

Constitution by the People or to the People: A Critical Analysis of Zimbabwe's Constitutional Development in View of the Constitution Select Committee (Copac) Led Process

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Abstract

This paper examines Zimbabwe's constitutional development and analyses the view that constitutional making processes and their substantive outcomes are a reflection of the political interests of the rulers at any given time. It traces the background to constitutional reform in Zimbabwe back to the 1979 Lancaster Constitution. A compendious analysis of the Constitutional Commission's draft of 1999/2000 is succeeded by a discussion of the 2001 National Constitutional Assembly (NCA) draft. In the main, this paper discusses the COPAC-led constitutional-reform process and some of the challenges obtaining in the ensuing political environment. These challenges are examined in light of the elite theory of constitutional making to advance the notion that the procedures of constitution making and the contents thereof are a clear reflection of the interests of the political elites of that time. Moreover, parallels will be drawn between the Lancaster and the COPAC processes where after it will be argued that the processes were not people driven ones but were negotiated. The comparative analysis will show that these two documents were adopted as working constitutions during their times due to the mutual consensus between the interested internecine parties as prescribed by the elite cohesion theory, which is an off shoot of the elite theory. Therefore, this study downplays the democratic and pluralist theories as key drivers of constitution making process in Zimbabwe and advances the view that constitutional making processes and outcomes reflect the fears, aspirations and interests of the rulers other than the views of the masses.

Keywords: Constitution; Zimbabwe's constitutional development; COPAC; CISOMM; NAC

Introduction

Until the turn of the twentieth century, emphasis in constitutional jurisprudence as Serge¹ posits was almost exclusively focused on substantive provisions of constitutions with no or limited scrutiny of the processes by which they are made. Ihonvbere² however, states that constitution-making processes are today viewed as 'critical to the strength, acceptability, and legitimacy of the final product.' Against this backdrop and for better illumination into the fundamental issues discussed under this study, it is pertinent to define what a constitution is at this point. Various definitions of a constitution have been put across by various scholars in legal and political studies. Contemporary constitutional Scholars Jackson et al.³ define the constitution as '...the document in which the most important laws of the land is authoritatively ordained'. Political scientists, though, define the constitution broadly. Wormuth⁴ [1] also weighs in by defining the constitution as a set of rules and customs, written or unwritten, legally established or extralegal, by which a government conducts its affairs. Broadly therefore and as a working definition adopted in this paper, a constitution is a set of fundamental principles or established precedents according to which a state is governed. A fundamental classification of Constitutions is codification or lack of codification. A codified constitution is one that is contained in a single document, which is the single source of constitutional law in a state. Jackson and Leopold⁵ [2] submit that an uncoded constitution, with the British Constitution as

a good case in point, is one that is not contained in a single document, consisting of several different conventional sources, which may be written or unwritten. The quest by the Zimbabwean people to own their home grown constitution is well established in the various historical administrative phases and struggles that they have lived through, including the liberation struggle and ultimately the 1979 Lancaster Constitutional discourse. This constitutional crusade continued well into the first decade of the twenty-first century as a cacophony of voices from every nook and corner of Zimbabwe's body politic registered a legitimate need for a home grown constitution. The inception of the inclusive government in 2009 created a unique platform of constitution-making by the people for the people⁶. Therefore, since 2009, Zimbabwe was involved in a constitution-making process spearheaded by a Select Committee of Parliament on the New Constitution (COPAC). The writing of a new constitution was a cardinal requirement of Article 6 of the Global Political Agreement (GPA) signed in September 2008 by the three political parties represented in parliament⁷The GPA was brokered and guaranteed by the Southern African Development Committee (SADC) and facilitated by the South African presidency and it ended the 2008 election dispute between President Mugabe and former Prime Minister Tsvangirai. The dispute led to a near constitutional crisis as

⁶Article XI of the Global Political Agreement

⁷Ibid

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¹Serge ZN (2008), Popular Participation for Disempowerment: Democratic Constitution Making in the Context of African Liberal Democracy, Eduardo Montlane University, Mozambique. p. 8

²Ihonvbere J (2000), Towards the New Constitutionalism in Africa, CDD, Occasional Paper Series.p.44

³Jackson and Leopold (2001), Constitutional and administrative Law 8th Edition. p 5

⁴Wormuth FD (1949), The Origins of Modern Constitutionalism (New York: Harper and Brothers), p 3

⁵Jackson and Leopold, supra p. 7

the legitimacy of President Mugabe's ascendancy to the presidency after a controversial presidential runoff triggered off an avalanche of worldwide condemnation. This led to the formation of the transitional inclusive government that assumed office in February 2009. The COPAC led constitution-making process is the latest in a cocktail of post ceasefire constitutional-reform endeavors which witnessed the production of five constitutions: one of which was adopted at Lancaster in 1979, three of which were never adopted and the COPAC one which was resoundingly adopted on the Referendum plebiscite held on the 16th of March 2013. This paper advances the notion that the 'people-driven constitution' mantra maybe mere propaganda designed to placate the passive and ceremonial participation of the masses in the constitution making process. In 1979, the constitution that came into force was a product of negotiations at Lancaster. Problematically, this constitution though negotiated, remained in force until the 22nd of May 2013 and had been amended a record nineteen times. These amendments were, for all intent and purposes meant to serve the interests of the rulers who negotiated the Lancaster document rather than advancing the wishes and aspirations of the people. The Constitutional Commission's draft was also a regurgitation of the Lancaster House constitution and it sought to do nothing but consolidate the executive presidency of the 1987 amendments. Notwithstanding these naked truths, the processes were thrust out to the people as representative. This problem, among others, has prompted this study. In 2009, COPAC conducted constitutional hearings in all the wards of the country and organized two All-Stakeholder Conferences. While acknowledging these efforts, it has been argued that there can be no valid claim of popular involvement in the process⁸ since the constitutional conferences and the outreaches were only symbolic and were marred by violence which stifled the intended open and democratic participation by the consulted masses⁹. The body that drafted the constitution was chosen on party lines¹⁰, a significant number of youths despite their majority did not attend outreaches meetings¹¹ and foreign funders and actors allegedly influenced the process¹². On this basis, the claim that the constitutional review process in Zimbabwe was representative calls for empirical analysis. The problem under investigation is that the COPAC led constitutional making process and other processes preceding it in Zimbabwe have been conducted in a way that appear people driven when in it would appear that it is a gross misrepresentation and an abuse of the representative democracy concept. This problem is exposed through a thorough investigation into how the negotiating elite actors representing their political parties influenced the outcome of every phase of the process. In sum, this paper is motivated by the need for empirical research to examine whether the constitutional review process was representative or whether it was a reflection of the interests of the ruling elite. It also investigates how participatory and inclusive the constitutional review processes were with special focus on the recent COPAC led process. It is also an investigation of whether politics impacted on actors or stakeholders' