[54] They were moderated and facilitated by officials trained by the NCA. The officials took note of the comments of the people after which they generated reports, summarising the provisions that ordinary citizens were happy with and those that they were not happy with. The reports were submitted to the NCA.

Based on the input received from the consultation, the NCA isolated areas of consensus and dissensus. Once the areas of dissensus were isolated, the NCA commenced a process of updating the draft. The drafters got instructions from the NCA. Once the draft was updated, it was handed to the NCA. It was against this background that the NCA on 1 December 2001, convened an All Stakeholders Constitutional Conference to debate the draft, and, if possible, agree on a final draft and secure approval.[55]

Delegates to the All Stakeholders Constitutional Conference received the draft with mixed feelings. There were some who were only too happy to accept the document as it was. They insisted that the draft must not be tampered with as it embodied the preferences of ordinary citizens.[56] On the other hand, there were those who wanted to see the draft reflect, to some extent, some of the ideas the government wanted included in a new constitution.[57] The debate was put to rest when close to 85% of the delegates raised their hands to endorse the draft.[58]

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[53] Makwiramiti 2013: 5.

[54] Kodzwa 2013: 4. See also Gava Z, 2004: 2.

[55] Zhangazha W, 2010: 2. See also Kwaramba 2008: 3.

[56] Chatora 2009: 5.

[57] Kodzwa 2013: 4. These included the issues of redistributive justice, the appropriation of land without compensation, land rights for communal farmers and indigenisation. See also Kuseni 2013: 3; Gall 2003: 3.

[58] See subsection 14.1 of Chapter Three.

Once endorsed, the draft Constitution was presented to government with the demand that it be accepted as the Constitution of Zimbabwe:

> This is now the Final Draft, which from the evidence available to the NCA, has been endorsed by a broad section of the people of Zimbabwe. It is being presented to the government of Zimbabwe with a DEMAND that it be enacted into law. The Government must among other things, facilitate the holding of a referendum on any future Constitution of Zimbabwe. The NCA will be leading a process of ensuring that Zimbabwe eventually has a new, democratic and people-driven constitution. This Final Draft represents such a constitution and the NCA will advocate for its enactment into law.[59]

As widely expected, the government rejected the draft constitution, citing its interest in the matter. The government argued that the actions of the NCA did not carry moral and legal authority. The NCA, it was argued, could not act as the representative of the people. It also objected to the fact that the Constitution of 2001 incorporated a property and land clause that institutionalised far more generous compensation than the Lancaster House Constitution.[60] It was clear that the draft Constitution, the government argued, introduced changes that were far too broad. Although not provable, politicians already on edge argued that most of the clauses of the NCA's constitution targeted them. Under siege from a government that was unrelenting, the Constitution of 2001 joined the long list of draft constitutions before it that did not see the light of day.



[59] Draft Constitution of 2001: 1. See also Chimbwa 2012: 4.

[60] Makwiramiti 2013: 5. The State President was known to favour a land clause that exempted the government from the obligation to compensate expropriated land if the British government did not honour its commitment to fund the exercise. The land crisis in Zimbabwe dates back to the conquest of the country by mercenaries hired by Cecil John Rhodes (see section 2 of Chapter Two). Following conquest and placement of the land under colonial power, various legal instruments were enacted giving legal control of the land to the white settlers. Following the passage of the Land Apportionment Act of 1930 and the Land Tenure Act of 1969, the appropriations of land from indigenous communities intensified. For example, between 1945 and 1959, 85 000 blacks were forcibly moved from their land. Between 1964 and 1973, a further 88 000 blacks were dispossessed and their land given to white farmers. None of these families received compensation. Due to the movements, whites who constituted 3% of the population, held 38 million hectares of arable land, while blacks who constituted 97% of the population were given 42 million hectares of mainly non-arable land to share. Until clause (section) 16 was amended, the Lancaster House Constitution precluded black leaders who came to power in 1980 from forcibly appropriating, for resettlement, any land owned by members of the white community. It also guaranteed white farmers 'adequate compensation', payable in foreign currency. See also Goredema V, 2013:3; Gall 2003: 3.

From an institutional perspective, the NCA should be commended for bringing together ordinary citizens to negotiate a new constitution. Given the increasing scepticism about the suitability of traditional institutions, such as national legislatures, to spearhead the making of democratic constitutions,[61] the NCA 'was the prescription that the doctor just ordered'.[62] Not only did it provide a viable alternative, its operations were laudable as they did not depend on the interests and prejudices of power hungry politicians. The creation of the NCA gave the hope that a new constitution making body was able to represent, articulate or defend the broad and permanent interests of society that must define the pillars of any democratic and enduring constitution.

The composition of the NCA was clearly informed by the principle of inclusion discussed in Chapter Three.[63] Comprised of delegates drawn from a wide spectrum of civil society organisations, the inclusivity of the NCA was never in question. What was questioned was the necessity of excluding the ruling party from constitution-making. In fact, it was wrong for the NCA to start off without the ruling party. The problem with such an approach is that it created tensions that raised fundamental questions about the credibility of the process.[64] As one author noted:

> Without courting the participation of government, much less the politicians monopolising State power, the NCA was bound to fail. This is so as its type of constitution-making all too easily sought changes that transformed the status quo in ways that are fundamentally incompatible with the interests and legacies of the political elite. Given the fact that historically the political elite always sought to dominate the context in which constitutions are created in Zimbabwe, the NCA ought to have prioritised negotiation and compromise and not confrontation.[65]

The constitution-making body was also not based on any statutory or constitutional authorisation. That is why there might be some substance in the comments of Eddison Zvobgo, then Minister of Justice, Legal and Parliamentary Affairs, that challenged the legitimacy of the NCA:

[61] See subsection 3.1 of Chapter Three.

[62] Mavare 2013: 3.

[63] See subsection 2.3 of Chapter Three.

[64] Gava Z, 2004: 2. See also Gall 2003: 2; Mandaza 2012: 2.

[65] Chidziva 2004: 3. See also Mwiti 2013: 3.

> How can a few people sitting under a tree call themselves the National Constitutional Assembly? In my view, you are neither national, nor constitutional, for you have not been enacted by any constitutional process.[66]

In so far as process-related issues are concerned, the NCA must be commended for providing citizens with an opportunity to put to rest the search for a durable and legitimate constitution. As argued by one author, 'the process manifested the desire by civil society organisations to produce a long-lasting constitution'.[67] The consultation that was undertaken by the NCA was not only extensive but it was also participatory. The fact that the NCA made an effort to solicit the views of ordinary citizens both before and after drafting is also commendable. It suggests that ordinary citizens were afforded an opportunity to influence drafting.

As much as the NCA must be commended for undertaking consultation before and after drafting, one must be cautious in claiming that drafting was informed by consultation. As a baseline survey was not carried out before and after consultation, it was, as some argued, not possible to ascertain the extent to which ordinary citizens attributed the success of constitution making to intervention through consultation. The NCA should have defined the parameters for assessment in both phases of the consultation before consultation. Unfortunately this was not done, thus opening the NCA to the criticism that it held the consultation as a largely formal gesture to give the impression that all segments of the society influenced drafting.[68]

The NCA's resolution to 'bludgeon and frog-march' government into accepting its constitution was not only confrontational but also ill advised. It amounted, as many argued, to forcing the government to accede to its demands. The circumstances under which the NCA sought to have the government adopt its controversial constitution, as many argue, 'were as contentious if not worse than those under which the State President was unsuccessful in ambushing civil society and imposing the draft Constitution of 2000'. [69]

On balance, though, the conduct of the NCA had fundamental significance in the context of keeping pressure on the State to adopt a constitution- making process on terms that are not as

[66] Olivier 2007: 1. See also Murwira & Gumbo 2013: 4; Mhlotshwa 2012: 2.

[67] Kurehwa 2013: 1. See also Chatora 2009: 2; Zhanje 2012: 2.

[68] Mabwe 2013: 3.

[69] Soko 2005: 3. See also Goredema S, 2005: 4; Halkett 2002b: 3.

contentious as those of 2000 that it controversially dominated. In what was a first for Zimbabwe, the NCA demonstrated the importance of civic society organisations coming together to shape the debate and trajectory on constitutional development. Importantly, the involvement of civil society organisations, through the NCA, underscores their significance in an environment in which the State continues to develop cold feet on the question of constitutional development.[70]

## 4. The 2007 constitutional process

Following the rejection by government of the draft by the NCA, three rival political parties, ZANU PF, Movement for Democratic Change-Tsvangirai (MDC-T) and Movement for Democratic Change-Mutambara (MDC-M)[71] coalesced to create a constitution for Zimbabwe. The particular process of constitutional development was initiated at a time when the legitimacy of the ruling party was increasingly being questioned. It had much less political support and was increasingly isolated, both inside and outside the country. Reeling under the weight of international punitive measures, it was presiding over an economy teetering on the brink of collapse and a society in which astronomical unemployment posed a significant threat to the stability of the country.[72]



Having failed to dislodge ZANU PF from power through the electoral process, the MDC formations agreed to an arrangement that would see a new constitution negotiated by the political parties represented in Parliament. The three political parties temporarily agreed to bury their ideological differences and initiated a political party driven constitution-making process. The process excluded political parties not represented in Parliament. The process of constitution-making under the tutelage of ZANU PF and the two MDC formations was not based on a written agreement. It was based on an ad hoc consensus.

[70] Chipara 2013:3.

[71] The 'M' after MDC represents the surname of Arthur Mutambara, leader of the breakaway faction of the original MDC led by Morgan Tsvangirai. The 'M' is used to distinguish the breakaway faction from the original MDC. A former student leader, National Aeronautics and Space Administration researcher and professor of robotics and mechanotrics based in South Africa, Arthur Mutambara was elected leader on Sunday 26 February 2006, at the first Congress of the breakaway faction of the MDC-M held in Bulawayo. The 'T' after MDC represents the surname of Morgan Tsvangirai, the founding president of MDC. It distinguishes the Mutambara led faction from the Tsvangirai led faction. Robert Mugabe has led ZANU-PF since ZANU and ZAPU merged in a unity agreement signed in 1987. The PF after ZANU stands for Patriotic Front.

[72] Mhuka 2012: 4. See also Gweshe 2012: 3; Mamombe 2012: 4.

The process commenced with the appointment of three legal drafters, all drawn from the participating political parties. Patrick Chinamasa, a lawyer by profession and Secretary of Legal Affairs of the ruling party, represented ZANU PF. The second legal drafter, Tendai Biti, is a lawyer by profession and now former Secretary-General of the original MDC. Welshman Ncube, a former Professor of Public Law at the Law Faculty of the University of Zimbabwe and Secretary-General of the breakaway faction of the original MDC, represented MDC-M. Soon after appointment, the legal drafters assembled in the resort town of Kariba, approximately three hundred and fifty kilometres west of the capital Harare, to negotiate a constitution.[73] The negotiations for a new constitution began aboard a ship on Lake Kariba.[74]

Ordinary citizens and the press were not allowed anywhere near the constitution-making venue. To make matters worse, no mechanisms were put in place to enable ordinary citizens to participate in the process of constitution-making through civil society organisations or directly by making oral and written submissions, workshops or special consultative forums.

Drafting commenced in the first week of September 2007. Contentious issues were referred to the leaders of the three political parties. The leaders of the political parties engaged each other until they reached a compromise. The agreed position was then handed to the drafters for incorporation. The drafters periodically handed drafts to the leaders of the political parties. It took three weeks to finalise drafting. On 30 September 2007, the drafting team presented a final document to the leaders of the three political parties, marking the completion of the assignment bestowed on them. Although not officially stated, the three political parties intended to make parliament approve the document under circumstances that were not transparent.[75]

The plan to make parliament approve the draft under opaque conditions generated a huge public outcry. At the centre of the public outcry was the complaint by civil society organisations that the process of constitution making was fundamentally flawed. Many supporters of the MDC formations threatened to vote for other political parties in the event that the latter endorsed the document. Given the intensity of public condemnation of the

[73] Muchemwa 2009: 1. The draft Constitution of 2007 is also known as the Kariba draft Constitution. See also Moyo L, 2009: 1.

[74] Straddling the border between Zambia and Zimbabwe, Lake Kariba is the world's largest man-made lake and reservoir by volume.

[75] Muchemwa 2009: 2. See also Vollan 2013: 18; Manhanga 2013: 4.

constitution, politicians had no choice but to abandon plans to transform the draft constitution into supreme law. They were forced not to submit the draft constitution to parliament for adoption.[76]

From the foregoing, it is clear that the process of constitution-making offered yet another significant opportunity to 'conclude a deal on a new constitution'.[77] The fact that the political parties that constituted parliament were in charge of constitution-making suggests that the process had some legitimacy. The major problem is that there is general scepticism over the legitimacy of political-party-driven constitution-making. In the 21st century, it is no longer the prerogative of political leaders to decide on and grant constitutions to people.[78] A constitution is not an ordinary piece of legislation that must be left to political parties that agree along ideological lines. It is, after all, a framework not just for political parties but for the nation. The domination of the process of constitution-making by politicians was, to say the least, problematic.[79]

In many ways, the attempt at a new constitution manifested the shortcomings of a typical RT model of constitution making that relies on political parties.[80] The composition manifested the preferences of a small coterie of power hungry political party leaders. As noted by one author, restricting the constitutional reform process to a select team of partisan representatives 'meant that most Zimbabweans were denied their right to write a constitution for themselves'.[81] The International Crisis Group noted that the draft Constitution of 2007 was problematic as it was created 'without civil society input'.[82] The appointments were criticized on the ground that they embodied the narrow partisan interests of the appointing authorities. As echoed by one author:

[76] Zvorwadza 2009: 2. See also Shoko 2009: 2.

[77] Gambe 2012: 3. See also Kwaramba 2008: 1; Chitande 2011: 13.

[78] Section 7 of Chapter Two and section 3.1 of Chapter Three.

[79] Zhanje 2012: 5. Professor Lovemore Madhuku dismissed the 2007 draft constitution because its creation was 'an elite process from the start.' In the same vein, Makanaka (2012: 3) noted, '[e]verything that is objectionable in the current Constitution (meaning the frequently amended Constitution of 1980) is reproduced in the Kariba Draft...why would anyone call this a new Constitution?' See also Campbell 2012: 7; Biti 2009: 2.

[80] See subsection 3.4 of Chapter Three.

[81] NCA 2001: 1. See also Gotora 2009: 3, Moyo J.N, 2007: 3.

[82] Chimunhu Z, 2009: 4.

> It is regrettable that the attempt at constitutional reform was tied to the whims and caprices of the political elite. The fact that the process of constitution making was concocted by a collection of politicians and reflected executive preferences suggests that the final document could not claim to be democratic, legitimate and reflective of the popular will of the people.[83]

An inclusive constitution-making process would have required the inclusion of not just the representatives of all political parties but the representatives of civil society groups as well. Inclusion ought to remain at the 'heart of any calls for constitutional reform'.[84] The fact that the political parties pursued a deliberate policy of robustly excluding representatives of key stakeholders in society, including the combative civil society organisations, famed for decades for championing the cause for constitutional reform, suggests that the authorities paid lip service to the exigencies for broad based representation. Sadly therefore, without the representation of various segments of the society, the composition of the constitution-making body came far too short of meeting the basic standards embodied in the principle of inclusion outlined in Chapter Three.[85]

There was no civic education and consultation before drafting. Although this is consistent with the manner in which RTs operate, the political parties, by failing to undertake consultation, discredited, at least in the eyes of the court of public opinion, the credibility of their process of constitution-making. A hugely disappointed citizen stated that the 'governing political parties must not be forgiven for not consulting ordinary citizens on the contents of the constitution'.[86] It was also ironic that the drafters borrowed heavily from the draft Constitution of 2000 that was rejected in a referendum. The fact that the team of constitution makers smuggled through the backdoor a raft of contentious issues previously rejected in the Constitution of 2000 suggests that the role of the constitution makers was simply 'to rubber stamp executive preferences and not to question, modify or debate any constitutional proposals'.[87]

## 5. Conclusion

[83] Zvorwadza 2009: 4. See also Dow U, 2001: 113; Chimbare 2009: 3.

[84] Mashiri 2009: 1. See also Chitiyo 2009: 1.

[85] See subsection 2.2 of Chapter Three.

[86] Zhanje 2012: 1. See also Walsh 2012: 5; Veritas 2010a: 3.

[87] Gambe 2012: 4.

Although constitution-making projects carried out in the post-colonial Zimbabwean state were held in a slightly different environment, they were prone to the same systemic weaknesses that doomed their predecessors to create constitutions that were short-lived. While racial considerations were no longer a key element of the equation that went into the designing of the institutions and processes of constitution-making, they were replaced by equally inappropriate consideration, namely, the ruling party's quest to hold onto power under any circumstances. The question of who gets involved, and when and how, continued to be mediated by political interests rather than by the imperatives of creating optimum institutions and processes of constitution making. With the ruling party becoming increasingly wary of losing its grip on power, political expediency dominated the successive constitution-making projects. It was, therefore, clear that the institutions and processes that were used to create the successive draft constitutions between 2000 and 2007 were not fully inclusive, participatory and transparent.

To be sure, the 2000 and 2001 constitution-making projects have brought to the process members of the Zimbabwean society that were totally excluded in the making of previous constitutions. Yet, systematic exclusion was evident in the post-colonial successive constitution-making efforts as well. Although included in the 2000 Constitutional Commission, members of the opposition, representatives of the white community, the black middle class and students contributed much fewer delegates when compared to the ruling party. This was achieved by ensuring that the number of delegates drawn from the ruling party exceeded delegates drawn from other organisations, usually by a ratio of 3:1. The exclusion of all segments of society in the body that created the 2007 draft Constitution saw the constitution-making body becoming an appendage of the political parties represented in parliament.



It is also difficult to argue that the constitution-making efforts were transparent. With no clear criteria set, it was often difficult, for example, to justify why certain people were appointed to constitution-making bodies. Not only were major decisions on the content reached under the veil of political expediency, those involved often sought to privatise the constitution-making project by monopolising the determination of content. With no facilitation from the State, the media often found itself unable to inform the public about the activities surrounding both the institutions and processes of constitution-making.

Although the public did participate in some of the activities leading to the creation of the 2000 Constitution such as through consultation and ratification referendums, the level of participation often left a lot to be desired. The consultations were often carried out under conditions that were not conducive. The consultative processes were characterised by threats from those heavily invested in the status quo, manipulation, coercion, and the threat of physical harm.[88] Even if people were consulted, their views were often disregarded when the final decision on content was made. The decisions of politicians frequently supplanted those of ordinary citizens gathered through consultation. The situation became worse in 2007 when politicians tried to come up with a draft constitution without involving the population at all.

Given all of the above, it is not surprising that the constitution-making projects did not come to fruition. The failure of the constitution-making processes of 2000, 2001 and 2007 reflected the inability and reluctance of those in charge of the reins of power and the opposition to place constitution-making ahead of the unrelenting pursuit of power. However, the successive failures did not stop the search for a new constitution for Zimbabwe. In 2009, Zimbabwe embarked on another constitution-making project. The following Chapter focuses on the institutional and procedural choices of constitution making under the Constitution Parliamentary Select Committee of 2009. The Chapter will attempt to show that the challenges which Zimbabwe encountered in its search for a legitimate constitution in the past century are replicated in the constitution-making process which commenced in 2009.



[88] Gava D, 2013: 4.

# Chapter Five: Constitution-making under the Constitution Parliamentary Select Committee (2009)

## 1. Introduction

On 29 March 2008, a year after the rejection of the 2007 draft Constitution, Zimbabwe went to the polls to choose new parliamentarians and a State President. This was one of the most disputed national elections in the political history of Zimbabwe. As the Zimbabwe Electoral Commission (ZEC) began to announce the results of the elections, it became abundantly clear that the official opposition political party, the MDC-T, led by Morgan Tsvangirai, would romp to victory.[1] With every indication pointing to victory for Morgan Tsvangirai of the MDC-T, the ZEC deferred the announcement of the presidential election results for a month, raising suspicion that the inordinate delay allowed the ruling party to manipulate the result and deny Tsvangirai victory. The electoral authorities did not give a reason for the hold-up. When the results were eventually released, they showed that Tsvangirai had secured the largest number of votes. However, he was not declared the winner as he had secured only 48 percent of the total votes instead of the 50+1 percent threshold provided in the Constitution to avoid a run-off election. This meant a second round of voting. However, Tsvangirai withdrew from the election, citing violence and intimidation of his supporters. Despite Tsvangirai's withdrawal, the election went ahead, with Robert Mugabe as the sole candidate in a widely discredited election on 27 June 2008. The ZEC declared Mugabe the winner. The result of the run-off presidential election was not recognised by the Southern Africa Development Community (SADC), the African Union (AU) and the international community.[2]

The disputed election plunged the country into a serious political crisis. At its height, the political crisis was characterised by the State's disregard for dissent, recourse to draconian laws, excessive censorship, and the systematic closure of the democratic space. Owing to a lack of investor confidence, the economy teetered towards collapse. With inflation reaching 516 quintillion percent, the economy all but ground to a halt.[3] Fearing further degeneration of the country and descent into an abyss, the AU intervened through the SADC. It sought a

[1] Bell 2013: 3. First to be announced were the local government elections, which showed the opposition party in the lead. The subsequent announcement of the results of the parliamentary elections also put the MDC-T in the lead. See also ZESN 2008: 8; Chasakara 2008: 1; Amnesty International 2008: 2.

[2] Mutisi M, 2011: 3. See also Zimbabwean 2008: 2; Thornycroft 2008: 2.

[3] Burgess 2008: 1. See also Blair 2008: 2; Coltart 2008: 5.

negotiated solution to the political crisis. Thabo Mbeki, former President of South Africa, was asked to broker a political agreement involving the leaders of the political parties represented in the Parliament of Zimbabwe, Robert Mugabe of ZANU PF, Morgan Tsvangirai of the MDC-T and Arthur Mutambara of the MDC-M. [4]

Following protracted negotiations, Thabo Mbeki was able to get the leaders of the three main political parties to sign a political agreement, the Global Political Agreement (GPA), on 15 September 2008. Supported by the SADC and guaranteed by the AU, the GPA aimed to 'create a genuine, viable, permanent, sustainable and nationally acceptable solution to the Zimbabwe situation'.[5] Based on the GPA, a Government of National Unity (GNU) was constituted. It drew its members from the three political parties represented in Parliament. Mugabe retained his position as President, Tsvangirai became Prime Minister, and Mutambara moved into the position of Deputy Prime Minister.

More importantly for purposes of this thesis, the GPA made constitution-making part of the solution to the political crisis that had characterised the country. In this regard, it vested the Parliament of Zimbabwe with the authority to establish a Constitution Parliamentary Select Committee (COPAC), comprised of legislators drawn from the political parties represented in Parliament, to spearhead the creation of a new constitution. Article 6 of the GPA provides for the various stages of the process of constitution-making.[6]

Using the standards identified in the Chapter Three, Chapter Five assesses the institution and processes of constitution-making under COPAC. It does this by analysing each stage of the constitution-making project. The aim is to ascertain the extent to which the institutions and processes used to create the 2013 Constitution promote the values associated with the creation of durable and legitimate constitutions.

[4] Chigora & Guzura 2011: 6. See also Moyo J.N, 2012: 4; Mbiba 2015: 3.

[5] GPA 2008: 1. The GPA is twenty pages long and has twenty five articles that address various complex issues that can be categorised as follows: declaration of commitment to jointly solve the challenges facing Zimbabwe, restoration of political and economic stability, restoration of state institutions, restoration of the rule of law, arrangements for sharing power and implementing the agreement. See also Veen & Meijenfeldt 2011: 1; EISA 2008: 8.

[6] Makumbe 2011: 1. See also Masunungure 2010: 13; Centre for Conflict Resolution 2011: 10.

## 2. The GPA as a basis for constitution-making

The suitability of the GPA as the basis for making a constitution was not something that was easily agreed upon. For those who had become weary of unsuccessful constitution-making efforts, the GPA was a compromise document for producing a legitimate and durable constitution. Chatora nevertheless praised the GPA for creating an environment that made it possible for political parties to work together to create a new constitution.[7] This perspective was also echoed by Gumbo who praised the GPA for providing a framework that made it possible for the major political parties to implement the vision of a new constitutional order.[8]

Others, however, questioned the suitability of the GPA to serve as the basis for constitution making. At the centre of this is the question about the inclusive, transparent and participatory nature of the process that led to the signing of the GPA. As the GPA was a significant national decision, there was a need to ensure that 'it manifested the views of the people for whom a new constitution was to be created'.[9] In relation to this, some expressed their concern about the exclusion of other political formations in negotiating the GPA. Its establishment did not take into consideration the views of the poor, the youth, school-going children, the disabled, and ethnic, religious, and cultural minorities.[10] This has led some to question the 'legitimacy of the GPA as a framework for basing a constitution making process'.[11] Rights groups, like Women of Zimbabwe Arise (WOZA), came to the conclusion that, '[the GPA] may…prove inadequate as a tool of creating a truly people-driven constitution'.[12]

For others, it was not clear if the creation of the GPA was informed by the principle of transparency. Transparency, as mentioned in Chapter Three, rejects making important national decisions with far reaching consequences behind closed doors.[13] The GPA was negotiated in secrecy. This has led some to believe that the creation of the GPA was informed by the narrow political interests of a small coterie of power hungry politicians. In the words of one author, '[n]ot only were the negotiations conducted in secrecy, they were not

[7] North 2013: 4. See also Matinenga 2009: 4, Bratton & Masunungure 2011: 19.

[8] Chitate 2011: 5. See also Chirwa 2009a: 3; Chitiyo 2009: 2.

[9] Lee R, 2013: 1. See also Nzimbe 2012: 4; Makumbe 2009: 309.

[10] Manhanga 2013: 4.

[11] Zata 2009: 2.

[12] WOZA 2009: 1.

[13] See subsection 2.4 of Chapter Three. See also Herald 2011a: 2.

influenced by the common good but narrow political considerations'. [14] It was for this reason that a rights group monitoring the constitution making process argued that Article 6 of the GPA was 'inadequate as a tool for creating a new constitution'.[15] A constitution created by such a defective framework can hardly be legitimate, goes the argument.

One must pay tribute to the political leaders that were behind the creation of the GPA that eventually facilitated the creation of a new constitution.[16] The leaders of ZANU PF and the MDC formations must be commended, 'for the courage shown in agreeing to set aside political differences that existed for over a decade on the question of constitutional development'.[17] The fact that sworn political enemies momentarily buried the hatchet for purposes of constitutional development must be hailed as a postive development. The question is whether the GPA put in place appropriate constitution-making institutions and processes to create a legitimate and durable constitution. This thesis begins to answer this question by first discussing the suitability of COPAC as a constitution-making institution.

## 3. Parliament led constitution-making

As mentioned earlier, the GPA placed the responsibility for constitution-making in the hands of Parliament. More specifically, it mandated its select committee, COPAC, to lead the constitution-making project. Many were not sure about the suitability of Parliament as a constitution-making body. Campbell, for example, doubted the appropriateness of Parliament given that legislators were elected following an election that was not only marred by political violence but whose credibility was the subject of contestation among citizens.[18] Makanaka expressed reservations about the representativity of Parliament given that there was a body of opinion that argued that parliamentary elections were tampered with to deny the opposition a clear majority in the legislature.[19] Reynolds also questioned the suitability of parliament on



[14] Griffiths 2013: 6. See also Moyo, J.N, 2009: 2; Huni 2009: 1.

[15] Veritas 2011c: 2.

[16] Turner 2012: 4. The question of whether or not the GPA was constitutionalised is not important. This is because countries enjoy the discretion to come up with frameworks that reflect local conditions. After all, there is no universal standard on this issue. The fact that the framework of a constitution-making process is not constitutionalised does not necessarily mean that it is not sufficiently institutionalised. See also Huni 2009: 3.

[17] Chikoya 2013: 2. See also Zata 2009: 1.

[18] Mabwe 2013: 3. See also Ministry of Constitutional & Parliamentary Affairs 2013: 3; Zhanje 2012: 5.

[19] Makanaka 2012: 4. See also Kwaramba 2008: 4; Zata 2009: 1.

the basis that it did not represent all the political parties.[20] The other concern, according to Barrett, was that ordinary citizens had not been consulted about the acceptability of the idea of assigning the mandate of constitution-making to a parliamentary select committee.[21] The government was, however, quick to allay fears related to the placing of the responsibility of constitution-making in the hands of parliament. During a press conference, the Speaker of Parliament insisted on the advantages of constitution-making under the aegis of Parliament. He stated that the parliament led constitution-making process was legitimate as parliamentarians embody the legitimate preferences of people who voted them into Parliament. Bestowing legislators with the responsibility for constitution-making, he argued, makes the process of constitution-making transparent and credible. In addition, putting parliamentarians in charge of constitution-making, the Speaker insisted, increases opportunities for ordinary citizens to contribute to the process of constitution-making.[22]

It is submitted that legitimate questions can be raised about the appropriateness of allowing COPAC, a subsidiary committee of the Parliament of Zimbabwe, to be the key institution that spearheads the constitution making process. Putting a parliament in charge of the constitution-making process puts the ruling politicians of the day in an ideal position to dominate the process of constitution-making under the guise of being representatives of the people. As noted by one author, 'a parliament is necessarily a product of the temporary electoral choices that depend on the political winds, interests and prejudices of the moment'.[23] It is common cause that parliament, as mentioned in Chapter Three, prioritises the short-term interests of politicians.[24]

Parliament's inclusiveness for purposes of constitution-making is also doubtful. Given that parliaments in Zimbabwe are elected on the FPTP system, it is difficult to argue that Parliament represents the voices of all segments of the society. As argued by another author, '[t]he unsuitability of parliamentarians as constitution makers stems from the fact that they are chosen to represent people who voted them into parliament and not those who subscribe

[20] Reynolds 2012: 4.

[21] Barrett 2012: 5. See also Chimunhu J, 2009: 1; Maronga 2009: 2.

[22] Moyo L, 2009; 3. See also Makwiramiti 2013: 3; Chikoya 2013: 2.

[23] Moyo J.N, 2009: 2. See also Ndoro 2009: 2.

[24] See section 4 of Chapter Three.

to political values that are in conflict with those they purport to embody'.[25] The point is that a parliament does not adequately articulate or defend the broad interests of society that must 'define the pillars of any democratic and enduring constitution'.[26]

Furthermore, one can also question the wisdom of making parliamentarians that were elected to serve for a limited period the sole authors of a constitution that endures well beyond the time for which they are elected to serve in Parliament. Although Parliament, as the Speaker argued, does indeed represent the will of the people, that representation has meaning only in the limited sense of a five-year term (in the case of Zimbabwe) and within the confines of the constitution under which Parliament is elected. There is no democratic argument that justifies the creation of a wholly new constitution under the direction of 'specific political parties that may happen to dominate it at a given time'.[27] The fear is also that a parliament that at the same time serves as a constitution-making body will tend to write a large and perhaps excessive role for itself into the constitution.

The traditional role of parliament also makes it unsuitable for purposes of constitution-making. Parliament needs to limit itself to its routine law making functions and not venture into constitution-making, a superior assignment best undertaken by a separate body. As argued in Chapter Three, it is wrong to place the making of a constitution in the hands of parliamentarians as ordinarily parliaments are there to enact laws, which are subordinate to constitutions as prescribed by the people.[28]



### 3.1 Composition of the Constitution Parliamentary Select Committee

With questions of legimacy hanging over it, Parliament, nevertheless, proceeded to constitute COPAC. Twenty-five legislators were appointed to constitute COPAC. In line with the GPA, the legislators were drawn from the three political parties in the GNU, with ZANU PF contributing ten members, the MDC-T eleven members, and the MDC-M three members; the 25th member represented traditional leaders.[29] Seven members were women. Three co-

[25] Moyo J.N, 2009: 2.

[26] Moyo J.N, 2009: 2. See also Muchemwa 2009: 3; Chimbwa 2012: 4.

[27] Chigayo 2012: 3. See also Turner 2012: 4.

[28] See section 4 of Chapter Three.

[29] Makwiramiti 2013: 3. During the course of the constitution-making process, David Coltart of the MDC-M was replaced by Edward Mkhosi (MDC-M), Edward Chindori-Chininga of ZANU PF was replaced by Lazarus

chairpersons were appointed.[30] The composition of COPAC was a proportional reflection of the number of legislators that each political party represented in Parliament.

## 3.2 Creation of subcommittees

COPAC arranged its members into five subcommittees.[31] Each of the five subcommittees had a chairperson and a deputy chairperson. The size of the subcommittees varied depending on the tasks at hand. The smallest subcommittee (i.e. the legal subcommittee) had four members while the largest (i.e. the stakeholders' subcommittee) had twelve members.

Two auxiliary committees were created to assist COPAC. The first auxiliary committee, the Management Committee, was tasked with providing policy direction to COPAC. It consisted

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Dokora (ZANU PF), and Jabulani Ndhlovu of the MDC-T was replaced by Innocent Gonese (MDC-T). Gladys Gombani-Dube of the MDC-T passed away and was not replaced, leading to a situation where COPAC concluded its work with twenty 24 members instead of 25. See also COPAC 2009a: 3; Veritas 2010b: 3.

[30] Shuro 2010: 2. The appointments were based on the recommendations of the Chief Whips of the political parties represented in Parliament and the determination of the Committee on Standing Rules and Orders of Parliament. Before the enactment of Constitution Amendment No 19, the Committee on Standing Rules and Orders consisted of the Speaker, the Deputy Speaker, members nominated by the Speaker, and other members elected by the Houses of Parliament (National Assembly and Senate) by secret ballot. With the enactment of Constitution Amendment No 19 in 2009, during the GNU, its membership was expanded to include the President and Deputy President of the Senate, the leader of government business, the leader of the opposition, the chief whip, and members elected by the Houses of Parliament. Its composition is such that the number of elected members should be greater than the number of members nominated by the Speaker. The election of members to this Committee is based on the political and gender composition of the Houses of Parliament. Chaired by the Speaker, the Committee on Standing Rules and Orders is the policy making body in Parliament that determines and nominates the legislators who serve on Select Committees. It is also mandated with appointing legislators who chair Select Committees. In addition, the Committee on Standing Rules and Orders supervises the administration of Parliament, makes staff appointments and fixes their conditions of service. See also section 57 (1) of the Lancaster House Constitution of Zimbabwe; Standing Order 13 (1); Standing Order 149 (1); section 57A of the Constitution Amendment No 19; Barrett 2012: 5; Parliament of Zimbabwe 2004: 23.

[31] Walsh 2012: 3. The budget and finance sub-committee was responsible for ensuring the effective management of financial resources for the constitution-making body. The sub-committee on human resources focused on the effective management of human resources. The sub-committee on stakeholders was tasked with ensuring that all programmatic activities of the parliamentary committee related to the convening of major activities were managed effectively. The sub- committee on information and publicity was responsible for ensuring the effective management of the media and communications arm of the constitution-making body. Finally, the legal sub-committee was responsible for legal issues that needed to be attended to. See Makwiramiti 2013: 4.

of the three co-chairpersons of COPAC, their three deputies, two representatives from civil society, three negotiators of the GPA (who were government Ministers accountable to the leaders of the political parties in the GNU) and the Minister of Constitutional and Parliamentary Affairs. The Committee represented the link between COPAC and the Executive. The second auxiliary committee was the Steering Committee. The Steering Committee included the three co-chairpersons of COPAC, their three deputies and two representatives of civil society.[32] The Steering Committee was responsible for supervising the implementation of decisions of the Management Committee and relied on the goodwill of politicians to implement its decisions.

One can question the extent to which the composition of the constitution-making body reflects an inclusive institution. As argued in Chapter Three, a constitution-making body is inclusive to the extent that it draws all segments of society into the process of constitutional development, such as, the poor, the youth, school-going children, the disabled, and ethnic, religious, and cultural minorities.[33] It is '[o]nly when all the segments of a society are represented in a constitution making body that an objective claim can be made about a credible constitution making body'.[34] Composed of 25 members, all drawn from political parties in the GNU, COPAC did not reflect the wide assortment of voices present in the country. Many segments of the Zimbabwean society were not included in the composition of COPAC. Above all, COPAC was entirely made up of politicians. It seems that opportunities for the inclusion of a large number of stakeholders were sacrificed on the altar of political convenience.



The same can be said about the composition of the Management Committee. The Management Committee was made up entirely of politicians. It was for this reason that one author branded the Management Committee as 'a typical elite body that was created to protect the interests of politicians'.[35] That is also why 'its ability to act as an impartial institution seeking to advance the common good was doubtful'.[36]

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[32] Nemukuyu 2012a: 4. It was co-chaired by the two representatives of civil society. See also Murwira & Gumbo 2013: 4; Towindo 2012: 2.

[33] See subsection 2.3 of Chapter Three. See also Chiziro 2009: 4.

[34] Gondo 2009: 2.

[35] Veritas 2009c: 3. See also Nemukuyu 2012a: 3.

[36] Chibaya 2012: 3. See also Munda 2009: 2.

The fact that the Steering Committee was chaired by representatives of civil society might have increased the possibility that ordinary citizens would become more engaged in the process of constitution-making through their appointees. This arrangement gave the hope that executive intrusion would be limited to the minimum. However, a close look at the composition of the Steering Committee reveals that the inclusion of the civil society members 'creates the wrong impression that the committee was inclusive'.[37] The inclusion of civil society representatives does little to allay fears of politicians disproportionately dominating the process of constitution-making. This was so because the two representatives of civil society in the five-member Steering Committee were chosen by the political parties in the GNU. More importantly, they were appointed without consultation with civil society.

Furthermore, what was problematic was the ability of the Steering Committee to enforce its decisions. As mentioned earlier, the Committee relied on the goodwill of politicians in order to enforce its decisions. The fact that the Steering Committee lacked this capacity indicated that its oversight role was of little practical significance. Its reliance on the very same politicians it was created to scrutinise 'suggests that paralysis and elite domination characterised the context in which its decisions were given form and implemented'.[38]



### 3.3 Guidelines for creating the Constitution

The terms of reference of COPAC were derived from Article 6 of the GPA. According to the terms of reference, COPAC was obliged to call for a Constitutional Conference (First All Stakeholders Conference) that comes up with general themes that would guide the content and structure of the new constitution.[39] This was to be followed by public hearings and consultations.[40] COPAC was then obliged to upload the data derived from the process of consultation before classifying and categorising it in readiness for legal drafting.[41] COPAC was expected to eventually table its draft constitution at a Constitutional Conference (Second All Stakeholders Conference) where delegates would get an opportunity to assess the document against the ideas they had presented during consultation and, if necessary,

[37] Makanaka 2012: 1. See also Doroza 2009: 3; Reynolds 2012: 4.

[38] Chifodya 2013: 3. See also Nemukuyu 2012b: 2.

[39] Article 6.1 (i) (a) (i) of the GPA.

[40] Article 6.1 (i) (a) (ii) of the GPA.

[41] Article 6.1 (i) (a) (iii) of the GPA.

recommend changes.[42] The draft constitution, accompanied by a constitution making report, had to be adopted by Parliament.[43] Once the document was adopted by Parliament, COPAC would then submit its draft constitution to the ZEC, which would organise a constitutional referendum in which people would be asked to either accept or reject the draft Constitution as the supreme law.[44] In the event that it was adopted, the document was to be presented to Parliament for enactment, paving the way for its coming into effect.[45]

The terms of reference tick on many of the boxes that make good terms of reference. The terms of reference clearly defined the vision, mission, goals, structures and timeline of the process of constitution-making. It was accompanied by a comprehensive work breakdown structure and schedule. It was also clear on the question of stakeholders. It was not vague on the question of roles and responsibilities. It spelt out what needed to be achieved, by whom, how and when. That, undoubtedly, facilitated the accomplishment of the responsibilities placed on COPAC. What was missing from the terms of reference was the financial plan.[46] Article 6 of the GPA was silent as to how the process of constitution-making was going to be funded. Attention naturally turned to Treasury. Treasury was, however, adamant that it could not spare any resources as the entire machinery of the State was running on a shoe string



[42] Article 6.1 (i) (a) (iv) of the GPA.

[43] Article 6.1 (i) (c) (ix) of the GPA.

[44] Article 6.1 (b) of the GPA.

[45] Veritas 2011e: 2. In accordance with the timeline set out in Article 6.1 (c) the GPA, the First All Stakeholders Conference was to be held by not later than 13 July 2009 following the composition of COPAC. Thereafter, COPAC was to undertake public consultation by not later than 13 November 2009. This would be followed by drafting after which the constitution-making body would submit its draft Constitution to the Second All Stakeholders Conference to be held by not later than 13 February 2010. The draft constitution and accompanying report were to be tabled in Parliament by not later than 13 March 2010. Following this, the draft Constitution and accompanying report was scheduled to be debated by not later than 13 April 2010 in Parliament. A referendum on a new constitution was to be conducted by not later than 13 July 2010. The plan envisaged the publication of the constitution in a Government Gazette by not later than 13 August 2010. This was to be followed by its enactment in Parliament. See also Chafa 2009: 2; COPAC 2009a: 2.

[46] Turner 2012: 4. One might also argue that the terms of reference did not sufficiently describe the purpose and structure of the process of constitution-making. The terms of reference did not convey a clear sense of change over time. Given these ambiguities, the extent to which the terms of reference provided a basis for making future decisions and developing a common understanding among the constitution makers is questionable. See also Muzulu 2014: 1.

budget. Parliament, it appeared, did not have a budget to fund the making of a new constitution.

Eventually, an appeal was made to the United Nations Development Programme (UNDP) to financially assist the legislature in bring about the constitution. With a positive response from the UNDP, a Memorandum of Understanding (MOU) was signed. This led to the establishment of a Project Board that was tasked with approving budgets and work-plans concerning the utilisation of the funds for the constitution-making process. The Project Board consisted of all members in the Management Committee, three representatives of the donors and two representatives of civil society.[47]

It is regrettable that the process of constitution-making was institutionalised before there was an operational budget. As mentioned in Chapter Three, the issue of funding must be resolved prior to the institutionalisation of the process of constitution-making in order to avoid a situation whereby the creation of a constitution drags on for years due to a shortage of funding.[48] The absence of funding indicates that the institutionalisation of the process of constitution making was not rigorously thought through. It gave an impression that the process of constitution-making 'proceeded according to guesswork, supposition, assumption and speculation'.[49]



One can, of course, question whether the government should have proceeded to unveil a constitution-making programme knowing that it lacked the requisite budget. The heavy reliance on donations to fund the construction of a country's constitution is also problematic. Whereas there is nothing unusual about development agencies funding government initiatives, such arrangements often unlock a plethora of problems, including exposing processes to manipulation. Such interventions often result in a process of constitution-making that, practically, responds to the needs of donors and not ordinary citizens for whom a constitution is being created. The other problem is that donor funding is often accompanied by conditions that fundamentally alter the course of a process of constitution making. As argued by one author, '[d]onors do not just dispense money like confetti. Like local actors, including power hungry politicians, they calculate. Using their money, they can control the

[47] Veritas 2011b: 2. The Project Board was supposed to meet on a quarterly basis. See also International Crisis Group 2011: 3; Nyoka 2009: 1.

[48] See section 4 of Chapter Three.

[49] Chingwaru 2009: 2.

process and outcome of constitution making'.[50] A government that is not able to substantially fund its own activities, as some argued, has no business undertaking a constitution-making process. It must wait, at least, 'until it is able to fund itself'.[51]

## 4. The First All Stakeholders' Conference

The formation of COPAC and its auxiliary committees, coupled with the decision of the UNDP to fund the project, signalled the fact that constitution-making had commenced in earnest. Exactly three months after COPAC was established and became operational, the First All Stakeholders' Conference was held at the Harare International Conference Centre, from 12 to 13 July 2009. Hosted by COPAC, the First All Stakeholders Conference was basically a Constitutional Conference that had two objectives. Its first objective was to discuss the methodology of collecting and collating evidence on the wishes of the people on what needed to be incorporated in the new constitution. The other objective was to constitute the thematic committees of COPAC.[52]

### 4.1 Composition

The preparations for the First All Stakeholders Conference began with questions being asked about its composition. Questions were raised about the danger of packing the First All Stakeholders Conference with political appointees. It was argued that the majority of delegates to the First All Stakeholders Conference should be drawn from civil society organisations. This was seen as important in order to counter the domination of the process of constitution-making by the political elite.[53]

According to the initial plan, the process of identifying delegates to the First All Stakeholders Conference would involve two stages. COPAC would first invite groups such as traditional leaders, local councillors, churches and farmers to provincial consultation meetings. Upon

[50] Mataza 2012: 4. See also Makova 2012a: 5.

[51] Moyo J.N, 2009: 2. A disclaimer is appropriate as far as this quotation is concerned. As apt as it is, it was made by Professor Jonathan Nathaniel Moyo, a fierce critic of the constitution-making under COPAC. Given the fact that Professor Moyo was the spokesperson of the Constitutional Commission whose draft Constitution was rejected in 2000, it is not clear how much the criticism projected his intention to see COPAC fail. See also Gara 2009: 2; COPAC 2009b: 2.

[52] COPAC 2012a: 2. See also Mhaka 2012: 3.

[53] Morreira 2009: 3. See also Kubatana 2009: 5.

arrival at the provincial consultative meetings, staff from COPAC would accredit delegates that would participate in the Conference.[54]

However, weeks before the First All Stakeholders Conference commenced, the process of identifying delegates was abandoned when it was discovered that war veterans around the country were undermining the process of identifying delegates in order to ensure that only supporters of ZANU PF are selected to represent communities.[55] War veterans aligned to ZANU PF were not the only group that tried to manipulate the First All Stakeholders Conference. There were also reports of legislators who sought to control the processes of the First All Stakeholders Conference by making sure that only people who supported certain constitutional agendas were accredited to the Constitutional Conference. As a result of the interferences, many civil society organisations that had worked on constitutional issues for a long time found themselves excluded from the list of delegates to the First All Stakeholders Conference.[56]

The interferences prompted COPAC to abandon its initial position of involving provinces in the selection of delegates. It decided to constitute the Constitutional Conference based on appointments made from Harare. All parliamentarians were regarded as automatic members of the Constitutional Conference. The involvement of civil society organisations was left to political parties to determine. The political parties in the GNU were given the discretion to nominate delegates from civil society organisations of their preference. The decision raised dust and, as a result, it was dropped quickly. Civil society organisations were then asked to

[54] Thornycroft 2009a: 3. Accreditation was a formal registration process which began by recording delegates' identity numbers and organisational details. Thereafter, it captured details, such as the number of delegates in an organisation and whom they represented. It ended by capturing data relating to the qualifications and skills of delegates. See also Makwiramiti 2013: 5; Mhlotshwa 2012: 2.

[55] Turner 2012: 5. War veterans were accused of vetting people who wanted to attend the Conference. A critical consideration was whether a person echoed the constitutional views expressed by ZANU PF. Those who were known to champion other views were threatened with physical harm if they dared attend the Conference. The threat of physical harm was not imagined. Many people who were known to champion human rights issues in the rural areas which were prone to political violence were intimidated into not attending the Conference. Those who defied the war veterans were subjected to physical abuse. As many as 15 people were reportedly assaulted by war veterans. Of this number, three were known to have been hospitalised after suffering 'life threatening injuries'. See also Guma 2012: 3; Zimbabwean 2009: 1.

[56] Feldman 2013: 3. See also Mumba 2009: 2; Share 2012a: 3.

come up with names of their delegates for the Constitutional Conference and submit these to the organisers of the Constitutional Conference.[57]

Initially, the number of delegates was set at 1200 of which more than half were to be drawn from political parties. Civil society did not take this lying down. Under excessive pressure from public opinion that was becoming increasingly hostile, the constitution-making body, with the concurrence of the leaders of the political parties, was forced to increase the number of delegates from 1200 to 4000. More importantly, on 24 June 2009, COPAC agreed that 70 percent of the delegates be drawn from civil society organisations, with the remaining 30 percent coming from the partners in the GNU.[58] Citing logistical challenges, COPAC excluded non-resident citizens from participating in the Constitutional Conference.

What must be noted is the inclusive nature of the Conference. As stated in Chapter Three, a Constitutional Conference is inclusive to the extent that it draws its participants from various segments of society.[59] Attended by 4000 delegates, the Conference was inclusive. The successive governments of Zimbabwe did not have a track record of including so many people in a constitution-making project.[60] This does not, however, mean that the Conference was totally and fully inclusive as the authorities proudly claimed. As the age-old English idiomatic expression goes, 'the proof of the pudding is in the eating'. A breakdown of the percentages of the number of delegates reveals that the Conference was not inclusive enough. Delegates representing professional boards (a category which included professionals such as attorneys and doctors) constituted, for example, a meager 0.7% of the delegates. The number

[57] COPAC 2009b: 2. See also Guma 2009: 1.

[58] Veritas 2009b: 3. According to the information obtained from the Minister of Constitutional and Parliamentary Affairs, Advocate Eric Matinenga (2009: 2), the Conference was to be attended 'by 4000 delegates of whom 30% (1 500) would come from political parties and 70% (2500) would come from civil society organisations'. But a close examination of the information provided by the government and echoed by COPAC suggests that it cannot be correct. A recalculation of the percentages seems to suggest that 37.5% of the delegates were drawn from political parties and 62.5% was drawn from civil society organisations. The discrepancy in the percentages is most likely the result of a typing error on the part of the government officer who computed the data as civil society organisations would not have accepted a situation in which political parties sent more delegates than they were entitled to. The arrangement that 30% of the delegates should be drawn from political parties and 70% from civil society organisations, was a major demand of civil society organisations. See also Griffiths 2013: 6; Sibanda T, 2012a: 2.

[59] See subsection 3.3.1 of Chapter Three.

[60] Griffiths 2013: 6. See also North 2013: 6; Cross 2009: 2.

of delegates representing professional boards was less than the number of delegates representing traditional healers, who constituted 3% of the delegates. Only 1% of the delegates were drawn from academia (i.e. university professors). Traditional leaders fared much better than university professors as they comprised 3% of the delegates. Clearly, there was very little consideration given to the need to increase the number of delegates who had the technical know-how to contribute to the complex subject of the Conference, namely structures of a constitution.[61]

It was also clear that women were not adequately represented. Of the 4 000 delegates, only 1652 were women. The fact that the number of men outnumbered that of women by a ratio of almost three to two is problematic. After all, women constitute 52% of the total population. It is ironic that the only gender that was specifically mentioned by name in the Preamble to Article 6 of the GPA ended up being underrepresented:

> Determined to create conditions for our people to write a constitution for themselves; and Mindful of the need to ensure that the new Constitution deepens our democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship and equality for women.[62]



Also, no meaningful effort was also made to bring on board 'Asians, whites and other minority groups in society'.[63] Non-resident citizens were also not included, despite the fact that well over a quarter of the country's population is living outside the country.[64]

More importantly, the majority of those so appointed (using the 30% - 70% principle/formula) appeared not to represent a cross-section of ordinary citizens but political parties. Zimbabwe Lawyers for Human Rights argued that not all delegates purporting to represent civic society organizations were in fact representing civil society groups.[65] Some of the delegates represented proxy groups associated with the political parties in the GNU. '[W]ithin the 70% were representatives from proxy groups seeking to advance the cause of

[61] Kuseni 2013: 3.

[62] Preamble to Article 6 of the GPA. See also Chisora 2009: 3.

[63] Chirwa 2009b: 2. See also Gumbo 2012a: 2.

[64] Makwiramiti 2013: 5. This prompted one author to accuse 'the government of treating its non-resident citizens as being less equal than those living inside the country'. See also Gappah 2013: 2; Gagare 2012: 3.

[65] Chitande 2011: 3. See also Gotora 2009: 2.

political parties in the GNU.'[66] This suggests that the composition of the First Stakeholders Conference was a product of patronage. It suggests that the Conference was saturated by people who were appointed based on their ability to defend the constitutional positions of political parties and not the interests of ordinary citizens.

## 4.2 The accreditation of delegates

Initially, delegates to the Conference were going to be accredited (i.e. registered) in the provinces. However, without sufficient warning, the organisers changed their mind and decided to carry out accreditation at the venue of the Constitutional Conference in Harare. This turned out to be a miscalculation that exposed the limited administrative capacity of the organisers. COPAC lacked the equipment and financial resources to ensure smooth accreditation of delegates.[67]

On the day of accreditation (11 July 2009), staff from COPAC found themselves unable to cope with the number of delegates. They were only able to register less than 300 delegates of the 4000 that were invited to attend the Constitutional Conference. The stationery and cameras they had ordered for the registration were inadequate compared to the number of people who wanted to register 'spot on'.[68] The administrative shortcomings were not only confined to equipment. The constitution-making body was unable to secure enough hotel accommodation for the delegates, forcing many, who had come from outside Harare, and had no alternative accommodation, to sleep outside the Conference Centre.



## 4.3 The first day drama and chaos

The drama and chaos that characterised the accreditation process did not stop when the accreditation ended. On the first day of the Conference, midway through the speech by the Speaker of Parliament, Lovemore Moyo, veterans of Zimbabwe's liberation struggle began chanting ZANU PF political slogans and singing war songs denouncing the Speaker of Parliament, who was from Prime Minister Morgan Tsvangirai's political party, MDC-T.[69]

[66] Zimbabwe Lawyers for Human Rights 2010: 2. See also Chatora 2009: 4.

[67] Goredema V, 2013: 1. See also Mpofu 2009: 3; Veritas 2009a: 2.

[68] Makwiramiti 2013: 5. See also Chifamba 2013: 2.

[69] Lovemore Moyo, a legislator representing a political party that threatened to end ZANU PF's vice grip on power since the attainment of majority independence, was appointed Speaker of Parliament following the parliamentary elections held in 2008 in which he was elected to the House of Assembly as an MDC-T candidate

They demanded that the Constitutional Conference be stopped as it was, in their words, 'a conduit' for facilitating regime change. To make matters worse, they started throwing water bottles, prompting the Speaker of Parliament to abandon his opening speech halfway. The co-chairmen of COPAC appealed for order but the plea fell on deaf ears. In no time, activists from the MDC formations joined in the fray, leading to a scuffle. The situation degenerated into chaos. Although law enforcement officers intervened, the scale of the commotion was such that they were outnumbered. Consequently, a number of delegates accredited to the Constitutional Conference fled in fear of their lives, leading to the proceedings been adjourned prematurely.[70] In short, the first day of the Constitutional Conference was lost in the commotion. It was only after the principals to the GPA appeared on national television and reiterated the necessity for the proceedings to continue smoothly that real business commenced the following day, 13 July 2009.

### 4.4 The creation of the thematic committees

On the second day, the Constitutional Conference picked up from where it had left off the previous day. This time there were more law enforcement agents in attendance. The Conference was jointly chaired by two representatives of civil society, Professor Phinias Makhurane and Dr. Hope Sadza of the National University of Science and Technology (NUST) and the Women's University in Africa (WUA) respectively.[71]

The first task of the Constitutional Conference on the second day was to establish 17 thematic areas to be covered by the new Constitution.[72] The GPA obliged COPAC to set up

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for Matobo North constituency. When Parliament first met for its new term on 25 August 2008, Moyo was elected as Speaker of Parliament, receiving 110 out of 208 votes in the House of Assembly. In a secret ballot, Moyo reportedly received 99 votes from MDC-T Members of Parliament, seven votes from the breakaway MDC-M Members of Parliament, and four votes from ZANU-PF Members of Parliament. ZANU-PF did not present a candidate against Moyo and instead supported Paul Themba Nyathi of the breakaway MDC-M. See also Sibanda T, 2009: 1; Sokwanele 2009: 2.

[70] Nehandaradio 2009: 1. As soon as the meeting stalled, ZANU PF supporters took over the Conference room, started singing and demanding that the status quo not be changed. In particular, they called for the adoption of the Constitution of 2007 which had been made at the resort town of Kariba but later abandoned. See also Makova 2012b: 1; Gumbo 2012g: 2.

[71] Gutu 2009: 1. See also Gambe 2012: 3; Zvoma 2009: 2.

[72] Arato 2012: 2. The seventeen thematic areas were: founding principles of the constitution; media; land, natural resources & empowerment; war veterans; executive organs of the state, systems of government;

corrsponding thematic committees comprised of Members of Parliament and representatives of civil society organisations. In this regard, two resolutions came out of the Constitutional Conference. The first resolution focussed on the composition of the thematic committees created by COPAC. It was resolved that in each committee, representatives of political parties should constitute 30 percent of the members while those from civic society would make up 70 percent. The second resolution called for COPAC to ensure that there would be equal representation of men and women in all its sub-committees.

Many queried COPAC's creation of seventeen thematic committees. There was a general concern that the thematic committees were too many in relation to the task at hand. The concern was that having a plethora of thematic committees often leads to management challenges. Given the fact that the project of constitution making was running on a shoe-string budget, COPAC should have created only a few thematic committees. The creation of so many thematic committees exposed COPAC as being 'insensitive to the fact that the process of constitution-making was largely donor funded'.[73]

In addition to the creation of the thematic committees, the delegates at the Conference resolved that COPAC establishes an administrative arm that is separate from that which serviced parliamentary committees. During the formative stages of COPAC, it was the administration of Parliament, under the Clerk of Parliament, that provided secretarial, logistical and other support services to COPAC. The decision to establish its own staff was motivated by the need to increase its efficiency and effectiveness, and thereby expedite the process of constitution-making. As stringent timelines were set in Article 6 of the GPA, it

languages; public finance; women & gender; youth; disabled; traditional institutions & customs; labour; elections & transitional mechanisms; citizenship & bill of rights; arms of state; religion. The above thematic areas became a basis upon which the outreach programme was conducted. See also Mpofu 2009: 4; Chitandabere 2009: 3.

[73] Gambe 2012: 2. The Constitutional Commission of 1999 had eight thematic committees: fundamental rights; customary law; executive organs of the state; independent commissions; levels of government; public finance and management; separation of powers; and transitional mechanisms. The South African Constitutional Assembly of 1996 was also backed by only six thematic committees: character of a democratic state; structure of government; relationship between levels of government; fundamental rights; judiciary and legal systems; and specialised structures of government. See also Maodza 2009: 3; news24.com 2010: 2.

was thought best that the secretariat would fully concentrate on meeting the deadlines in order to expedite the creation of a new Constitution for Zimbabwe.[74]

## 4.5 'Participatory conference'?

Despite some of the shortcomings in its composition, the First All Stakeholders Conference was, by and large, participatory. The manner in which the Conference took place manifested the basic norms of participatory democracy. The structures of the impending constitution were not the result of thumb sucking but the outcome of robust discussion in which ordinary citizens were offered an opportunity to state their preferences. On the basis of probing through questions, an atmosphere that fostered participatory constitution making was created. Typical of a 'gathering of the nation', delegates debated the structures of the impending constitution 'before they agreed on its general structures'.[75]

The fact that ordinary citizens were able to contribute to the general structure of the constitution, it was argued, 'indicates that the principle of participation influenced the activities of the Conference'.[76] One is hard- pressed to find evidence that points to reckless meddling by the Executive in the manner in which the Conference was conducted. Neither is it easy to find any indication that suggests either overt or covert meddling by the Executive in the manner in which the decision on the structures of the constitution was arrived at. The fact that there was no executive interference suggests that the Conference met some of the basic standards of participatory democracy for constitution-making.



One cannot, however, ignore the disruptive nature of the events that unfolded on the first day of the Conference and their impact on participation. Supporters of certain political parties accredited as delegates 'fought' to control the proceedings of the Conference until they were subdued. The role of violence in undermining the participative nature of the Conference cannot be denied. In fact, delegates coming from politically volatile areas, many noted, kept quiet throughout the Conference. All they did, some observed, was fidget uncomfortably in

[74] Feldman 2013: 4. By 21 December 2009, COPAC had established its own secretariat headed by a national co-ordinator. The secretariat, first headed by Peter Kunjeku and later Gift Marunda, was based at COPAC Head Office. See also International Crisis Group 2011: 5; COPAC 2013a: 5; Veritas 2009b: 2. In October 2010, COPAC chose not to renew Peter Kunjeku's contract as national co-ordinator and appointed Gift Marunda in an acting capacity until the parliamentary committee disbanded in 2013 on completion of its work.

[75] Gomba 2009: 1. See also Murwira & Gumbo 2013: 4; Sibanda T, 2009: 1.

[76] Chatora 2009: 2. See also Gumbo 2012b: 2 Gonda 2009: 2.

their seats. One could sense that these delegates wanted to contribute to the discussion but that 'fear of retribution was holding them back'.[77]

Generally speaking, one cannot discount the significance of the First All Stakeholders Conference in setting the constitution making agenda. The Conference should also be commended for bringing together key stakeholders in the making of the constitution. In this regard, it symbolised the coming together of ordinary citizens to discuss the manner in which the new constitution was going to be created. This is in line with the widely held belief that constitutions must be documents whose origins must be traced back to ordinary citizens. By bringing ordinary citizens together to discuss the general structures of the impending constitution, COPAC sent a message that its process of constitution-making was going to be based on some of the benchmarks of participatory constitution-making. The Conference created a situation in which the ensuing stages of constitution-making were broadened to include the representatives of the voices and aspirations of the broader community.[78]

Importantly, the Constitutional Conference signaled the fact that the process of constitution-making had begun in earnest. Its completion paved the way for the third stage of the constitution-making process, the outreach consultation stage.



## 5. Outreach consultation

Article 6.1 (a) (ii) of the GPA obliged COPAC to solicit the views of ordinary citizens before the drafting of the constitution commenced. As argued in Chapter Three, consultation before drafting is usually aimed at providing greater scope for the expression of ordinary citizens' views as well as the enhancement of their initiatives in constitution-making.[79] In addition, consultation aimed to facilitate the contribution of ideas by ordinary citizens to contribute ideas towards the construction of a constitution.[80] The consultation was meant to enable ordinary citizens to influence drafting through suggestions.

[77] Thornycroft 2009b: 2.

[78] Gambe 2012: 2.

[79] See subsection 4.2.4 of Chapter Three.

[80] COPAC 2010: 3. The consultation programme was funded by the UNDP. To meet the needs of COPAC, the UNDP put together a budget amounting to US$4.8 million. Much of the money was sourced from Western donor countries. Over half of that money went towards allowances for staff conducting the consultation. A good

## 5.1 Development of talking points

The process of consultation started with COPAC hiring six lawyers, with each of the three political parties appointing two lawyers. The lawyers were tasked to develop what was termed 'talking points'. Like standard questions that are often developed by a constitution-making body to assist the systematic collection of data, the 'talking points' were used to solicit views from the people.[81] The questions were developed around the 17 thematic areas and were consented to by the three political parties. In total, 26 questions covered all the 17 thematic areas.[82] Once the questions were developed, they were tested before being adopted by COPAC.[83]

## 5.2 Translation of talking points

The adopted talking points were then translated from English into vernacular languages. Initially, COPAC translated the talking points to Shona and Ndebele. Later, the talking points were also translated into Xhosa, Sotho, Chewa, Tonga, Kalanga, Venda and Nambya. The objective was to enable citizens to contribute to the creation of the constitution using the language with which they are comfortable. [84]



One issue that becomes clear immediately as one analyses the talking points is that they did not cover every aspect that warranted reflection in the constitution. At the very least, they were skeletal, raising fears that they were an inadequate tool for data collection. Any questionnaire that leaves issues to the imagination runs the risk of undermining the purpose for which it was created. Given the fact that a constitution is a document that impacts both the public and private spheres, the questionnaire ought to have been made much more

portion of the remaining funds went towards hiring motor vehicles for use during the consultation exercise. See Herald 2011b: 2; Gweshe 2012: 3.

[81] North 2013: 3. See also Walsh 2012: 4.

[82] Griffiths 2013: 6. Some thematic areas had more questions than others because of the nature of the issues they covered. See also Gunda 2012: 3; Magure 2009: 3.

[83] Zhangazha W, 2010: 2. The talking points were first administered to members of COPAC. This was done in a pilot study. The pilot study was a small scale preliminary study meant to test the accuracy of the talking points before their use in the field. Members had the opportunity to suggest how best the effectiveness of questions could be improved. Based on the suggestions gathered through the feasibility study, the talking points were revised before being used in the field. Even then, some lamented the fact that they were not as accurate as they would have wanted. See also, Manyuchi 2011: 2.

[84] Feldman 2013: 4. See also Zaba 2011: 2.

comprehensive in order to reflect that reality. As this was not the case, one cannot help but come to the conclusion that the talking points were ill-suited to the task at hand.[85]

The talking points (questionnaire) used by COPAC were not accompanied by a definition of key words.[86] This opened the exercise of consultation to too many interpretations, some manifestly spurious and intended to misinform rather than enlighten. This raises worrying questions about the usefulness of the talking points as tools for data collection and the quality of the data they generated for purposes of drafting. In the absence of a definition of the key words found in the talking points, it is difficult 'to state with certainty whether consultation under COPAC met its objectives'.[87]

### 5.3 Setting up outreach consultation teams

In total, 860 people participated as members of the consultation teams. Of those that participated, 70 percent were drawn from civil society groups, with the rest coming from the three political parties and the traditional leaders.[88] As far as the participation of civil society organisations was concerned, the decision of how many delegates each organisation could have was determined by COPAC. Under this arrangement, civil society organisations applied to COPAC requesting to be part of the team in charge of consultation, after which COPAC decided on the request. There were no standards used in arriving at its decision. Once a decision was made, COPAC wrote to individual civil society organisations advising each of the number of their people that could participate in the consultation teams.[89] Drawing on the 860 people, COPAC established 54 consultation teams. Each consultation team consisted of



[85] Take for example the following question under heading Theme 4: Citizenship and Bill of Rights: How should citizenship be acquired? Surely to expect villagers with little education to respond meaningfully to such an overloaded question boggles the mind. See also Turner 2012: 5; Chirova 2010: 2.

[86] Makwiramiti 2013: 5. The questionnaire/talking points should have been accompanied by a comprehensive list of terms used with accompanying definitions to facilitate meaningful consultation. Some of the words that needed definition include: 'rights', 'legislature', 'executive', 'judiciary', 'state', and 'government'. See also Chingwaru 2009: 3; Financial Gazette 2010: 2.

[87] Shumba G, 2010: 2. See also Matshazi 2013: 2; Chirwa 2009a: 2.

[88] North 2013: 4. ZANU PF and the MDC-T contributed 12% each. The MDC-M contributed 4% and traditional chiefs contributed 2% of the delegates, respectively. See also Banya 2012: 2; Herald 2012b: 1.

[89] Veritas 2010a: 2. See also Chifodya 2013: 1.

16 members. Each team comprised three team leaders, three rapporteurs, three drivers, six ordinary members and one technician.[90]

## 5.4 Training of outreach consultation teams

Once the consultation teams were constituted, COPAC moved to capacitate the teams. The constitution making body carried out training of outreach consultation teams between December 2009 and January 2010. The aim was to ensure that all outreach consultation members had a fair understanding of the methodology to be used in conducting the outreach consultation.[91] In the wake of the training, each consultation team was provided with laptops, loudspeakers, and video and audio cameras for capturing data.[92]

## 5.5 Preparing for the outreach consultation

Before sending out the teams into the field, COPAC launched a publicity campaign that encouraged ordinary citizens to be a part of the process of 'people driven constitution making'.[93] The publicity campaign sought to encourage citizens from all walks of life in Zimbabwe to give their views to the teams undertaking consultation as well as to use other methods to submit their views to COPAC. This was communicated in all national languages through newspapers, radio, television, schools and parliamentary constituency offices. It also involved a door to door delivery of publicity materials. COPAC also used its website to disseminate information and get feedback on the process. A few days before consultation, COPAC augmented the already existing publicity initiatives by distributing education materials, such as, a Talking Points Booklet, a Frequently Asked Questions Brochure, posters and flyers, an Outreach Manual, a Meeting Points Booklet, and a Newsletter. The

[90] Zhanje 2012: 3. See also Radio Dialogue 2009: 4.

[91] Mutandwa 2010: 8.See also Makwiramiti 2013: 5; Kubatana 2010: 2.

[92] Barrett 2012: 5. The equipment was sourced under a multi-donor fund worth US$21 million. Managed by the UNDP, the funding was sourced mostly from Western donors including the Governments of Australia, Denmark, France, The Netherlands and Norway. Others were the Canadian International Development Agency (CIDA), the Department for International Development (UK), the European Commission, the Swedish International Development Cooperation Agency (SIDA) and the United States Agency for International Development (USAID). See also Muchemwa 2009: 3; Matinenga 2009: 6.

[93] Campbell 2012: 4. See also Sibanda L, 2010: 2.

consultation programme was officially launched on 16 January 2010 at the Harare International Conference Centre.[94]

## 5.6 How consultation took place

Consultation in the provinces was staggered.[95] Within the provinces, consultation was decentralised to districts with wards being the venues for the meetings.[96] In a district with 16 wards like Guruve South, for example, the consultation teams would move from one ward to another until all the wards in the district were completed. Once the meetings planned for that district were exhausted, the consultation team would move to another district. On average, members of the consultation teams spent 14 days in one district before moving to the next district. Three meetings were allocated to each rural ward while urban wards were allocated one meeting per ward. In total, it was reported that 4943 outreach consultation meetings, attended by 1 118 760 people, were held across the country.[97] Of the total number of participants, 416 272 were males and 441 238 females. There were also 253 240 youths and 8020 people with special needs.[98]

Each consultation meeting was chaired by three team leaders drawn from the political parties in the GNU. It was the team leaders, themselves national legislators, who were responsible for putting questions to ordinary citizens on what they wanted incorporated in the



[94] Zaba & Dube 2010: 3. In their speeches, President Mugabe, Prime Minister Tsvangirai and Deputy Prime Minister Mutambara appealed to Zimbabweans to attend the consultation meetings and contribute towards the creation of a constitution for Zimbabwe. Their speeches underscored the need for citizens to exercise tolerance of fellow countrymen who expressed views that were contrary to those held by others. The speeches by the leaders were important in that they encouraged the creation of a conducive environment for the outreach teams to conduct the consultation. However, as will be shown later, the divide between supporters of the political parties was not bridged by the outreach programme as they continued to work against each other's interests throughout the consultation process and in the other stages of the constitution-making process. See also Muchemwa 2009: 3; Chronicle 2010: 2.

[95] COPAC 2013b: 37. The first segment of the consultation programme targeted the provinces of Bulawayo and Midlands. The second segment targeted the provinces of Mashonaland East, Mashonaland West and Matabeleland North. The third segment of the consultation programme targeted the provinces of Manicaland and Mashonaland Central. This was followed by the fourth segment, which targeted the provinces of Masvingo and Matabeleland. The final segment targeted the metropolitan province of Harare. See also Madava 2012b: 2.

[96] Veritas 2010b: 2. See also Fox 2010: 472.

[97] Copac 2012b: 2. See also Doroza 2009: 3.

[98] COPAC 2013b: 14. See also Mabwe 2013: 4; Nyaira 2010: 2.

constitution. The team leaders, using the 'talking points', engaged attendees on their constitutional preferences. Rapporteurs recorded the responses electronically and manually.[99]

Soliciting the views of ordinary citizens was not only limited to the consultation meetings. Citizens were invited to submit their views electronically. Those who wished to do so were expected to download the questionnaire (talking points) from the website of COPAC and answer 26 questions. The email was the most widely used method of making submissions. However, citizens were also able to submit their contributions through ordinary mail or drop off written contributions to the offices of the constitution-making body. Fifty-two written submissions were received from institutions and ordinary citizens locally.[100] Two thousand and two hundred responses were received from non-resident citizens.[101]

The consultations also targeted specific categories of people. COPAC, for example, organised children's consultation forums throughout Zimbabwe.[102] Using child participatory methods, the consultation sought to solicit the views of children on the rights they wanted enshrined in the new constitution. COPAC also held consultation meetings for physically handicapped people. This was done with the involvement of the National Council of Disabled Persons of Zimbabwe (NCDPZ). A total of ten consultation meetings, one for each province, were held at the provincial capitals. [103]



[99] Turner 2012: 5.

[100] COPAC 2013a: 5. This number includes those received through email, the postal service and hand delivery. See also Gweshe 2012: 2.

[101] Most contributions submitted by email originated from citizens living in South Africa, Britain, the United States, New Zealand and Australia. The data received from non-resident citizens was merged with the data received from ordinary citizens in the wards. See Zimbabwe Exiles Forum 2010: 2.

[102] Mutseyekwa 2010: 1. The meetings were facilitated by the United Nations Children's Fund (UNICEF) and COPAC. See also Sokwanele 2011: 4; Mataza 2012: 6.

[103] Mafungo 2012: 2. Each meeting started with a Christian prayer after which the objectives of consultation were outlined. Thereafter, consultation got into gear. The contribution of participants to these meeting was limited to talking point number seven which addressed the rights of people with disability. In this regard, the organisers engaged disabled people on the rights they wished to see enshrined in the constitution to address their plight. As in the meetings before it, delegates were encouraged to contribute freely to the creation of the constitution. The contributions were captured manually and electronically. Each of the one day meetings closed with a Christian prayer after which the delegates went home.

A special consultative meeting was also held for national legislators. The special meeting was requested by the legislators themselves who were not able to provide their inputs as they were responsible for conducting the consultation. Chaired by the co-chairpersons of COPAC, the consultation lasted six hours. As in the outreach consultation meetings, the contributions of legislators were captured audio-visually and manually through the writing of minutes.[104]

Generally speaking, the consultation process afforded ordinary citizens an opportunity to contribute ideas to the creation of a new constitution. It implied an unequivocal acceptance of the fact that COPAC's powers were delegated to it by the people.[105] This is consistent with the principle that a constitution-making body must consult with, and defer to the wishes of, the people, who after all, are the 'true' source of popular sovereignty.

The consultation was, by and large, extensive. The fact that 4943 outreach consultation meetings were held is by any measure a grand achievement. One must also acknowledge the fact that over one million people attended the consultation meetings. Equally encouraging is the fact that the number of women who attended the consultation meetings was higher than the number of men who attended.[106] COPAC must also be commended for targeting the vulnerable. Thousands of people living with disabilities attended the consultation meetings. The consultations were, however, in some respects, inadequate and insufficient. In the case of the physically disabled, for example, the consultation prioritised talking point number seven on the rights of people with disability and neglected other talking points. While a discussion on the rights of people with disability was relevant, confining their contribution to one talking point was ill-advised as it created the perception that the other talking points were not relevant to them. It projected the image of a consultation 'in which the physically challenged were prejudiced on the basis of conditions that they were born with'.[107]

Many also condemned the exclusion of non-resident citizens in the consultation. No reasonable effort was made to draw non-resident citizens into the process of consultation.[108] With over 3 million people living abroad, the failure of the authorities to tap into the views of these people through face-to-face consultation was, to say the least, unfortunate. Of course,

[104] Guma 2012: 3. See also Kubatana 2010: 3.

[105] VOA 2011a: 1.

[106] Walsh 2012: 2. See also Nyika 2012: 4; Nemukuyu 2012a: 3.

[107] Chirevo 2010: 2. See also Gambe 2012: 4.

[108] Chimbwa 2013: 4. See also Shuro 2010: 2; Zimbabwean 2010: 2.

they were allowed to participate by submitting ideas electronically. The problem is that consulting people through the internet is not a viable substitute for face to face consultation. Consulting people through the internet hardly counts as meaningful consultation. The inadequacy of this arrangement is concretised by the fact that very few people found it worthwhile to submit their contributions through email. Out of 3 million Zimbabweans living outside the country, less than 2500 bothered to submit their views through email.

In so far as the process of consultation itself is concerned, it indeed offered ordinary citizens an opportunity to contribute towards the creation of a new constitution. However, the fact that the process of consultation was not preceded by civic education made it arguably less effective. As mentioned earlier, ideally civic education needs to precede consultation. Civic education prepares ordinary citizens to engage in meaningful consultation. This unfortunately was not the case with the consultation under COPAC. Of course, COPAC undertook a publicity campaign in which it informed citizens about the dates for consultation. That, however, hardly counts as civic education. The fact that consultation was not preceded by civic education creates doubt as to whether ordinary citizens were well primed for the consultation.[109]

Furthermore, the effectiveness of consultation was undermined by the fact that it was, generally speaking, characterised by some level of coercion.[110] Although the coercion was experienced in both rural and urban settings, it was more pronounced in the rural areas of the country. Its prevalence underscored the fragility of the environment in which consultation was taking place. One person was killed in Harare and as many as 14 people reported injured in political violence as the political parties escalated attempts to control the process of consultation through coercion.

The use and the threat of the use of coercion often featured senior civil servants. Members of the defence force and the police with a vested interest in maintaining the status quo were also fingered as the main culprits who used the threat of bloodshed to force villagers to support constitutional positions favoured by ZANU PF.[111]

[109] Veritas 2010c: 2.

[110] Zimbabwe Peace Project 2010: 9. See also Veritas 2010d: 1; Onslow 2011: 13.

[111] Turner 2012: 5. In terms of s 93(1) of the 1980 Lancaster House Constitution of Zimbabwe, under which the outreach programme was carried out, the function of the police was to preserve internal security and maintain

The fact that serving members of the army and the police were frequently used to coerce people into supporting certain constitutional positions suggests that the process of consultation did not provide the environment necessary for a truly democratic expression of the will of the people. The problem is that when people are intimidated, they mimic whatever political parties would like to hear to avoid reprisal. The recourse to intimidation is also regrettable as it took the country back to the unfortunate era of intolerance when dissent was treated as treason, those who expressed opposing opinions as foreign agents and patriotism as the monopoly of those who blindly supported it. In short, doubts were raised about the 'credibility of the consultation'.[112]

In addition to coercion and intimidation, the consultation process was characterised by manipulation. Three types of manipulation dogged the consultation. The first type involved rogue village heads seeking to tilt the outcome of consultation in favour of ZANU PF. To achieve this, village heads held weekly roll calls of villagers. In addition, there were reports that village heads monitored villagers on a weekly basis with regard to whom they met, their whereabouts, and their movement in and out of villages. More often than not, village heads, before commencement of the consultation, would seat people according to the political parties they support. For example, members of political parties opposed to the creation of a constitution that changes the status quo would be seated on one side of the meeting hall and those from political parties keen to create a constitution that unsettles the current order would



law and order. According to the Police Act, law enforcement officers are not allowed to involve themselves in party politics. The law demands that they draw a line between their responsibilities as State law enforcement officers and their political persuasion. Law enforcement officers are deemed to be in breach of the Constitution and the Police Act if they undertake political activities while still in the employment of the police. Moreover, the law does not permit the police to promote through canvassing, the activities of a political party where their sympathies lie. This is not the first time the defence force and members of the police have been accused of being partisan. On several occasions during the 2008 elections, high profile figures in the army openly declared their support for ZANU PF. Junior army officers who threw their weight behind the former ruling party were rewarded with promotion and moved up the chain of command. Some retired army officers reportedly appeared in full military gear at the start of the outreach consultation programme to induce citizens to endorse the constitutional positions of ZANU PF. Section 96 (1) of the Constitution provides the purpose of the army as defending Zimbabwe and not meddling in elections. The Defence Act also forbids members of the army to use state resources to advance the interests of political parties. See also Doroza 2009: 3; Morreira 2009: 1.

[112] Chimedza 2010: 2. See also Zhangazha T, 2012: 2.

sit on the other side. Those making contributions were often observed reading from scripts that were reportedly prepared by village heads. This type of manipulation was extensive.[113]

Some degree of coaching was also evident in the management of the consultation meetings. Coaching took many subtle forms. It was manifested in political parties drilling ordinary citizens on how to respond to specific questions on the talking points (questionnaire).[114] This was evident with people rehearsing known party constitutional positions. Frequently, coached citizens were exposed through contributions which they themselves seemed to have difficulty in understanding. It also manifested itself in people reading from prepared scripts and making contributions in ways not consistent with the question presented to them. In a number of consultation meetings, a very small number of people repeatedly offered to answer questions with the majority of the people in attendance remaining quiet. When a question was posed to them, they looked to the few vocal people to proffer an answer, notwithstanding the fact that at times the question posed was so basic that anyone could offer a meaningful contribution.[115] The fact that political parties in the governing coalition coached their supporters ahead of the consultation suggests that consultation facilitated an ideologically based dialogue on constitution making. More importantly, when people are coached, they are reduced to parrots.

The third type of manipulation involved the use of bussing. This involved political parties bussing in supporters from outside the ward where a consultation meeting was scheduled. ZANU PF was the chief culprit of this underhand tactic. It was notorious for moving its supporters in buses from one consultation meeting to the other to dilute the influence wielded by rival political parties. Intolerance often degenerated into violence.[116]

Finally, consultation was undermined by the presence of laws that restricted political rights. The Access to Information and Protection of Privacy Act (AIPPA) was, for example, one of the two laws that was used to stifle independent media reporting during the process of consultation.[117] Stories on the consultation written by journalists working for the State media

[113] International Crisis Group 2011: 3. See also Zimbabwean 2010: 1; VOA 2011b: 2.

[114] Thornycroft 2010: 2. See also Crisis in Zimbabwe Coalition 2011: 2.

[115] Shuro 2010: 2. See also Zimbabwe Independent 2012: 3.

[116] Chitate 2011: 3. See also Dow U, 2011: 9.

[117] Feldman 2013: 2. AIPPA was passed by the Parliament of Zimbabwe on 31 January 2002 and signed into law by President Mugabe on 15 March 2002. The brainchild of Professor Jonathan Nathaniel Moyo, Minister of Information, Media and Broadcasting Services, AIPPA is frequently used by the ZANU PF government in its

were subject to heavy censorship.[118] The official reason was the need to curb information deemed injurious to the national interest and security. Security concerns were, thus, used to undermine consultation. The objective, according to many, was, however, to muzzle dissent.

The Public Order Security Act (POSA) was the other law that negatively affected the constitution-making process.[119] POSA created an obligation for all consultation meetings to be granted regulatory clearance before they got underway. Senior police officials with a vested interest in maintaining the status quo often used this legislation as pretence to deny authorisation for consultation meetings in communities known to champion constitutional views that were hostile to those of ZANU PF.

In general, one can doubt the effectiveness of a consultation process in which people were coerced and intimidated. Ideas generated through such a consultation do not manifest the free will of the people. Rather, they tend to echo the perceptions of those with the ability to create



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ongoing campaign to stifle independent media reporting in Zimbabwe. Since enactment, the law has been used by the government to arrest, harass, intimidate and control the activities of journalists, photographers and media outlets, particularly the independent print media. On 12 September 2003, the government used AIPPA to close Associated Newspapers of Zimbabwe (ANZ), publishers of *The Daily News* and *The Daily News on Sunday*. Arguably, the closure is AIPPA's severest blow against freedom of the press in Zimbabwe. See also New Zimbabwe 2010: 2; Mutandwa 2010: 18.

[118] Chipara 2013: 5. Quoting the Media Monitoring Project of Zimbabwe, Chipara uses statistics to illustrate the level of censorship. Of the 50 stories published by the State media, only 10 were not heavily censored. A key characteristic of the censorship was that the public media devoted more coverage to stories of ZANU PF officials who did not wish to see the consultation succeed. In line with this approach, 45 of the 50 stories published by the public media featured the opinion of Professor Moyo who did not mask his wish to see the consultation fail. It was on the watch and instruction of Moyo, Chipara argues that editorial policy saw more censorship of stories on the consultation. See also Nehandaradio 2010: 3.

[119] Kuseni 2013: 2. A draconian law, POSA was enacted in January 2002. Its chief architects were Professor Moyo and Patrick Chinamasa, the then Minister of Legal and Parliamentary Affairs (now Minister of Finance). Often described as 'a plot against human rights', the law gave the police sweeping powers. It is frequently used to stifle the activities of civil society organisations and opposition political parties that threaten the ruling party's grip on power. Over the course of the past few years, the law has been increasingly used to prosecute human rights defenders and community based activists and restrict their rights to: freely assemble; criticise the government, and the President; and to engage in, advocate or organise acts of peaceful civil disobedience. Many regard it as legislation that helped President Mugabe consolidate power. See also Bell 2012: 2.

violence. To then accept that contributions made in such a hostile environment 'reflected the wishes of ordinary citizens would be the height of irresponsibility'.[120]

Notwithstanding the above, the completion of the consultation was of great importance. It nudged the constitution-making process closer to completion.[121] It led to the next stage of the constitution making process, namely, the categorisation and classification of data obtained through consultation.

## 6. Categorisation and classification of data

Soon after the completion of the consultation process, COPAC began categorising and classifying data in readiness for the drafting. During this stage, the thematic committees classified data derived from the consultation into the 17 themes that formed the general structure of the constitution. The idea was for those assigned the responsibility to draft the constitution to draw ideas from the data in a systematic way.[122] In its pure form, the data resembled the constitutional preferences of ordinary citizens.

### 6.1 Composition of thematic committees

As decided by the Constitutional Conference, 425 people were appointed to serve in the 17 thematic committees.[123] Using the formula agreed to at the 'first' Constitutional Conference, the committees were composed of members of civil society and parliamentarians with 70 per cent of those appointed to the thematic committee being persons drawn from civil society organisations. The remaining 30 per cent were parliamentarians drawn from the political parties in the governing coalition. In addition, 30 politicians not represented in parliament were included. Seventeen traditional leaders (chiefs) were also appointed to the thematic committees.

Co-chaired in the usual tripartite arrangement involving the political parties in the GNU, each of the 25 member thematic committees was split into three groups, each of which was headed by one of the three co-chairpersons. Each of the three groups was composed of eight members drawn from civil society organisations, ZANU PF and the two MDC formations.

[120] Chadwa 2010: 2. See also Campbell 2012: 5.

[121] Guma 2012: 2. See also Chisere 2011: 1.

[122] Chitate 2011: 2. See also Tsoro 2011: 3.

[123] See subsection 4.4 of this Chapter. See also Radiovop 2011: 4.

The twenty fifth member was appointed by traditional leaders. Each group included a rapporteur, a researcher, a data analyst, and an expert in constitutional affairs. The arrangement was meant to expedite data categorisation and classification.

Many commended COPAC for ensuring that its thematic committees comprised delegates drawn from both civil society and political parties. More importantly, delegates were also drawn from political parties not represented in Parliament. The fact that the thematic committees were composed of people representing various interests in society indicates that they were, by and large, inclusive. Some are of the view that 'the inclusion of delegates from civil society exponentially increased collaboration in data classification'.[124]

The contention that the thematic committees were inclusive has, however, been challenged. This relates to the fact that many of the civil society representatives expressed views that were indistinguishable from those of the coalition parties. Over half of the representatives of civil society organisations in the thematic committees publicly expressed views that mirrored those of the political parties in the GNU.[125] This gave the impression that some representatives of civil society organisations were 'proxies for the political parties in the GNU'.[126] It suggested that they 'were doing a hatchet job on behalf of the three political parties'.[127] Had they been 'their own representatives, they would have clashed more with the ruling parties during data classification', it was argued.[128] This led some to conclude that '[a]ny talk of the thematic committees being inclusive was cheap politicking'.[129]

Obviously, the domination of the agenda of data classification by politicians undermined collaboration between the delegates representing civil society organisations and those

[124] Kuseni 2013: 4. See also Veritas 2011a: 3.

[125] Makwiramiti 2013: 3. A quick perusal of the views of the representatives of civil society organisations before and during data classification exposed how their constitutional preferences tended to mirror those of political parties in the GNU on issues, such as presidential terms of office, separation of powers, and the protection of individual rights. Given the fact that civil society organisations in Zimbabwe are often funded in order to reflect certain political opinions, it does not come as a surprise that they identified with the political parties in the GNU in the manner that they did. See also Mandaza 2012: 4.

[126] Zivo 2013: 4.

[127] Feldman 2013: 4.

[128] Mambare 2013: 2.

[129] Ndoro 2011: 2.

representing political parties.[130] The fact that politicians dominated the agenda of data classification suggests that the representatives of civil society organisations were confined to the periphery of the data classification exercise.[131] Had the delegates from civil society organisations been regarded as equals, we would have seen collaboration emerging as a strong feature of the data classification process. That, however, was not the case. It is therefore not surprising that legitimate questions hang over the collaborative nature of the process of data classification.

There were also questions raised around the size and effectiveness of the thematic committees. The thematic committees, as mentioned earlier, were composed of fifteen people each. Most analysts argued that the thematic committees were too unwieldy in relation to the task at hand. More problematically, one cannot but notice that there were too many politicians, without technical skills, that were represented in these committees. This led one



[130] Griffiths 2013: 4. Data classification was the process of placing data derived through consultation into various categories in accordance with the 17 thematic committees adopted by the First-All Stakeholders' Constitutional Conference (see subsection 4.4 of this Chapter). It was an exercise undertaken in readiness for drafting. The data was categorised by teams made up of people drawn from civil society organisations and political parties. However, according to Griffiths, politicians dominated data classification through both covert and overt means. The debate on how data ought to be classified was dominated by politicians. When there was no agreement on how to classify certain data, the categorisation stalled. Although civil society organisation often put forward commendable propositions about how to solve the ruckus, the suggestions were not always taken into consideration. Through the chairpersonship role, politicians dominated the agenda of data classification. A close analysis of the discussion on data classification suggests that the chairpersons often used their influence to determine data classification. Lacking a political constituency, the influence wielded by representatives of civil society organisations was marginal. Although the classification was manifestly a technical process, political clout was a much more important asset than the ability to categorise raw data and derive a scientific meaning. Seemingly, from the point of view of politicians, having the representatives of civil society organisations in the thematic committees was important to give a semblance of legitimacy to the data classification. See also Makanaka 2012: 4.

[131] Chisango 2010: 5. Given the fact that political parties were represented by some of their most senior political activists, it was not surprising that classification, to some extent, resembled a political duel in which political parties wanted to dominate the classification. The representatives of civil society organisations often found themselves 'flowing' with politicians. Perhaps, what this teaches us is that politicians ought not to participate in data classification following consultation. In any case, they should have been left out of this stage as the majority of them lacked the capacity not only to classify data but also to derive any meaning from that classification. See also Gava D, 2013: 3.

author to argue that the composition of the thematic committees manifested the 'influence of the concept of political correctness'.[132]

## 6.2 Standardisation of ward meetings

The categorisation and classification of data obtained through consultation required standardising the number of meetings conducted in the wards. This included addressing the disparity in the number of meetings held in rural and urban areas. As mentioned earlier, some wards, particularly those in the rural areas, had more consultation meetings than those in the urban areas. With a view to reduce the walking distances to the nearest consultation meeting venue, an average of three ward meetings was allocated to each rural ward. In the case of urban wards, one meeting was allocated. When it came to categorising responses in readiness for drafting, it was clear that the disparity in the number of meetings favoured citizens from the rural areas. With this in mind, it was agreed, after extensive deliberation, that the three meetings allocated to each rural ward would be treated as one for purposes of classifying data.[133]

## 6.3 Consolidation of reports



With the number of meetings held in the wards standardised, the process of consolidating reports began in earnest. The consolidation of reports was progressive. It started with the thematic committees consolidating reports from meetings within a ward into a ward report. Reports from wards were consolidated into a district report. These were then put together into a provincial report.[134] Subsequently, ten provincial reports were merged into a national report. The reports from the special outreach consultation meetings held for the youth, parliamentarians and the disabled were also merged into the national report. It further included the responses of Zimbabweans domiciled in other countries submitted through email and reports on written submissions received at the head office of COPAC.[135]

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[132] Shumba Z, 2011: 2.

[133] Chisango 2010: 5. See also Ncube 2011: 3.

[134] Thus, a province with eight districts, such as Mashonaland Central, had one report. See North 2013: 5; Chitate 2011: 2.

[135] Zaba 2011: 3. Following the merger, the team leaders and rapporteurs of the thematic committees signed a certificate. The certificate was a statement which was to the effect that they had gone through the responses

## 6.4 Classifying data

One of the issues that emerged following the consolidation of reports was the method that must be used to classify data. Political parties in the governing coalition had different ideas regarding the methodology to be used for analysing and classifying data. While ZANU PF wanted the quantitative method to be used, the MDC formations preferred the qualitative method.[136]

The quantitative method involved analysts counting the number of people that supported a certain idea during consultation. It basically meant going by what the majority of the people said. By focussing on the number of people who supported a certain idea, it was argued, a clearer and more precise picture of the constitutional preferences of the ordinary citizens would emerge. Others, however, argued that this reduced data analysis to 'the codification of the imposition of the majority's will'. [137] It also reduced data classification to an opinion poll. The qualitative method, on the other hand, entailed classifying data according to the soundness of the ideas contributed by ordinary citizens. It involved analysing the soundness of the contributions of ordinary citizens recorded during consultation. In addition, it took into account factors such as the effect of intimidation, coercion and coaching. For its proponents, this method of categorising data gave the hope that the outcome would very much 'resemble the contributions of ordinary citizens'.[138]



Eventually, an agreement was reached to use both methods of data classification. This required fusing the two methods. It was a compromise method that diffused a dispute that would have led to the premature demise of the process of constitution-making. By drawing elements from both the quantitative and qualitative methods, the hybrid method succeeded in

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recorded in the COPAC database under the thematic area concerned, and that by appending their signatures they confirmed that the data reflected the public views generated during the consultation. See also Radioyop 2011:3.

[136] Feldman 2013: 5. Debate on the question of a suitable data analysis method was not confined to the conference rooms of COPAC. Supporters of the partners in the GNU joined in the fray. On 13 May 2011, the representatives of the partners to the GPA convened a meeting to resolve the matter. Coming three weeks after the thematic committees were supposed to have commenced their work; the meeting started with the representatives of ZANU PF reiterating the necessity of using a quantitative data analysis method, while those from the MDC formations advocated the use of a qualitative data analysis method to classify the data derived from consultation. See also COPAC 2013b: 14; Kubatana 2011: 3.

[137] Makwiramiti 2013: 5. See also Youth Forum 2011: 2; Veritas 2011b: 2.

[138] Chisere 2011: 4.

placating the different demands of the political parties drafting the constitution. How exactly the analysts 'scored,' after going through these two procedures, was, however, left to speculation.[139] COPAC did not provide much information.

However, the hybrid data analysis method was far from being the panacea many claimed it to be. The fact that the hybrid method was dominated by phenomena, such as, supposition, assumption, guesswork and speculation, was a major concern that only served to undermine its credibility. With this limitation in mind, it is not therefore mind-boggling that many found it morally convenient to criticise the hybrid data analysis method for what some referred to as the sin of 'belittling the practical significance of consultation'.[140]

In fact, in its report to Parliament on 6 February 2013, COPAC acknowledged the shortcomings of the methods used to classify data:

> Given the fact that this was not a scientific study, the Select Committee resolved that both the statistics (quantitative) and qualitative outcomes (for example meeting atmosphere and others) must be taken into account in deciding what would eventually go into the constitution. The interpretation of these statistics therefore has to take into account these limitations in methodology.[141]

Perhaps the greatest weakness of the classification was that it was not undertaken by a team of experts. As noted earlier, the majority of those in the thematic committees were politicians. Although it could be argued that the intention was to reflect a degree of unity among the political parties effecting constitutional development, the domination of politicians also raised worrying questions about the extent to which they could be relied upon to champion the constitutional preferences of ordinary citizens as opposed to advancing their narrow political agendas. Given that previous constitutional developments were squandered on the altar of political expediency, the wisdom of making politicians direct data classification is questionable. The burden of the classification ought to have been placed on the shoulders of experts.[142]

[139] Griffiths 2013: 6. See also Tsoro 2011: 3.

[140] Zivo 2013: 3. See also Nzimbe 2012: 2.

[141] COPAC 2013b: 20.

[142] Gambe 2012: 3. Yash Ghai (2004: 9) proposes the use of constitutional commissions in receiving and analysing recommendations generated through consultation. See also Newsday 2011: 2.

In short, the categorisation of the ideas generated through consultation was an important technical process. It gave an impression that the classification of the ideas generated through consultation was undertaken with a high degree of rationality. But it seems that it was no more than an impression. As many argued, there was no discernible link between consultation and data classification. More problematically, the task was dominated by politicians and not experts. This means that the content of the constitution was given form by political prejudices and not the demands of ordinary citizens. Just as politicians make the final decisions about what is classified, they 'can also undermine the result of consultation through deciding what is incorporated and left out'.[143]

In any event, the completion of data categorisation and classification was a huge milestone. The completion was a cumulative gain that nudged the process of constitution-making towards the more significant and technical stage of drafting. It also fostered a new narrative premised on the realisation that a new constitution was now well within sight. Most importantly, for the optimistic, it reinforced the conviction in the ability of COPAC to deliver a new constitution.

## 7. Drafting



Following the categorisation and classification of data, the constitution making body began to prepare for drafting.[144] The exercise began with COPAC constituting a team of 17 legal experts drawn from the political parties in the GNU. Each of the three political parties appointed five legal experts. The traditional leaders (chiefs) were allowed to appoint two legal experts to protect their interests. The team of legal experts was responsible for identifying issues that were worthy of incorporating in the impending constitution.

Comprised of legal experts drawn from the participating political parties, the drafting committee was not inclusive enough. The only group that was represented outside this arrangement were the traditional leaders who, as we saw, were allowed to appoint two legal experts. It was difficult to overlook the fact that not all political parties were represented. Neither was it easy to overlook the fact that civil society organisations were not represented.

[143] Mambare 2013: 4. See also Chipara 2013: 4; Gwangwava 2013: 3.

[144] Kuseni 2013: 3.

The composition of the drafting committee, it was argued, represented a disturbing 'case of structural exclusion'.[145]

Notwithstanding the above, the process of identifying issues that were deemed worthy of incorporating in the constitution began with the legal experts going through the national statistical report, a consolidated document put together by COPAC following the end of data classification by the thematic committees. Issues that the legal experts considered worthy of incorporating were extracted from the national statistical report and placed in a document entitled 'List of constitutional issues'.[146] The team of experts then examined the issues with the objective of identifying issues that qualified to be recommended for incorporation into the impending constitution. Those issues were then put together in a document called 'List of agreed constitutional issues'.[147]

Following the development of the list of agreed constitutional issues, the team of experts commenced the process of developing the constitutional principles that would guide drafting.[148] After a rigorous examination of the general pattern of responses in the national statistical report, the team of legal experts identified 26 constitutional principles.[149]



[145] Griffiths 2013: 6. See also Shuro 2010: 2.

[146] COPAC 2013b: 17.

[147] Gambe 2012: 6. See also Veritas 2012a: 2.

[148] Zaba 2011: 5. The constitutional issues related to the text, while the constitutional principles constituted a framework adopted by COPAC for purposes of guiding drafting. Whereas in Namibia and South Africa, the constitutional principles were developed by politicians representing various political parties, in Zimbabwe, they were extracted by legal experts from what the people said during consultation. In Namibia and South Africa, the constitution making actors constantly and assiduously measured all proposals against the principles, in Zimbabwe, political intercession usually defined the way forward. Unlike in Zimbabwe, in Namibia and South Africa, the constitutional principles had the force of binding norms and were considered a part of the composite constitutions of the two countries. In the case of South Africa, as we saw in subsection 4.6 of Chapter Three, after its Constitution was adopted, the Constitutional Court assessed it for compliance with the constitutional principles. See also Mushava 2012: 3.

[149] Feldman 2013: 4. Soon afterwards, the team started filling gaps in the information collected during consultation as some of the responses tendered by ordinary citizens during consultation were inconclusive. It also became necessary to fill in gaps where ordinary citizens answered the 'what' aspect of a question and did not bother to answer the 'why' part of the question. An example is question 20 which dealt with specialised constitutional watchdogs for monitoring, promoting and enforcing rights and obligations in their areas of specialty. Most people answered question (a) which asked: What independent commissions should be provided

## 7.1 Appointing legal drafters

With the constitutional issues identified, COPAC began to look for legal drafters. In this regard, it invited people interested in drafting to submit their resumes in the same way as when people apply for jobs that are advertised. The search ended with COPAC appointing Moses Chinhengo, Brian Desmond Crozier, and Priscilla Madzonga, to draft the new constitution.[150] According to one of the co-chairmen of COPAC, Paul Mangwana, '[t]hese are all experienced legal practitioners with vast experience in drafting and we expect that they will do their job in a professional and impartial manner'.[151]

Once the legal drafters were appointed, COPAC engaged Hassen Ebrahim, a South African consultant on constitution making, to offer expert advice during drafting. The role of the consultant, according to his terms of reference, was limited to giving advice.[152] Drafting was the responsibility of the three drafters assisted by the 17 legal experts mentioned above.

Civil society organisations requested COPAC to add their representative to the drafting committee. The request was rejected on the ground that it would result in an unwieldy drafting committee.[153] It was argued that a bloated drafting committee was not in the best



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for in the constitution? They did not answer questions (b) and (c) which respectively asked: How should their independence be protected? How should independent commissions be appointed? Another example is question 22 on public finance which dealt with issues pertaining to the management and accounting of public funds, the Consolidated Revenue Fund, the preparation and management of the budget, and the auditing of and oversight of public finances. Most people answered question (a) which asked: Which aspects of Public Finance should be regulated by the constitution? In the majority of cases, people did not answer the (b) aspect of the question which asked: How should the constitution provide for the management of the national budget? All the issues in which the team of legal experts intervened by filling in the gaps to complete the picture were placed in a document which the team called 'document on gap filling'.

[150] Mwiti 2013: 4. They are the same people who drafted the 2000 Constitution which was rejected in a referendum (see section 2 of Chapter 4). The rejection of the draft Constitution by the referendum held on 12-13 February 2000 had nothing to do with the quality of the drafting. One of the drafters, Crozier, was a former Director of Legal Drafting in the Attorney-General's Office with over 30 years' of experience in drafting Bills for enactment in Parliament as well as other forms of legislation. Frustrated by government's flagrant disregard for the rule of law, Crozier resigned from the Zimbabwe Public Service on 31 July 2000. See also Veritas 2012b: 2.

[151] Sokwanele 2012: 2.

[152] Nemukuyu 2012b: 3.

[153] Makwiramiti 2013: 5. See also Mataza 2012: 6.

interests of the constitution making body as it made it particularly difficult for the legal drafters to fulfil the responsibility bestowed on them.

COPAC deserves an accolade for its choice of local legal drafters. The legal drafters were suitably qualified for the job. They also possessed the requisite experience needed to succeed in the assignment. The fact that they had drafted the Constitution of 2000 meant that their experience was not in doubt. Moreover, their standing was legitimised by the fact that they were selected following 'an invitation of applications from suitable candidates'.[154]

There were, of course, some transparency related concerns in the manner in which the recruitment was handled. The fact that COPAC did not make public a list of the people who applied for the jobs on offer, some argued, 'suggested that secrecy characterised the recruitment'.[155] The other concern is that the public was not informed about the methods used to select successful candidates. Ordinary citizens should have been informed about this. Such openness would have given ordinary people the opportunity 'to assess for themselves the suitability of all candidates, including those who were eventually hired'.[156] As this was not the case, the assertion that those who were eventually hired were the best candidates, besides being grossly overstated, was a poor characterisation of what actually transpired.



## 7.2 Commencement of drafting

Following the appointment of Hassen Ebrahim, COPAC issued a statement that legal drafting had commenced at a secret location. It also revealed that the legal drafters were under instructions to finish the drafting within 35 five days. Unfortunately, two weeks after drafting commenced, *The Herald*, a government owned newspaper, printed what it called 'a leaked draft constitution'.[157] COPAC disowned the document published by the press. Even so, the leaked document generated debate that was manifestly divisive.[158]

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[154] Zhanje 2012: 2.

[155] Sokwanele 2012: 1. See also Chibaya 2012: 2; Moyo J.N, 2012: 2.

[156] Chipara 2013: 4. See also Chitate 2011: 6.

[157] Nemukuyu 2012a: 3. See also Mwonzora 2012b: 3; New Zimbabwe 2012b: 2.

[158] COPAC 2013b: 17. In this regard, citizens who could not identify views they submitted during consultation charged that drafting was not guided by public input. On the other hand, those who identified their ideas often argued that the document misrepresented the views they submitted during consultation. See also Hove 2012: 2; Share 2012b: 4.

The greatest discord came from the war veterans who accused the drafters of capitulating to opinions hostile to ZANU PF. It was against these accusations that, on 11 January 2012, war veterans aligned to ZANU PF invaded COPAC's meeting held at a remote hotel in Vumba, Manicaland Province. In disrupting the meeting, the group of war veterans blamed the drafters for allegedly ignoring the views of ordinary citizens and substituting them with the views of western governments hostile to Zimbabwe. They sang liberation war songs and chanted ZANU PF slogans before handing in a petition in which they demanded that drafting be stopped. Drafting did not stop as demanded.[159]

The rowdy intervention of war veterans forced COPAC to announce the formation of a Co-chairpersons' Forum, which comprised the three co-chairpersons of COPAC and six expert advisers, two nominated by each of the three GPA political parties. The task of the Forum was to work closely with the lead drafters to avoid a situation where the lead drafters would be accused of tampering with the views expressed during consultation.[160] It was basically responsible for supervising the drafting committee.

## 7.3 Receiving preliminary draft

On 22 January 2012, the Co-chairpersons Forum announced that the drafters had completed work on the preliminary draft of the new Constitution. The draft was handed in within the 35 working days agreed with COPAC.[161] The draft was examined by the co-chairpersons after which it was submitted to the full COPAC. The full COPAC received both the report and draft at the Harare International Conference Centre.

The report outlined issues on which there was agreement and issues for which they needed to find common ground. Issues that they could not agree on were termed 'contentious' and classified as subjects that required further engagement. It emerged, for example, that while the MDC formations wanted dual citizenship, ZANU PF was opposed to it. The MDC formations wanted a moratorium on the death penalty, while ZANU PF wanted to retain the death penalty for certain categories of crimes. On devolution, the MDC formations wanted

[159] Gumbo 2012f: 2. See also Mwonzora 2012c: 2; Herald 2011c: 2.

[160] Nemukuyu 2012b: 3. See also Herald 2012a: 2; New Zimbabwe 2011: 1.

[161] North 2013: 6. See also Veritas 2012c: 3.

government power devolved to provinces and local councils while ZANU PF was opposed to devolution on the basis that it would lead to the country breaking up along ethnic lines.[162]

### 7.4 Resolution of contentious issues

Shortly afterwards, COPAC submitted the preliminary draft to the Management Committee with the request that it resolve the contentious issues. Comprised of representatives of the parties in the GNU and chaired by the Minister of Constitutional and Parliamentary Affairs, the Management Committee was seized with the task of resolving the contentious issues for the greater part of the months of June and July 2012. The Committee met five times in Harare. It was not until late July 2012 that an agreement was reached on some of the contentious issues. Once this happened, the legal drafters worked tirelessly to produce a second draft. The revised draft was then submitted to members of COPAC on 21 July 2012 and was adopted as the interim draft.[163]

Following its adoption by COPAC, the draft was presented to the three political leaders on 22 July 2012. Subsequently, on 25 July 2012, the draft Constitution was made available to ordinary people. It could be accessed from the website of COPAC, thus enabling ordinary citizens as well as interested parties to scrutinise it.[164]



### 7.5 Reaction to the draft constitution

Soon afterwards, two political parties in the GNU, the MDC-T and MDC-M, endorsed the draft Constitution. The Secretary-General of the MDC-M, Priscilla Misihairabwi-Mushonga, stated that her party had endorsed the draft 'because it was a process born out of negotiation. We negotiated every full stop and every comma in the draft. So, we are very happy with the

[162] Sibanda T, 2012a: 4. Other issues which the political parties could not agree on were: the question of removing the prosecuting function from the Attorney-General's office and giving it to a new office; the Prosecutor General's office; the question of whether the new Constitution should recognise gay rights; and the question of whether the new Constitution should provide for one Vice-President or two Vice-Presidents as was the case under the Constitution in operation when drafting got under way. See also Karimakwenda 2012: 2; Sibanda T, 2012f: 1.

[163] Machivenyika & Gumbo 2012a: 8. See also Herald 2011d: 2; Kandemiri 2012: 2.

[164] COPAC 2012a: 1. See also New Zimbabwe 2012a: 2; Gambe 2012: 4.

final outcome'.[165] Both political parties urged their members to vote 'Yes' in the impending referendum.

Statements attributed to Patrick Chinamasa, ZANU PF Secretary of Legal Affairs, issued on 27 July 2012, indicated that ZANU PF was generally in favour of the draft. It was reported that ZANU PF's highest decision making body, the Politburo, had gone through the draft line by line and found 97% of the document to be acceptable. It was also reported that the 3% that ZANU PF found to be objectionable were mainly issues of nomenclature. Despite the assurance, on 29 July 2012, ZANU PF published in *The Sunday Mail*, a state-owned newspaper that often acts as its mouthpiece, a long list of amendments to the draft constitution.[166]

The declarations by the political parties revealed that the constitution-making project still had a long way to go before it reached completion. It became clear that the endorsement of the draft constitution by the MDC formations was premature.[167] It was evident that there was a need to open serious dialogue on the amendments sought by ZANU PF.[168] It also became clear that the negotiations would be protracted and characterised by intense political posturing. The other political parties had no option but to assure ZANU PF that the issues it put forward would be considered in the wake of the Second All Stakeholders Conference. It was only after receiving this assurance that ZANU PF agreed that the draft be submitted to the Second All Stakeholders Conference.

Drafting was an important milestone. The political parties had transcended their differences by managing to establish common ground and identify the underlying societal issues that needed constitutional expression. The commencement of drafting underscored the fact that there was no turning back as far as the question of constitutional development was

[165] Daily News 2012: 2.

[166] Nemukuyu 2012a: 9. The amendments sought by ZANU PF included the need to change the national objectives and foundations of the impending Constitution so that there is more emphasis on the armed struggle waged by the people of Zimbabwe against the settlers; strengthening central government's role in the management of the affairs of local government; entrenching the role of the State President in the appointment of provincial governors; and strengthening the role of central government with regard to the composition of provincial councils. See also Chimbare 2009: 2; Madava 2012b: 2.

[167] Makwiramiti 2013: 5.

[168] Griffiths 2013: 6. See also Sibanda T, 2012b: 3; Gunda 2012: 3.

concerned.[169] Most importantly, it signalled that the end of the process of constitution-making was now within sight.

More importantly, the question is whether drafting was guided by the results of consultation. This is about the extent to which drafting unfolded on the basis of the results of the consultation that preceded it. Drafting, as mentioned in Chapter Three, must take place on the basis of the constitutional preferences of citizens expressed during consultation.[170] Although drafting was influenced by the consultation that preceded it, there is no denying the fact that the prejudices of politicians played an important role. This is so because, after consultation, politicians took centre stage. As a result of the brazen takeover by the political leaders, drafting ultimately reflected the balance of power between the parties in government. Importantly, drafting, as many argued, 'manifested a sophisticated division of spoils'.[171] The short-term interests of politicians became the single most important defining feature of constitution-making.

Although it is generally accepted that politicians are responsible for selecting, enforcing, implementing and evaluating societal choices, it is necessary to limit their involvement if the process of constitution-making is to enjoy wide public support and not be viewed as one that fosters the interests of the elite. Constitution-making is, after all, a higher level of law making in which it is only the freely expressed will of ordinary citizens that gives validity to the legitimacy of the process and outcome. It was the failure by politicians to observe this principle that prompted one author to argue that the process 'reflected the belief among the elites in society that what matters most is the level of popularity of the politicians'.[172]

COPAC submitted a complete document to the Second All Stakeholders Conference. However, the document was the subject of contestation, with ZANU PF seeking 260 amendments. Whilst the MDC wanted the issues raised by ZANU PF to be addressed at the Conference, ZANU PF preferred that the issues be addressed before the Conference. In the

[169] Chigayo 2012: 2. See also Zhanje 2012: 3.

[170] See subsection 4.2.4 of Chapter Three.

[171] Zhanje 2012: 3. See also Share 2012c: 2; Paradza 2012: 3.

[172] Turner 2012: 2.

interest of progress and to allow the Conference to proceed as scheduled, the MDC agreed to engage ZANU PF on the amendments it sought.[173]

With the creation of a draft, the political parties represented in COPAC, it seemed, had not resolved their ideological differences on constitutional development. Rather, the political parties had simply retreated to their bases to fight another day.

## 8. The Second All Stakeholders Conference

Based on Article 6 of the GPA that mandated COPAC to submit its draft Constitution to a Constitutional Conference, the constitution-making body began to make preparations for the Second All Stakeholders Conference in October 2012. Whereas the First All Stakeholders Conference gave delegates an opportunity to inform drafting, the Second All Stakeholders' Conference was aimed at giving delegates an opportunity to react to concrete constitutional proposals. At this Constitutional Conference, COPAC was expected to receive and take note of the comments and recommendations of delegates on the draft Constitution. COPAC was obliged to compile a report covering all aspects of the Constitutional Conference.[174]

### 8.1 Delegates to the Constitutional Conference



As the preparations for the Conference gathered momentum, the number of delegates who could attend the Constitutional Conference became an issue. Initial indications were that the Constitutional Conference was going to be attended by 4000 delegates, as had been the case with its predecessor. However, COPAC was forced to settle for 1 350 delegates given the fact that it was operating on a shoe string budget. Of the 1 350 delegates, 30 per cent were to be drawn from political parties and 70 per cent from civil society organisations. Given the significance of the Constitutional Conference, civil society organisations argued for an increase in the number of delegates that could attend the Conference. They complained that the number of delegates allocated to them was small compared to the number of civic organisations in the country.[175]

[173] Sibanda T, 2012a: 3. See also Veritas 2012a: 2; Share 2012d: 2.

[174] Moyo, J.N, 2012: 6. See also Chitemba 2012b: 4; The Zimbabwean 2012: 2.

[175] Mafa 2012: 2. See also Sibanda T, 2012c: 3; Chakanyuka 2012: 4.

The composition of the Second All Stakeholders Conference manifested the typical shortcomings of a National Conference, which were discussed in Chapter Three.[176] Delegates to the Conference were handpicked by politicians. The problem is that politicians are notorious for appointing people that they know reflect a certain thinking. Not only are such appointments based on political patronage, they also allow politicians to reproduce themselves through their appointees. Although not stated as one of the guiding considerations for getting appointed, civil society organisations appeared to have opted for 'level of education' as a key consideration in deciding who is chosen as a representative.[177] This is slightly problematic. Unless people are chosen on the basis of democratic processes, the extent to which they identify with the interests of ordinary citizens is always debatable.

## 8.2 Plot to stop the Conference

Delegates to the Second All Stakeholders Conference were provided with a copy of the draft Constitution. Many, however, demanded that additional documents leading to the draft Constitution be provided to them. One of the documents that delegates wanted to receive ahead of the Conference was the national statistical report, which summarised ideas gathered during consultation. The request was turned down. Fearful of opening a Pandora's Box, COPAC refused to issue the national statistical report. It would only issue delegates with a copy of the draft constitution.[178]



The refusal sparked a strong public outcry. For some, it was no longer about support documents. The fiercest critics of the constitution-making process demanded the transformation of the constitutional forum from a consultative gathering into a redrafting conference. Danny Musukuma, a ZANU PF activist, filed an urgent chamber application, seeking to interdict COPAC from convening the Second All Stakeholders Conference. He argued that the Constitutional Conference should be deferred until such time as the national statistical report was published in the local media.[179] The delegates, it was argued, would not be able to participate meaningfully unless the national statistical report was published before

[176] See subsection 3.3 of Chapter Three.

[177] Mambare 2013: 2.

[178] Sibanda T, 2012d: 1.

[179] Danny Musukuma v Constitution Parliamentary Select Committee and Others Case No. HC12128/12 para 1. See also Nemukuyu 2012a: 1.

the Conference commenced. Without a published national statistical report, goes the argument, the constitution-making process could not be regarded as being people driven.[180]

The Court, presided over by Justice Ben Hlatshwayo of the High Court, ruled in favour of Musukuma. In his decision, the judge outlined a number of conditions that COPAC needed to meet. COPAC was ordered to inform the nation about the existence of the national statistical report. It was required to publish the national statistical report on its website (www.copac.org.zw).[181] COPAC was also ordered to make available hard copies of the national statistical report to the 10 provincial administrators' offices countrywide by midday Friday, 19 October 2012 to enable interested citizens to photocopy it.[182] COPAC complied with the judgment.[183]

The legal woes of COPAC did not end with the judgment. Once again, Musukuma brought a case against COPAC, demanding that the Constitutional Conference opening on the 21st of October 2012 be postponed by seven days to allow people to study the national statistical report. He argued that COPAC could not report at the Conference before giving delegates a reasonable time to study the national statistical report. The High Court, presided over by Justice Mary Zimba-Dube, dismissed the case.[184] The judge ruled that the Constitutional Conference could not be deferred or stopped as the court was satisfied that COPAC had



[180] Zaba & Gagare 2012: 5. Furthermore, it was argued that COPAC would violate people's right to freedom of expression if it failed to provide the national statistical report to delegates before the commencement of the Constitutional Conference. See also Murwira & Gumbo 2013: 4; Chigayo 2012: 3.

[181] Sibanda T, 2012e: 4. See also Nemukuyu 2012b: 2; Mangwiro 2012: 3.

[182] Feldman 2013: 5. The Court also ordered COPAC to give Danny Musukuma a hard copy of the national statistical report and other documents used in drafting ahead of the Conference. See also Cendrowicz 2013: 3.

[183] Nemukuyu & Taadira 2012: 2.

[184] Turner 2012: 6. Besides the court challenges, COPAC encountered logistical problems that drew attention to its administrative capacity in relation to the successful hosting of the Constitutional Conference. Hours before the Constitutional Conference opened, it was reported that it was encountering problems securing accommodation for the delegates as most hotels booked for delegates were still occupied by those attending the Sanganai/Hlanganani World Travel and Tourism Africa Fair which ended in Harare on 21 October 2012. A decision was then made to accommodate about 900 delegates from outside Harare, while those from the capital stayed at their homes. Even then, some of the delegates staying in hotels were shocked on 23 October 2012 to discover that their bags had been removed from their rooms at the Holiday Inn and Crowne Plaza Monomotapa hotels during their absence by hotel staff after COPAC failed to conclude its business within the two days booked and paid for. See also Gumbo 2012g: 2.

complied with every detail outlined in the court order.[185] With 1 350 delegates in attendance, the Constitutional Conference was officially opened by the three leaders of the political parties in the GNU on 21 October 2012.[186] The Harare International Conference Centre was the venue of the Constitutional Conference.[187]

The state of delegates' preparedness for the Constitutional Conference was questionable. Delegates to the Constitutional Conference should not have been denied the documents they needed to make their participation in the Conference meaningful.[188] Without the documents,

[185] Nemukuyu & Taadira 2012: 1. After Justice Mary Zimba-Dube's ruling, COPAC refused to accredit Musukuma as a delegate arguing that it could not accredit him to the same processes he was fighting. However, following political pressure, it later relented and accredited him as ZANU PF delegate number 401 to the Constitutional Conference. See also Griffiths 2013: 6; Zimbabwe Mail 2012a: 5.

[186] Gumbo 2012c: 2. With the legal wrangles resolved, COPAC commenced the Constitutional Conference by asking delegates to sign a code of conduct. The code of conduct outlined a set of rules that had to be observed by delegates accredited to the Constitutional Conference. Delegates were required to be courteous and refrain from using obnoxious language or gestures that disrupt the proceedings of the Constitutional Conference. The code also outlined a number of penalties for breaching the code of conduct. COPAC could dismiss delegates whose conduct threatened to disrupt the Conference. COPAC's human resources sub-committee could institute disciplinary proceedings against a delegate who broke the code of conduct. Delegates could also be summarily expelled from the Conference. COPAC could also withhold allowances or deduct a certain percentage of the allowances to an out of step delegate as punishment. Alternatively, the chairperson of the human resources sub-committee, in the company of at least two other members from different political parties represented in Parliament, could mete out any penalty they deemed appropriate. Further, COPAC could prohibit a transgressing delegate from participating in or being an observer at the proceedings of the Conference. See also Veritas 2012b: 4, Sibanda T, 2012b: 2.

[187] Mushava 2012: 3. The opening session was also attended by Vice-President Joyce Mujuru, Deputy Prime Minister Thokozani Khupe, Ministers, Deputy Ministers, Provincial Governors and Resident Ministers, Members of Parliament, diplomats and Permanent Secretaries. Also seated among the foreign invitees was the South African High Commissioner to Zimbabwe, representing South Africa, the country whose presidents were largely responsible for facilitating the GPA under which the process of constitution making was taking place. Moreover, the opening ceremony was attended by representatives of commerce and industry. The master of ceremonies was the Permanent Secretary for the Ministry of Constitutional and Parliamentary Affairs while Oliver Mutukudzi and the Prison Band provided music and entertainment. See also Mavare 2013: 3; Ngoma 2012: 1.

[188] These documents included the national statistical report that included the views gathered during consultation, the national report that summarised the stages leading to the Constitutional Conference, the documents explaining the 'tools' used during drafting and the various reports produced by COPAC since the process of constitution-making commenced. See Gava D, 2013: 3.

the Constitutional Conference could not be expected to facilitate participatory constitution-making. It is not understandable how COPAC expected delegates to make meaningful contributions to, and participate fully at the Second All Stakeholders Conference 'when they did not have the full set of documents used in the drafting'.[189] The decision of COPAC to submit incomplete documentation undermined the credibility of the Conference.[190] It presented the image of a constitution-making body that was not fully committed to the basic objectives of consultation. It is not appropriate that a constitution-making body asks ordinary citizens to reflect on incomplete documentation. Only when people are given a full draft are they able to fully assess and enrich drafting. As this was not the case, COPAC should have deferred the Conference until the documentation was complete.

## 8.3 Accreditation of delegates

The constitution making body began to accredit delegates to the Constitutional Conference in the capitals of the provinces on 16 October 2012 which ended the next day. The decentralisation of accreditation was well received. COPAC was not as overwhelmed as was the case with the first Constitutional Conference when all delegates were accredited at the Conference venue. The accreditation of delegates was followed by the accreditation of observers to the Constitutional Conference, which took place between 18 and 19 October 2012 at COPAC Head Offices in Milton Park, Harare.[191] Although the accreditation of delegates and observers went smoothly, the accreditation of journalists was far from being smooth.[192] Media houses complained that they were being limited to two journalists per media house. There were also reports that freelance journalists were turned away, while some media houses alleged that they were told that they were too small to warrant registration.

[189] Mashava 2012: 2.

[190] Griffiths 2013: 6. See also Mamombe 2012: 3.

[191] Turner 2012: 6. The observation team comprised officials drawn from foreign embassies in Harare, the Southern African Development Community (SADC) and the African Union (AU). In order to minimise the number of observers, it was determined that a maximum of two people would be accredited to represent each organisation or embassy. The observers were responsible for monitoring the discussions and activities at the Constitutional Conference. See also Gagare 2012: 3.

[192] Walsh 2012: 5. The accreditation of journalists took place on 18 and 19 October 2012 at the COPAC Head Offices in Harare. See also Mangwiro, 2012: 3.

Journalists complained that accreditation was unwarranted as it restricted them from covering an event that was of national interest.[193]

Notwithstanding the complaints by journalists, the accreditation stage was largely described as 'smooth and well planned'.[194] There were short queues at the accreditation desks. On average, three minutes was the time it took for a delegate to be accredited and walk away with a Constitutional Conference identity document complete with a photograph. A total of 100 journalists from within and outside of Zimbabwe were accredited as delegates to the Second All Stakeholders' Conference.

## 8.4 Official opening of the Conference

The official opening of the conference was marked by a series of opening speeches by Deputy Prime Minister Arthur Mutambara, Prime Minister Morgan Tsvangirai and State President Robert Mugabe. From the speeches, it was immediately clear that members of the executive had different views on whether Parliament or the Executive had the final say in the resolution of contentious issues. Whereas the Prime Minister told delegates that Parliament was responsible for resolving the contentious issues, the State President allocated the responsibility to the Executive.[195] The State President reminded delegates that, 'sometimes Parliament thinks that it is full of sovereignty that it should control the acts of the principals, *hazviite*'.[196]



The statement by the State President that the Executive had the final say on the contentious issues made a mockery of the usefulness of consultation after drafting. The statement was problematic as it signified the exercise of tight executive control over the process. His use of

[193] Guma 2012: 1.

[194] Machivenyika 2012: 2. See also Griffiths 2013: 6; Sibanda T, 2012d: 2.

[195] Machivenyika & Gumbo 2012b: 2. See also Mashavave 2012: 2.

[196] Ngarande 2012: 1. Translated, '*hazviite*' is a Shona word meaning certain actions are not possible. In this sense, constitutionally speaking, the State President used the word to denote that Parliament could not place limitations on the actions of the Executive in the context of the doctrine of separation of powers. The alarming declaration by the State President was the first sign that the resolution of the contentious issues would be purely an exercise in political compromise. Besides sharply countering the cardinal principles of democratic constitution-making, the State President's pronouncement resonates with the old, realist approach, according to which a constitution or constitution-making represents 'the balance of power' in the sense of the status quo prevailing at the time. See also Newsday 2012a: 3.

the shona word *hazviite* is revealing, in the sense that it indicated that he was far from being convinced that ordinary citizens could play a role in the creation of a constitution. Importantly, it reveals 'the State President's infatuation with the arrangement in which politicians gift constitutions'.[197]

## 8.5 Co-chairpersons take delegates through the draft

Following the official opening ceremony, the three co-chairpersons of COPAC reiterated that the objective of the Constitutional Conference was to give delegates an opportunity to engage with the draft before them. Delegates were, however, informed that 'debate was not allowed in the Constitutional Conference'.[198] In the words of Mwonzora, one of the co-chairmen of COPAC, 'delegates to the conference did not have the power or mandate to amend the draft'.[199]

COPAC arranged the delegates into 18 groups corresponding to the impending constitution's themes.[200] Each group consisted of 50 individuals, comprising members drawn from the three political parties in the GNU and representatives of civil society. Delegates either chose a group to participate in or were nominated by their parties or the organisations they represented. Each group was led by three co-chairpersons appointed from the political parties in the GNU. Each of the 17 groups was assigned its own chapter in the draft Constitution to assess.



COPAC recorded the proceedings of all the breakaway groups both electronically and manually. Some groups were able to finish an analysis of the chapters of the Constitution allocated to them on 22 October 2012, while others finished the following day. Once the discussions were finalised, the chairpersons of the breakaway groups presented reports in the plenary session. The reports focussed on three areas. Each report outlined the provisions in the draft Constitution that were deemed acceptable to group members, included suggestions for new additions or subtractions to the draft Constitution and pointed out areas where the

[197] Chibaya 2012: 4. See also Sibanda T, 2012f: 2.

[198] Share 2012b: 3. See also Sibanda T, 2012e: 3; Newsday 2012b: 1.

[199] Mwonzora 2012a: 2. See also Zimbabwean 2012: 2.

[200] Guma 2012: 4. Although the impending Constitution had 17 themes, 18 thematic group discussions were created. This is because theme 1 on the Founding Principles of the Constitution was divided into two themes for purposes of expediting the discussions. This saw another group discussing the Preamble of the Constitution. See also ZimDaily 2012: 1.

group could not reach agreement.[201] Delegates were not allowed to interfere with reporting in the plenary session. Neither were they allowed to react to the reports after presentation. The Second All Stakeholders Conference ended in Harare on Tuesday 23 October 2012.

The group discussions were not without problems. It was immediately noticeable that group members were divided along political lines. A key challenge was that some delegates resorted to intimidation, harassment, and heckling of, and issuing verbal threats against, other delegates. In this way, delegates hoped to control not only the deliberations but the outcome of the Constitutional Conference. In the majority of cases, delegates from ZANU PF were responsible for intimidating, harassing, heckling and verbally assaulting delegates from civil society and the other political parties.[202]

One can commend COPAC for instituting the Second All Stakeholders Conference. It provided a public forum for delegates to reflect on the draft Constitution. This is in line with the widely accepted standard that ordinary citizens, as mentioned in Chapter Three, should be afforded an opportunity to comment on a draft constitution before its finalisation.[203] Some, however, discounted the contribution of the Constitutional Conference. They argued that it was a big waste of money.[204] The reason for this is that ordinary citizens could only make recommendations, which were implemented at the behest of a responsible authority. Finally, some argued that the Constitutional Conference was only useful in allowing ordinary citizens to rubber-stamp the views of the elite in the draft constitution.

The question is whether the Constitutional Conference facilitated genuine dialogue. Some argued that the conference did facilitate genuine dialogue as it offered conflicting parties the opportunity to sit down together and hammer out a binding, mutually acceptable document that responded to each party's needs. It is indeed true that the Constitutional Conference facilitated dialogue but it was inadequate. The Conference did not allow for a robust discussion of ideas on the draft constitution. This relates to the fact that the constitution making conversation turned out not to be a discussion of problems, conflicts, interests, preferences and claims of need, but narrow ideological priorities. It was unfortunate that the

[201] Griffiths 2013: 6.

[202] Feldman 2013: 5. See also Zimbabwe Lawyers for Human Rights 2012: 1.

[203] See subsection 4.2.4 of Chapter Three.

[204] Mhuka 2012: 2. See also Chitemba 2012a: 2.

dialogue was not informed by the common good but the masked interests of political parties. As one author noted:

> When ZANU PF wanted to promote its interests, it argued openly in terms of impartial values such as the interest of the country to have a stable government. On the other hand, when the MDC formations wanted to push through their own political objectives, they tended to refer to the values of democracy. The fact of the matter is that these were self-serving arguments dressed in public-interest garbs. By appealing to plausible-sounding impartial values while advancing self-interest, delegates undermined the unfolding of a frank dialogue on the issues that had caused deadlock.[205]

The Conference was often described as a 'mere talk-shop' and a 'charade'.[206] There is some credibility in the description of the Conference as a charade. The Conference was more about information sharing than about consultation. The fact that people could not advocate for the replacement of certain provisions in the document suggests that the Conference was an exercise in information sharing masquerading as consultation. This is deception. The gathering should have adopted a more consultative posture in order to get ordinary citizens to contribute ideas towards enriching the final document. In this case, however, there is no shred of evidence that the gathering afforded ordinary citizens a genuine opportunity to contribute ideas on constitution-making. As the gathering was more inclined towards information sharing, COPAC did not proactively solicit the views of ordinary citizens.[207] Given the foregoing, the question that now begs an answer is whether a conference can still be said to contribute to the process of constitution-making when all it does is facilitate information sharing. The answer is an emphatic no!

Although mired in ambiguity, the Second All Stakeholders Conference represented a big step in the right direction in so far as the finalisation of the constitution-making process was concerned. For a process of constitution-making that was painstakingly slow, all progress, no matter how modest, was worth celebrating. Following the hosting of the Second All Stakeholders Conference, COPAC met to finalise its report on the Conference and to

[205] Mhuka 2012: 3. See also Machivenyika & Gumbo 2012c: 2.

[206] Chitemba 2012b: 1.

[207] Makova 2012a: 2. See also Veritas 2012b: 4; Stuart 2013: 1.

highlight issues which required collective accountability and responsibility by the three political parties.[208]

## 9. Developments after the Conference

On 8 November 2012, COPAC submitted its report to the Management Committee outlining the outcome of the Second All Stakeholders Conference, which it was asked to resubmit.[209] Following the resubmission, the Management Committee discussed the revised report at its meeting held on 12 November 2012 and resolved that areas in which delegates to the Constitutional Conference did not recommend changes be factored into the draft Constitution. However, the Management Committee failed to reach consensus on the status of the 266 amendments proposed by ZANU PF. There was impasse as representatives of the MDC formations refused to agree to the amendments proposed by ZANU PF. The MDC formations argued that ZANU PF could not unilaterally propose amendments and then try to force them on its partners in the constitution-making process. It was also argued that ZANU PF could not at this stage propose amendments as its signature thereto denoted that it agreed with the draft constitution and that there had to be closure. Constitution drafting, after all, is not an exercise in futility. In response, ZANU PF insisted that the resolution of contentious issues be referred to the signatories of the GPA instead of being settled by the Management Committee. The



[208] Machivenyika 2012: 3. Starting in Harare on 5 November 2012, the two-day meeting generated a report outlining the following: (a) an analysis of the Second All Stakeholders Conference, covering the composition of delegates and the terms of reference they were given, and the Conference proceedings; (b) areas where no changes were recommended to the draft; (c) the areas where group reports record changes that were recommended by a delegate but do not indicate whether the group agreed or disagreed on the recommendations; and (d) a list of the areas where group reports record changes that were recommended by delegates but indicate that the recommendations were not agreed to by the group. Under item (c), COPAC agreed on taking some of the recommendations proposed and dismissed others considered inappropriate. It is in areas such as the question of gay rights, devolution, presidential running mates, the whittling down of executive powers, and dual citizenship that challenges on how to proceed arose. See also COPAC 2013b: 19; Herald 2012c: 2.

[209] Nemukuyu 2012a: 4. The Management Committee returned the report to COPAC with the instruction that it incorporate speeches by the political leaders made at the conference opening ceremony. COPAC was also instructed to add explanatory notes on the meaning of certain numbers in its report. It was furthermore asked to include in its submission the narrative report given by the co-chairpersons to the Constitutional Conference, and, finally, to supplement and recast certain aspects of the report. Some of the numbers in the report related to the number of times a certain clause received support from delegates. COPAC had not explained how these statistics found their way into its report when it was not part of the agreed method for assessing the support that clauses received from delegates at the Constitutional Conference. See also Paradza 2012: 4; Gumbo 2012d: 2.

demands by ZANU PF were rejected by the MDC that insisted that political party leaders had no role to play in the constitution-making process as it was driven by a duly constituted parliamentary committee in which each political party was represented adequately. Further, the MDC argued that, in keeping with the procedures of the process of constitution-making outlined in Article 6 of the GPA, it was imperative that the draft Constitution and report of the Second Stakeholders Conference be submitted to Parliament for its consideration without further delay.[210]

The impasse between the political parties triggered a huge public debate. On the one hand, there were those who wanted to see the leaders of political parties play an important role in the resolution of the contentious issues. On the other hand were those who wanted to see the contentious issues resolved by COPAC. Motivated by narrow ideological interests, supporters of ZANU PF argued for more political involvement while those from the MDC argued for more involvement of Parliament. Weighing in on the debate, civil society organisations chose the side that sought to see more involvement by Parliament in the resolution of the contentious issues. Some wanted to see the process put on hold until what they termed 'credible institutions' were created to take charge of the resolution of the contentious issues.[211]



## 9.1 Creation of a Committee of Seven

Eventually, the three political parties in the governing coalition mooted the idea of creating another committee to assist the Management Committee to resolve the contentious issues. An agreement was reached to establish a working group called the Committee of Seven. The working group was composed of the three co-chairpersons of COPAC, three cabinet ministers representing the parties to the GPA, and the Minister of Constitutional and Parliamentary Affairs as convener and chair.[212]

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[210] Sibanda T, 2012e: 4. See also Paradza 2012: 4.

[211] Chinhange 2013: 2. See also Hanyani 2012: 3; Makova 2012b: 2.

[212] Gava D, 2013: 1. The Committee of Seven comprised Eric Taurai Matinenga, Tendai Laxton Biti, Edward Tshothso Mkhosi, Priscilla Misihairabwi-Mushonga, Patrick Antony Chinamasa, Munyaradzi Paul Mangwana, and Douglas Togaraseyi Mwonzora. The issues which needed resolution included: the question of whether or not Chief Executive Officers or heads of statutory bodies must have term limits; the question of whether or not the State President should have power to dissolve Parliament; the question of whether or not to split the Office of the Attorney-General so that the Attorney-General becomes the advisor to Government and the National

The extent to which the Committee of Seven manifested a wide variety of voices is questionable. The Committee of Seven did not draw its membership from all sections of society. It, in fact, excluded the representatives of civil society. This is inconsistent with the norms of inclusive constitution-making. The various segments of society should have been brought together to ensure that most people's interests were heard and taken into consideration during the final drafting stage. As the resolution of contentious issues was an intensely political process, with high stakes for many groups in society, the need to broaden the number of groups participating in the resolution of the contentious issues ought to have been prioritised.[213]

## 9.2 Committee of Seven meets

The Committee of Seven met on 11 December 2012 to provide a framework and rules for engaging each other in the course of resolving contentious issues. It was agreed that the meetings to resolve outstanding issues would be convened and chaired by Eric Matinenga, the Minister of Constitutional and Parliamentary Affairs, and that the decisions of the Committee would be by consensus.[214] Furthermore, it was agreed that the decisions of the Committee would not be binding until they were endorsed by the political parties in the governing coalition.



Prosecuting Authority assumes the prosecution function; and the question of whether or not to keep the number of persons to be elected to the Provincial Council at ten or to reduce the number to five. Before the Committee of Seven could find its feet regarding its mandate to assist COPAC resolve contentious issues, one of three signatories to the GPA, ZANU PF, resolved on 8 December 2012 at its annual conference held in Gweru that if the constitution making process was not completed by Christmas of that year, the President should go ahead and call elections under the present Constitution. ZANU PF appeared ready to abandon the constitution making process despite pressure from the SADC Extraordinary Summit Meeting in Dar es Salaam on 8 December 2012. The commitment of ZANU PF to contribute to the resolution of contentious issues was also brought into question on 27 December 2012 when President Mugabe left the country for his annual holiday in Asia. While he was entitled to the holiday, to resolve the issues that were classified as 'contentious' needed the collective intervention of the leaders who were signatories to the GPA. The President only came back on 10 January 2013. On 10 January 2013, at an Extraordinary Summit Meeting of the Troika of the SADC Organ on Politics, Defence and Security Cooperation in Dar es Salaam, Tanzania urged 'the political stakeholders in Zimbabwe to expedite the finalisation of the constitution making process on the outstanding issues in order to pave the way for peaceful, credible, free, and fair elections in the country'. See also Bhebhe 2012: 2; Gumbo 2012e: 2; SADC 2012: 3.

[213] Gwangwava 2013: 2. See also Chikoya 2013: 2; Nemukuyu 2012a: 5.

[214] Zimbabwe Mail 2012a: 3. See also Sunday Mail 2012: 1.

## 9.3 More meetings are held

The Committee of Seven met on 12 December 2012 to negotiate the resolution of contentious issues. The meeting failed to find solutions to a number of questions. This was followed by a meeting of the co-chairpersons of COPAC held on 10 January 2013, after which the chairpersons issued a statement to the effect that they had provisionally managed to close the gap on some of the contentious issues.[215] Despite the progress, the chairpersons advised that more consultation was needed before a final resolution could be reached. They announced that they would table their report before the Committee of Seven, which was to be attended by the leaders of the three political parties in the GNU.

In the wake of the announcement, the Committee of Seven, together with the leaders of the political parties, met on 15 and 16 January 2013 to discuss the resolution of the contentious issues. The meeting started by noting issues that the political parties had resolved through compromise. Thereafter, changing gear, the meeting discussed the issue of presidential candidates nominating their running mates. As in the earlier discussions, ZANU PF restated its preference for the status quo in which the winner of the presidential election race enjoyed the discretion to appoint whomever he or she wanted to the posts of Vice-President. The MDC sought to institutionalise a system in which a presidential candidate nominated his or her running mate ahead of an election.[216] In the face of the difference in opinion between ZANU PF and the MDC formations, the meeting aborted without discussing the other contentious issues. The political parties blamed each other for the lack of progress.

Another meeting of the Committee of Seven was convened the following day. The meeting was attended by the leaders of the three political parties and was held at State House in Harare. The objective of the meeting was to try and hammer out a compromise on the contentious issues. Following extensive negotiations, the leaders of the three political parties agreed that the National Prosecuting Authority (NPA) be separated from the Attorney-General's Office and that the NPA be headed by a Prosecutor-General who is independent of the Attorney General. The political leaders agreed to retain devolution in the Constitution but with the inclusion of a preamble in the relevant chapter underlining that Zimbabwe remains a unitary state. They also agreed to replace Provincial Governors/Resident Ministers appointed

[215] Mambare 2013: 2. These were the question of devolution of power, the national prosecuting authority, the peace and reconciliation commission, and the land committee. See also Zaba & Gagare 2012: 4.

[216] Gumbo 2012a: 3. See also Zimbabwean 2012: 4; Herald 2012d: 2.

by the President with Provincial Chairpersons elected by Provincial Councils.[217] Following this, it was agreed that there would be no changes to the provision on land in the Constitution as per agreement of 17 July 2012.[218] It was also agreed that the National Peace and Reconciliation Commission be retained as a constitutional institution for a period of ten years after which it would become a statutory institution. They also agreed to have an Executive President as opposed to a ceremonial President. Finally, with regard to the contentious issue of presidential elections, they agreed that presidential running mates be retained in the Constitution although the provision would only become operational after ten years. The breakthrough was announced by President Mugabe, Prime Minister Tsvangirai, and Deputy Prime Minister Mutambara at a press conference. On 18 January 2013, the leaders of the political parties signed an agreement signifying that contentious issues had been resolved.[219]

One must pay tribute to the political leaders for their role in resolving the contentious issues. The involvement of political leaders reduced the chances of the outcome being contested. It played an important role in stopping the bickering and squabbling that had earlier characterised the resolution of the contentious issues. It also nudged the process of constitution-making closer to finality.[220]

It is, however, unfortunate that the resolution of contentious issues was placed in the hands of the political elite. The fact that political leaders dominated the resolution of contentious issues facilitated the privatisation of the agenda of constitution-making. It reduced the call for constitutional negotiation to the opaque question of who gets what, when and how. It also led to a situation in which a constitution is drafted in order to fit the needs of the politicians of the day. It is ironic that politicians should be allowed to dominate the resolution of

[217] Zivo 2013: 3.

[218] It was agreed that the Constitution would provide for the acquisition of agricultural land for public purposes, including settlement for agricultural purposes; land reorganisation, forestry, environmental conservation; or the relocation of persons dispossessed of their land. Land was to be acquired by notice published in the *Gazette.* Where agricultural land was compulsorily acquired for any of these purposes, no compensation was payable in respect of its acquisition, except for improvements effected on it before its acquisition. Those dispossessed of their land could not apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition. No court could entertain any such application. Furthermore, the acquisitions could not be challenged on the ground that they were discriminatory.

[219] Gambe 2012: 6. See also Kurehwa 2013: 4; Zimbabwe Mail 2012b: 2.

[220] Chifamba 2013: 2. See also Mavare 2013: 2.

contentious issues when one of the basic objectives of constitution-making is to considerably limit the powers of politicians. It can also be argued that the fixation of COPAC on a political settlement of the contentious issues was at variance with the 'basic values underlying the procedural principles of constitution making'.[221] In allocating the responsibility of resolving contentious issues to politicians, COPAC settled for an outdated approach in which politicians 'gift constitutions to ordinary people'.[222]

Perhaps COPAC should have established a competent and impartial body to handle the resolution of the contentious issues. This would have entailed the formation of a body comprised of technical experts with backgrounds in law, political science and public administration.[223] This would have ensured that 'the resolution of contentious issues is informed by the quest for the common good and not short term interests'.[224]

## 9.4 Drafters recalled

In the wake of the agreement, the executive invited the legal drafters to meet them at State House. It was at this meeting, which was also attended by the members of the Committee of Seven that the drafters were given signed instructions to bring the draft constitution of 17 July 2012 into line with the agreement that was reached on 17 January 2013. Immediately thereafter, the legal drafters resumed drafting. They completed drafting on Thursday 24 January 2013. Thereafter, the draft was handed over to the principals of the three political parties as well as to the members of the Committee of Seven on Friday 25 January 2013. Subsequently, on 25 January 2013, the draft was perused for evidence of compliance with the instructions issued by the three leaders of the political parties in the GNU and given preliminary approval. However, final approval was only granted on 31 January 2013 after



[221] Kurehwa 2013: 3.

[222] North 2013: 4. See also Mambare 2013: 3; Bell 2013: 2.

[223] Gava D, 2013: 2. The law is key in the drafting of constitutions whereas the other academic disciplines play an important role in the critique and discussion of constitutional reality. See also Laing & Thornycroft 2013: 3; Muleya 2012: 3.

[224] Manhange 2013: 3. One can, of course, also question whether it is even 'morally appropriate that experts should be allowed to substitute the constitutional views of ordinary citizens, including politicians'. (Mambare 2013: 3) As experts obviously lack socio-political legitimacy, it seems inappropriate in the 21st century that they should be given an open brief to 'supplant the views of all stakeholders under the guise of technical know-how'.

the legal drafters made some minor changes to the final draft in accordance with the suggestions of the three political leaders.[225]

## 9.5 Notice to present draft constitution to Parliament

On 5 February 2013, COPAC presented the draft Constitution and accompanying report to the House of Assembly, fulfilling its obligation under Article 6.1(a) (v) of the GPA, which mandates it to 'report to parliament on its recommendations over the content of a new Constitution for Zimbabwe'.[226] Douglas Mwonzora of the MDC-T and Munyaradzi Paul Mangwana of ZANU-PF introduced the motion calling for the adoption of the two documents by the House of Assembly. There was no debate on the contents of the draft Constitution and the accompanying report. A motion was read calling for the adoption of the two documents and the motion was put to the vote and approved without dissent.[227] On 6 February 2013, the draft constitution and accompanying report were tabled in the Senate, the other House, and were approved by all the Senators.

One can identify a raft of issues that makes one question the credibility of the process whereby the adoption of the draft Constitution was achieved.[228] The fact that the political leaders asked their members in Parliament to endorse the constitution raises concern about the extent to which the approval was credible. Legislators should not have been asked to 'vote in accordance with directives from political parties'.[229] The reason for this is that a constitution is a superior document whose adoption should not be held hostage by political party persuasions. The approval was choreographed to rubber-stamp the views of political



[225] Feldman 2013: 5. See also Langa 2012: 2; Muzulu 2014: 1.

[226] Veritas 2013b: 3.

[227] Nemukuyu 2012b: 2. There was no debate on the contents of the draft constitution. Debate on the text of the final draft was only to be allowed in the course of the second reading and committee stages of the Constitution Bill. In short, debate of the contents of the final draft was to be permitted after it was introduced in Parliament following the Referendum. Parliament passed the draft Constitution without amendments, paving the way for the principals to the GPA to agree on the dates for a referendum in which citizens would be asked the question of whether they approved or disapproved the draft constitution as basic law. There were no dissenting voices. See also Murwira & Gumbo 2013: 4.

[228] Chifamba 2013: 2. Before that, however, the analysis commends the two houses of Parliament, the House of Assembly and the Senate, for adopting the constitution with strong support. See also Sims 2013: 74; Veritas 2013c: 2.

[229] Goredema V, 2013: 2. See also Gava D, 2013: 2.

leaders. It ended up manifesting the ambitions of political party leaders and not those of ordinary citizens. Had the legislators 'used their own consciences to approve the constitution, the credibility of the process would not have been contested'.[230]

Nevertheless, the adoption of the report and draft by the House of Assembly and the Senate signified a fulfilment of Article 6 of the GPA which stipulated that the draft Constitution must be submitted to Parliament upon its completion. More importantly, it paved the way for the referendum on the new Constitution. This was a crucial stage that presented ordinary citizens with an opportunity to assess the suitability and acceptability of the constitution created by COPAC as the new Constitution for Zimbabwe.

## 10. The referendum

Organised by the ZEC, the referendum was held on 16 March 2013.[231] The exact wording of the referendum question was: 'Are you in favour of adopting the draft Constitution as the new Constitution of Zimbabwe?' Marking 'Yes' on the ballot paper denoted that the voter approved the Constitution while marking 'No' on the ballot paper meant that the voter was against the adoption of the Constitution.[232] To vote, one needed to produce proof of eligibility. Besides being 18 years old, one needed to produce a Zimbabwe passport, national identity card or a waiting 'identity' pass issued by the Registrar-General's office. No



[230] Chikoya 2013: 2.

[231] Makwiramiti 2013: 4. The referendum was held under new regulations under the Referendums Act. The new regulations were produced by the ZEC and approved by the Minister of Constitutional and Parliamentary Affairs. The regulations were gazetted on 1 March 2013 (*Statutory Instrument 26/2013)* and came into force immediately. They replaced the previous regulations which were gazetted in SI 22A/2000 and used for the previous Constitutional Referendum in March 2000. The regulations spell out in detail the procedure that the ZEC will follow in conducting the Referendum, and answer such important questions as: how voters can prove their eligibility to vote in the Referendum (i.e., what documents they should take with them to the polling station on Referendum Day), and where voters can vote. It also provides for ballot papers, ballot boxes, methods of voting, procedure on closure of voting, collation of results, as well as the announcement and publication of results of the referendum. See also Kurehwa 2013: 3; VOA 2013: 2.

[232] Manhanga 2013: 3. Once the voter completed the ballot paper, he or she folded it so that the official mark can be seen, but not the cross he or she has made. The voter would then proceed to the ballot box, hold the ballot paper up so that the returning officer can recognise the official mark on it, and must drop the paper in the ballot box in front of the returning officer. This marked the end of the voting process for the voter. See also Mambare 2013: 4; Feldman 2013: 2.

arrangements were made to allow non-resident citizens to participate in the referendum. The government argued that it lacked the resources to facilitate such an arrangement.[233]

The fact that any Zimbabwe citizen aged 18 years and above could vote in the referendum might suggest that the voting requirements were relaxed, facilitating broader participation. As a constitution is intended to last decades, if not longer, it is important that voting requirements, as argued in Chapter Three, are relaxed to enable as many voters as possible to participate.[234] The Election Resource Centre noted:

> The requirements for voting in the referendum were not as stringent as those in an election. Voters were only required to bring their national IDs in the absence of a voter's roll which enabled a number of unregistered, but ineligible voters to cast their votes.[235]

One must not, however, ignore the fact that non-resident citizens were excluded from voting in the referendum. Constituting a quarter of Zimbabwe's entire population, their exclusion casts doubt on the claim that voting requirements were relaxed.[236]



## 10.1 Result of the referendum

On 19 March 2013, the Chief Elections Officer released the national results of the referendum on the new Constitution for Zimbabwe.[237] The results were then transmitted to

[233] Gava D, 2013: 4.

[234] See subsection 4.5.1 of Chapter Three.

[235] Election Resource Centre 2013: 9. See also Bwititi 2013: 2; See subsection 4.5.1 of Chapter Three.

[236] Mwiti 2013: 2. Some writers turned to the rich South African jurisprudence to illustrate that the exclusion of non-resident citizens was no longer compatible with regional standards. In *Richter v Minister of Home Affairs* (2009) ZAGPHC 21; 2009 5 BCLR 492 (T) the High Court (and later the South African case of the Constitutional Court) upheld absentee voting rights. Peter Richter was a South African citizen who was living and working in England as a teacher. In 2009 he found that he would have to go back to South Africa if he wished to cast his vote in the national election. The reason for this was that s 33(1) (e) of the South African Electoral Act restricted absentee voting rights to holiday makers, businessmen, students and sportsmen, who were temporarily outside the country. Richter sought an order from the Court to affirm the constitutional right of non-resident citizens to register as voters for, and then vote in, South African national and provincial elections. Judge Ebersohn of the High Court granted the application brought by Richter. The Court held that temporary absence from the country for whatever reason could not be used as justification for denying citizens already registered as voters their voting rights. The significance of this decision was that it opened the door for expatriates who had permanently left the country but were registered as voters to cast their votes overseas. The decision was confirmed by the Constitutional Court. See also Le Roux 2009: 375; Chinhange 2013: 5.

the Minister of Constitutional and Parliamentary Affairs for notification. Immediately afterwards, on 25 March 2013, the said Minister published the results in the Government Gazette. Subsequently, the results were published in the national newspapers (see Table 1 below).[238]

**Table 1: The breakdown for the 2013 referendum national results**

| No | Province | Yes Vote | No Vote | Total rejected votes | Total votes cast |
|---|---|---|---|---|---|
| 1 | Bulawayo | 121 108 | 5 514 | 1 529 | 131 151 |
| 2 | Harare | 468 176 | 41 060 | 8 222 | 517 458 |
| 3 | Manicaland | 388 397 | 22 586 | 6802 | 417 785 |
| 4 | Mashonaland Central | 340 290 | 9 703 | 6980 | 356 973 |
| 5 | Mashonaland East | 374 045 | 15 405 | 7377 | 396 627 |
| 6 | Mashonaland West | 340 597 | 17 662 | 5365 | 363 624 |
| 7 | Masvingo | 376 713 | 20 717 | 7459 | 404 889 |
| 8 | Matabeleland North | 162 236 | 11 663 | 3376 | 177 277 |
| 9 | Matabeleland South | 129 959 | 10 040 | 2577 | 142 576 |
| 10 | Midlands | 378 445 | 22 139 | 6938 | 407 522 |
| | NATIONAL TOTAL | 3 079 966 | 179 469 | 56 627 | 3 316 082 |

**Source: Ministry of Parliamentary Affairs and Constitutional Development: 2013**

## 10.2 Tabling draft constitution in Parliament

Following the publication of the results, the Minister of Constitutional and Parliamentary Affairs introduced the Constitution of Zimbabwe Amendment Bill No. 20 of 2013 in the House of Assembly.[239] The House of Assembly, chaired by the Deputy Speaker, Nomalanga Khumalo, turned into one big committee for purposes of considering the clauses of the



[237] Moyo H, 2013b: 3. See also Election Resource Centre 2013: 9.

[238] 2013 referendum national results.

[239] Chipara 2013: 4. In Zimbabwe, a Bill usually begins its enactment journey as a memorandum that receives approval from the Cabinet. The memorandum then goes to an in-house ministry lawyer who drafts a 'layman's draft'. That draft, usually in cyclostyled form, circulates among interested senior officials and sometimes to other ministries. After amendment it goes for approval to Cabinet's Legislative Committee consisting of five Cabinet Ministers and the Director of the Drafting Division in the Attorney-General's Office. The final layman's draft then goes to the Parliamentary draftsman who puts the Bill into appropriate form for presentation to Parliament. Then the Bill goes back to the Cabinet's Legislative Committee for final endorsement. From there, the Bill returns to the full Cabinet for discussion and endorsement before printing. Finally, the Bill is presented to Parliament. It goes through three ritual stages before enactment. In the first reading, the Bill is introduced to the legislators. In the second reading, parliamentarians debate the Bill. Finally, in the third reading the Bill is put to a vote. If it secures the support of two-thirds of the parliamentarians, (in the case of a constitutional Bill), the Bill becomes an Act. See also Veritas 2013e: 2.

Bill.[240] Upon consideration, all the 156 legislators in attendance voted in favour of the Bill, exceeding the 144 statutory threshold, which is two-thirds of the 210 Members required to pass a Constitutional Bill. The Constitutional Bill was then presented to the Senate for approval. It was passed by 75 affirmative votes, out of the total possible membership of 99. The support it received surpassed the two-thirds majority required by section 52 (3) of the Lancaster House Constitution to pass any Constitutional Bill. Once passed by both Houses of Parliament, the Constitution of Zimbabwe Amendment (No. 20) Act was published in the Government Gazette on 22 May 2013 after which it was presented to President Mugabe for his assent. The signing ceremony was held at the State House in Harare immediately following publication of the new Constitution in the Government Gazette.

There seems to be consensus that the referendum was well run. The polling stations opened on time. There was no shortage of voting material. There were no reports of misconduct by polling officers recorded. With the exception of funding related issues, there were no major complaints about the way the actual referendum was organised and managed.[241]

Seemingly, there is a consensus that the referendum offered ordinary citizens a meaningful opportunity to participate in the process of approving the Constitution of 2013. The fact that ordinary citizens, through voting freely, could either accept or reject the Constitution is an indication that the 'referendum offered ordinary people a real opportunity to determine the fate of the Constitution'.[242] Yet, the referendum was arguably of limited significance.[243] The

[240] Murwira & Gumbo 2013: 1. The Bill's brief introductory memorandum stated that the purpose of the Bill was to provide for the replacement of the Lancaster House Constitution of Zimbabwe which came into effect on 18 April 1980 when the country received its independence from Britain. It goes on to state that the Lancaster House Constitution of Zimbabwe of 1980 as subsequently amended numerous times was being replaced by the new Constitution of Zimbabwe which was approved by the people of Zimbabwe at the referendum held on 16 March 2013. It draws attention to the fact that the Sixth Schedule to the new Constitution requires that it must be 'enacted' by Parliament in accordance with the Lancaster House Constitution. The Bill then provides for the repeal and substitution of the old Constitution by the new Constitution created by COPAC. Finally, it states that the new Constitution was going to be enacted on the 'publication day' as defined in the Sixth Schedule to that Constitution, that is to say, on the date on which this Act is published in the Government Gazette in accordance with s 51(5) of the Lancaster House Constitution, as well as stipulating which parts of the new Constitution come into force immediately upon its enactment. See also Muzulu 2013: 2; Veritas 2013d: 2.

[241] Shongore 2013: 3. See also Zimbabwe Lawyers for Human Rights 2012: 5.

[242] Gappah 2013: 5. See also Mwiti 2013: 3.

[243] Makwiramiti 2013: 6. See also Sunday Mail 2013: 2.

fact that all political parties supported the endorsement of the constitution and urged their supporters to approve the referendum suggests that the 'referendum was a damp squid'.[244] Had the outcome of the referendum really mattered, the period before the referendum would have been characterised by a genuine effort to appeal to ordinary citizens for support.[245] The fact that this was not the case appears to suggest that the call by political parties for ordinary citizens to endorse the Constitution was meant to facilitate a situation in which ordinary people would rubberstamp a document that addressed the narrow interests of political leaders.

There were also questions around the extent of government involvement in the referendum. As an interested party with vested interests, it was, some argued, inappropriate for the GNU to be heavily involved in the organisation of the referendum. The referendum campaigns mostly reflected the positions of the governing political parties. The extent to which those who campaigned in the election were able to get equal access to the State media is as important an issue. In this regard, many argued that the State failed to comply with this

[244] Kodzwa 2013: 3. The process of voting for the Constitution, one can also argue, was tainted by the fact that it could not be separated from the political parties and personalities that dominate Zimbabwe's politics.

[245] The adequacy of the time set aside for campaigning before the referendum was a bone of contention. The NCA and Professor Lovemore Madhuku, in (*National Constitutional Assembly and Professor Lovemore Madhuku v The President of the Republic of Zimbabwe and Chairperson/Acting Chairperson of the Zimbabwe Election Commission* N.O (2013) HC1330/13 para 7) challenged the 30 days set aside for campaigning in the High Court, presided over by Judge-President Chiweshe. It was argued that the period was 'grossly inadequate in light of the importance and complexity of the opinion being sought from voters'. The authorities, it was submitted, should have given ordinary citizens no less than two months to read and digest the draft Constitution before voting commenced. At the time the President announced the date when the referendum would be held, no official copy of the draft constitution or translated or simplified versions of the same had been published. The announcement of the date of the referendum amounted, in this regard, to putting the cart before the horse. Ordinary citizens were denied adequate time to study and debate the draft so as to participate in the referendum from an informed position. Despite this shortcoming, Judge-President Chiweshe ruled that 'in deciding to call for a referendum on the draft constitution and fixing the day and time for the holding of such a referendum, the first respondent acted 'on his own deliberate judgment' in terms of the Referendums Act'. The learned judge was right in his interpretation of the law. In declaring the date and time of the referendum, the State President was covered by section 31 K (1) of the Constitution and section 3 of the Referendum Act (2: 10). Under the two sections, the State President is required and permitted to act on his own judgement when setting the date for a referendum. Other cases that confirm the wide, discretionary and unfettered powers of the State President in setting a referendum date include Lawyers for Human Rights and Anor v The President of the Republic of Zimbabwe 2000 (1) ZLR 274 (SC) and Patriotic Front-Zimbabwe African People's Union v Ministry of Justice, Legal and Parliamentary Affairs 1985 (1) ZLR 305 SC. See also Zimbabwe Mail 2013: 2; Veritas 2013a: 4.

standard. This is because the State media ran more stories that promoted the message of the group that campaigned for the confirmation of the draft than it did for the group that campaigned for the rejection of the draft. As observed by one author:

> The state owned Zimbabwe Broadcasting Corporation (ZBC) carried 500 stories on the referendum campaign. Of these stories, 90% urged the people to adopt the draft constitution. Only 10% of the stories urged the people to vote 'no' in the referendum. In the print state media, 97% of the stories supported the 'yes vote' campaign. Only 3% of the stories urged the people to support the 'no vote' campaign. From the statistics, it is clear that there was no compliance with the SADC principle on equal opportunities to all to access the state media before an election is conducted.[246]

The extent to which the result of the referendum was an accurate reflection of ordinary citizens' acceptance and ownership of the new Constitution is also debatable. With 3 079 966 people voting for the adoption of the draft Constitution, (about 94.5% of the total votes), the official position was that the document received a huge endorsement.[247] However, a closer analysis of the result of the referendum against the number of eligible voters in Zimbabwe casts doubt on the claim that the draft constitution received huge public endorsement.

As of 2012, the Zimbabwe Statistical Agency (ZIMSTAT) put the population of Zimbabwe at 12 973 808.[248] The population of Zimbabwe that is 18 years and above, which constitutes the voting age population (VAP) of the country, is 51.3%.[249] Only 51.3% of the VAP voted in the referendum.[250] This puts the turnout for the referendum held on 16 March 2013 at 48.9%.[251] At 3 079 966, the number of people that voted 'yes' was 46.3% of the VAP. Statistically, therefore, less than half of the eligible voters (i.e the VAP) turned out to vote, and even less voted 'yes'.



[246] Manhanga 2013: 1. Although the 'No campaign group' received little publicity, it had a strong message. It is not clear whether that strong message would have translated into more votes had they be given the same publicity as the 'Yes campaign group'. See also Kangare 2013: 1; Sokwanele 2013: 2.

[247] Kangare 2013: 1. The 'no vote' was a paltry 179 489 (about 5.5% of the total votes). A total of 56 627 ballots were rejected bringing the total number of voters who participated in the referendum to 3 316 082. See also Moyo H, 2013b: 3; Herald 2013: 2.

[248] ZESN 2013b: 19. See also Moyo H, 2013a: 3.

[249] Gwangwava 2013: 3.

[250] Manhanga 2013: 1.

[251] Zivo 2013: 4. This percentage was calculated against the number of eligible voters on the voters roll. See also Moyo H, 2013a: 3.

An analysis of the voter turnout in the provinces also gives an indication of the extent to which ordinary citizens were motivated to participate in the referendum. Except for Masvingo, Mashonaland East and Mashonaland Central, the turnout in the other seven provinces was below the 50% threshold.[252] With the turnout rate ranging from a paltry 39% to 61%, indications are that people were not motivated to vote in the referendum.[253]

There were also claims that the result of the referendum was a product of massive political manipulation. The chief protagonist of the 'no vote campaign', the NCA, a rights group that had sought to dissuade ordinary people from participating in the referendum, rejected the result.[254] Its contention was that the number of people who voted did not match the voter apathy that characterised the referendum. The NCA argued that the electoral authorities working together with ZANU PF 'thumb sucked the number of people it said voted'.[255] Describing the referendum as a 'damb squid characterised by unprecedented apathy', the ZESN also echoed fears that the referendum result 'reveals less than it hides'.[256] According to ZESN, claims of vote stuffing (i.e vote rigging) cannot be ruled out:



[252] Calculated against the number of eligible voters (that is, those who are 18 years and above in each province), the turnout rate was as follows: Bulawayo 39.0%, Harare, 48.1%, Mashonaland West 49.9%, Midlands 49.0%, Matabeleland North 46.5%, Matabeleland South 40.6%, Manicaland 49.0%. Masvingo 53.1%, Mashonaland East 57.9%, and Mashonaland Central 61.0% (ZESN 2013b: 20). Given the fact that a simple majority was all that was required to pass the Constitution, the fact that less than 50% voted in the referendum effectively amounted to a rejection of the Constitution. See Mambare 2013: 2.

[253] ZESN 2013a: 20. See also Moyo H, 2013b: 3; Ruhanya 2013: 2.

[254] Election Resource Centre 2013: 10. 'There are fears from other sections of society such as the National Constitutional Assembly and those who campaigned for a no vote that the referendum result could have been rigged and that the high voter turnout was manipulated through ballot stuffing, the ZESN wrote in its report on the referendum report. This thinking, the ZESN noted, was motivated by the belief that ZANU PF was using the referendum as a test case for the forthcoming general elections scheduled for 2013.

[255] Feldman 2013: 6. After 16 years as a constitutional lobby group and following its failure in the referendum to persuade Zimbabweans to reject the Constitution drafted by COPAC, on Saturday 28 September 2013, National Congress, the highest decision making body of the NCA, resolved to transform the group into a fully-fledged political party that would compete with ZANU-PF, the two Movement for Democratic Change formations and several opposition parties in Zimbabwe. The constitutional lobby group turned political party did not change its name. Professor Lovemore Madhuku, previously chairman of the constitutional lobby group became the leader of the new political party. See also Gava D, 2013: 5.

[256] ZESN 2013b: 22.

> The allegations by civil society cannot be entirely dismissed. In any case, such allegations have been common ever since the founding general election in 1980. Such charges are given credence in the context of the worrisome decision by the Zimbabwe Electoral Commission (ZEC) to print 12 million ballot papers, almost twice the number of registered voters and just a million less than the total population of Zimbabwe of just under 13 million, according to the preliminary report of the 2012 national census.[257]

According to the MDC-T, the number of people who voted in the referendum was less than three million. The electoral authorities were said to have tweaked the referendum result by between 10-15%.[258] The MDC-T went on to say that the figures collated by its polling agents nationwide were much lower than those announced by the electoral authorities. Some constituencies were alleged to have recorded a 'higher turnout than the population ordinarily resident in the areas according to the last (2012) census statistics'.[259] Research

[257] ZESN2013b: 22.

[258] Feldman 2013: 6. Roy Bennett, a prominent civil rights activist and farmer in eastern Zimbabwe, was quoted as saying that 'the discrepancies indicated rigging'. Bennett argued that the figures released by the electoral authorities could not be accurate because of the 'general voter apathy that was experienced on the day'. See also Bell 2013: 2.

[259] Zhangazha W, 2013: 2. Based on a survey conducted by the Zimbabwe Democracy Institute (ZDI) in 2015, Wongai Zhangazha contends that the majority of Zimbabweans do not trust the ZEC. They are of the opinion that the ZEC is compromised and manipulates election results. The survey, according to Zhangazha, reveals that Zimbabweans also believe the Zimbabwe Human Rights Commission (ZHRC) is not independent. The ZDI conducted the survey in Harare's densely populated townships of Epworth, Hatcliffe and Highfield. It interviewed 308 respondents, male and female, of varying ages of 18 and above. Although the sample was small, the survey seems to have aptly described public opinion toward institutions supporting democracy. 79% of the respondents were of the view that the composition of the ZEC influences electoral processes. The President enjoys unfettered discretion in determining who is appointed a commissioner. The secretariat of the ZEC mainly consists of army intelligence and secret service operatives. The composition of the ZEC secretariat has repeatedly been a contentious issue in the run-up to elections for many years. Being beneficiaries of the status quo, it is argued that officials from the army intelligence and secret service manipulate the electoral landscape in ZANU PF's favour. Of the people interviewed, 73% said they had lost trust in the ZEC and accused the body of failing to conduct previous elections in a credible manner. In addition, the 2013 harmonised elections which saw President Mugabe winning against MDC-T leader Tsvangirai were judged as poorly conducted (76%), with 59% saying 'very poor' and 17% saying 'poor'. 'The majority distrust the ZEC because of its perceived partiality. The majority rated the ZEC's conduct of previous elections as very poor. 'Sixty-six percent have concerns about the ZEC's lack of independence and 61% have some reservations about the manner in which the appointments of commissioners are done. With ZHRC, the numbers are significantly lower: 57% doubt its independence and 47% have concerns about the appointment of its commissioners.' 77% were of the

undertaken by Vigil Zimbabwe Group also confirmed that the huge turnout reported by the ZEC 'did not add up to the actual experience of the day'.[260] Noting that the referendum was a test run for rigging the forthcoming general election, Ephraim Tapa, founder member of the Vigil Zimbabwe Group, argued that the result of the referendum did not manifest the despondency expressed by people in a survey carried out by the Vigil Zimbabwe Group before the referendum. The survey indicated widespread apathy, with many people arguing that they 'couldn't vote for something that they were not privy to'.[261]

Some saw a similarity in the voting patterns between the referendum and the parliamentary election that took place four months later. The voting patterns are almost identical to those experienced during the constitutional referendum. The constituencies with high turnout during the referendum repeated the same feat during the general elections. This could not have been coincidence, some argued, as the general election was undermined by voter apathy arising from the fact that most people had doubts about the credibility of the body running the elections. The fact that many doubted the credibility of the referendum and the general election results makes it difficult to regard claims of vote rigging as wishful thinking.[262] The discrepancies in the number of people who voted in the referendum appear to confirm the claim that the referendum was a test run for rigging the general election.[263]



opinion that the ZEC should not receive government funding through the Ministry of Justice and, 73% thought the same for the ZHRC, saying that receiving government funding through ministries to some extent compromises their independence.

[260] Vigil Zimbabwe Group 2013: 2. Although the accuracy of this statement has not been independently verified, according to reports by several newspapers, including the Business Day (a widely read South African newspaper) and the Guardian (an influential British newspaper), the constitutional referendum was characterised by a low turnout of voters. In some polling stations, it was observed, elderly voters outnumbered young voters, raising doubts about the extent to which the draft constitution was perceived to be intergenerational. The answer given by one young man interviewed by Ray Ndlovu of the Business Day seems to summarise the attitude of young people toward the constitutional referendum. 'Why should l vote for something that l don't know about, (that l) wasn't even given enough time to understand? It's completely useless.' See Ndlovu 2013: 2.

[261] Vigil Zimbabwe Group 2013: 2.

[262] Gwangwava 2013: 3. See also Zhanje 2012: 3.

[263] Cendrowicz 2013: 5. The results were baffling. By 2013, Robert Mugabe, the leader of ZANU PF, who has held Zimbabwe under his brutal authority as State President since independence from Britain in 1980, was a diminished figure, widely mocked by his countrymen for his senility and his narcissism. While he retained

## 10.3 The Constitution of 2013: Amended or new?

Following the referendum, the Constitution of 2013 was presented to Parliament and approved as an amendment to the Lancaster House Constitution of 1980. The fact that the Constitution of 2013 was presented and approved by the parliament of Zimbabwe as the Constitution of Zimbabwe Amendment (No. 20) Bill on 20 May 2013 suggests that the process of constitution making facilitated the 'incremental' amendment of the Constitution of 1980 rather than the creation of a successor constitution. Many, however, questioned whether Parliament was approving an amendment of the existing Constitution or a new Constitution.[264] Some argued that the document was an amendment to the Lancaster House Constitution. They premised their argument on the manner in which the document was adopted.[265] It was passed as an amendment to the Constitution and not a new one. The fact that it was adopted as an amendment suggests that the new document facilitated the alteration of certain clauses in the Lancaster House Constitution, as opposed to a wholesale reform of the constitutional order.[266]

> There is a difference between an original and an amendment. In this case, the Lancaster House Constitution of 1980 was the original and the Constitution of 2013 the amendment. Constitution of Zimbabwe Amendment (No. 20) continued the story of the amendment of the Lancaster House Constitution which began in the early 1980s. What this suggests is that the process of constitution making headed by COPAC facilitated incremental constitution making and not the construction of a new constitution from the ground as Zimbabweans were officially made to believe.[267]

Section 52 of the Lancaster House Constitution, which the authorities relied on to approve the COPAC draft constitution, has a heading titled 'Alteration of the constitution', which is expanded by section 52 (1) to mean 'amend, add to or repeal'. Under section 113 on Interpretation, 'amend' is defined as to include 'vary, alter, modify or adapt'. The roots of the verbs 'modify', 'amend', 'alter' and 'adapt' signify a moderate change to an existing structure, short of overhauling it. A strict interpretation of the aforementioned points to the fact that the Parliament of Zimbabwe was empowered to make piecemeal changes to the

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pockets of support in rural areas, and a power base in the police, army and courts, informal polling indicated a steady decline in his electoral appeal. See also Mabwe 2013: 3.

[264] Mambare 2013: 2.

[265] Gwangwava 2013: 4.

[266] Unnamed author in the Daily News 2010: 3. See also Chisora 2013: 2.

[267] Kurehwa 2013: 4.

Lancaster House Constitution and not wholesale changes. This suggests that the document that was produced in 2013 does not replace the Lancaster House Constitution. Rather, it simply changes certain clauses in the Lancaster House Constitution.[268] This explains why the procedure for amending the Lancaster House Constitution outlined in section 52 was followed. The debate over 'original and amendment' is also put to rest by the fact that the 2013 draft was presented and approved in Parliament as Constitutional Amendment No. 20. This renders the constitution-making project part of the all too familiar story in which the amendment of the Zimbabwe Lancaster House Constitution continues to be driven by narrow sectional priorities and ideological interests. Prior to this amendment, the original Lancaster House Constitution, as mentioned in the previous chapter, had been amended 19 times in 33 years. Others, however, maintain the view that the 2013 document was a new Constitution. They point to the fact that the GPA provided for a new constitution and not an amendment. The parliamentary committee, it was argued, presented its work as that of a constitution-making body and not an amending one. The cumbersome stages through which the document passed before it was adopted, it is often argued, is also synonymous with the adoption of a new Constitution rather than the amendment of an already existing document. The fact that a lot of financial resources were used to produce the document was another indication of the creation of a new Constitution, so the argument goes.[269]



## 11. Concluding remarks

It is still too early to tell if the 2013 document is going to endure. Nevertheless, for a country that has a long history of searching for a legitimate and durable constitutional order, the adoption of the 2013 document is, by any standard, a great achievement. The country overcame its inability to create a new Constitution. There is, however, uncertainty concerning the legitimacy of the new document. This relates to the manner in which the institutions and processes used in the constitution-making project were organised. The suitability of the institutions of constitution-making is still subject to rigorous contestation. The use of a parliamentary select committee to create the Constitution made constitution-making less ideal. As a constitution is supreme law, a new body should preferably have been used to create the constitution. The other concern is that COPAC and its ancillary committees were not as inclusive as many wanted them to be. Dominated by politicians of questionable

[268] Chikoya 2013: 3. See also Makwiramiti 2013: 6.

[269] Gava D, 2013: 5. See also Manhanga 2013: 1.

character, the institutions of constitution-making were better placed to respond more to the narrow interests of politicians and not to those of ordinary citizens. The prominent role played by politicians in resolving contentious issues points to institutional weaknesses. Given the fact that a parliamentary select committee was involved in creating the Constitution, adoption by Parliament served no useful purpose. The processes of constitution-making also suffered identical weaknesses as the institutions of constitution-making. Apart from the fact that they were dominated by politicians, the organisation of the process also highlighted major weaknesses. Consultation was not preceded by civic education. It was also marred by coercion, intimidation, and manipulation. Weeks before constitution-making came to an end, politicians unilaterally took over the process of constitution-making, making a mockery of the claim that the process was participatory. Although ordinary people were consulted through a referendum, that consultation carried little significance. By that time, ordinary people were simply being asked to rubberstamp a document that represented the narrow interests of politicians. Given the foregoing, it seems fair to suggest that the quest for a widely acceptable constitution is not yet settled.

# Chapter Six: Conclusions and Recommendations

## 1. Introduction

This study examined how a country can create a constitution that is legitimate and durable. Unlike the dominant literature that attaches prime importance to the content of constitutions, this study proceeded on the premise that the way we go about creating a constitution is as important as the contents of a constitution. It placed institutions and processes that are used to make a constitution at the centre of the equation that determines the legitimacy and endurance of a constitution. Focusing on Zimbabwe, it sought to examine the importance of institutions and processes of constitution-making in creating a good and lasting constitution.

In order to achieve the aforementioned objective, it first provided a historical background to the making of constitutions in Zimbabwe. The aim was to provide a historical perspective within which the more contemporary constitution-making projects can be examined. Furthermore, based on the emerging experiences around the world, it developed a template of constitutional principles that must guide any constitution-making effort. After demonstrating, based on comparative discussion, how the constitutional principles of inclusion, transparency and participation can be given effect to through institutions and processes of constitution-making, it proceeded to examine the more recent constitution-making efforts in Zimbabwe. It, in particular, rigorously examined the institution and process that were used to create the current Constitution. Both the institution used to make the Constitution and each of the stages of the constitution-making process were analysed to ascertain the extent to which they comply with the procedural design standards informing contemporary constitution-making that emerged in the last part of the 20th century, namely the principles of inclusion, participation and transparency.



Chapter Six has two objectives. The first objective is to draw conclusions on the COPAC-led project of constitution-making. The second objective is to provide recommendations on the key issues of institution and process that authorities need to pay attention in the making of a constitution. It is hoped that the suggestions will serve as a guide for the ongoing debate about the nature, structure and modalities of a constitution-making project that could lead to the adoption of legitimate and durable constitutions.

## 2. Conclusion

To begin with, COPAC was not an ideal institution for purposes of constitution-making. This relates to the fact that it was made up entirely of politicians represented in Parliament. A parliament is deemed to be ill-positioned to represent, articulate or defend the broad and permanent interests of society that must define the pillars of any democratic and enduring constitution. As argued in this thesis, parliament is necessarily a product of the temporary electoral choices that depend on the interests and prejudices of the moment.

The suitability of the bodies that assisted COPAC (i.e. the Management Committee, the Committee of Seven, Thematic Committees, the First and Second All Stakeholders Conferences, the outreach consultation teams, etc.) was also doubtful. They manifested the weaknesses of the delegating authority, the Parliament of Zimbabwe. They were not inclusive enough. First, they did not include representatives of all the political parties in the country. Second, some of the committees did not include a single representative of civil society. Instead, they were dominated by politicians from the political parties represented in government. The exclusion of other segments of society (such as political parties not represented in Parliament and representatives of civil society organisations) cast doubt on the credibility of the institutions that were used to create the new Constitution. After all, as argued in this thesis, how institutions of constitution-making are composed matters, as a constitution is a much more important assignment whose construction needs to manifest the interests of the various segments in society.

In so far as the process that led to the creation of the constitution is concerned, the study has revealed that the extent to which civic education prepared ordinary citizens to participate in the process is contestable. Not only was it ad hoc, it was not formally adopted as a component of a crucial programme facilitating the creation of the new Constitution. It was not an integral component of the format of the process of constitution-making. Without civic education, ordinary citizens were ill prepared to participate in the process of constitution-making. In the absence of civic education the enterprise of constitution-making offered rival political parties another opportunity to prepare their followers to pursue the consideration of routine politics under the guise of constitution-making.

To its credit, COPAC undertook consultation. Unlike civic education, such consultation was formally adopted and assigned the requisite resources to make it succeed. It was extensive in

that it covered all the corners of the country. The participation of villagers in the furthest corners of the country gave the hope that the contribution of ordinary citizens was genuinely valued. However, the consultation was less than ideal as it barely enabled ordinary citizens to influence drafting. First, it was not preceded by civic education, the practical significance of the consultation is doubtful. Furthermore, the consultation was dominated by political party activists and their surrogates, excluding various segments of the country including non-resident citizens. The rampant use by political parties of coercion, intimidation, and coaching to manipulate the consultation process rendered the consultation exercise less than meaningful. The use of brute force to cower ordinary citizens into submission flies in the face of the notion of consultation in accordance with the basic norms of participatory constitution-making.

Although the fact that COPAC submitted its draft to Parliament might suggest the promotion of accountability, such accountability was diminished by the fact that COPAC was a creature of Parliament. It was not expected that Parliament would refuse to adopt the constitution recommended by one of its sub-committees. This raises a basic question of the suitability of this arrangement for purposes of checks and balances. Since the membership of COPAC resembled that in Parliament, the submission of the document to Parliament was a formality that did not carry much weight.



The ratification of the Constitution through a referendum might have increased the impression that the Constitution was informed by the norms of participatory democracy. However, due to excessive politicisation of the referendum process, it is not easy to decipher the extent to which the referendum offered ordinary citizens a meaningful opportunity to participate in the approval of the Constitution. Given that all the political parties campaigned for the acceptance of the Constitution, there is reason to believe that ordinary citizens were cajoled into embracing a document that manifested elite values.

(Table 2 critically assesses the various aspects of the process of constitution-making of 2013)

**Table: 2: Theoretical and practical matrix of constitution-making under COPAC**

| **Theoretical Measure** | **In Practice** |
|---|---|
| Was there constitutional/statutory protection for the framework of the process of constitution-making? | No. |
| Were representatives of civil society included | No. |

| | |
|---|---|
| in COPAC? | |
| Did the First All Stakeholders Conference grant an opportunity to ordinary citizens to influence the composition of sub-committees, and general issues to be considered when writing the new Constitution? | Yes, but to a very limited extent. |
| Did the outreach consultation stage grant an opportunity to ordinary citizens to contribute ideas on the impending Constitution? | Yes, but to a very limited extent. |
| Was legal drafting handled professionally? | Yes, but legal drafting was undermined by excessive political intervention. |
| Did the Second All Stakeholders Conference grant an opportunity to ordinary citizens to assess the process and draft submitted to them? | Yes, but the agenda and its process were controlled by politicians. |
| Did Parliament critically analyse the report of the constitution-making, and of the draft constitution submitted to it? | No. |
| Did the referendum on the constitution grant an opportunity to ordinary citizens to increase their participation in the process of constitutional development? | Yes, but to a very limited extent. |



## 3. Recommendations

It is hardly two years since the 2013 Constitution of Zimbabwe came into force and the ink on the Constitution has not yet dried. The calls for a constitution that manifests the legitimate preferences of ordinary citizens are already becoming loud. The intensity surrounding the debate on a new constitution suggests the existence of a sizeable body of opinion genuinely questioning the extent to which Zimbabwe's new Constitution satisfactorily addresses intergenerational concerns. Given this scepticism, the question that now begs an answer is how long it will be before the constitutional debate in Zimbabwe translates into concrete and unstoppable demands for State action in the frosty days ahead.

Despite the fact that the thesis has delineated the major issues that schematic institutional design and process design choices ought to prioritise, the necessity for supplementary enquiry and debate on these issues cannot be overemphasised. The reason for this is that the analysis

was not meant to be conclusive, but rather to serve as a point of departure for further research. With this in mind, the thesis offers the following recommendation:

Given the questions raised about the suitability of Parliament for purposes of constitution-making, it is recommended that the next constitution be created by a specially convened CA, constituted of members that are directly elected. In order to promote inclusiveness, it is recommended that members be elected based on proportional representation as opposed to the first-past-the-post electoral system.

It is suggested that the CA itself takes charge of civic education the next time the country creates a constitution. This will minimise allegations of partisanship. If, however, the CA does not have this capacity, another organisation may be assigned the mandate for civic education. Even then, there is a need to ensure that civic education conforms to set standards. Besides running a comprehensive public information campaign using the entire spectrum of the media, mechanisms need to be put in place to reach potentially disenfranchised and marginalised citizens.

In addition, there is a need for the enactment of suitable rules and regulations that facilitate consultation with ordinary citizens. The duty to consult must be complimented by the establishment of formal and transparent procedures for receiving, analysing and processing written submissions and petitions. In particular, a clear procedure for incorporating into the draft the submissions generated through consultation must be established.

Drafting must be based on the legitimate views of ordinary citizens. To facilitate this, institutional mechanisms that provide for genuine consultation with people before and after drafting need to be enacted. Where consultation precedes drafting, the objective should be to enable people to connect effectively with the drafters through suggestions. Where consultation comes after drafting, the goal should be to give the public a chance to comment on concrete proposals. This again links up with the recommendation that all future constitutions in Zimbabwe should be adopted through CAs. This is based on the premise that sovereignty is vested in and flows from the people. Not only does this arrangement affirm the status of CAs as acts of popular sovereignty, it also reduces the necessity for constitutional referendums. The point is that if the earlier activities of CAs were genuinely participatory, then a referendum might not be necessary.

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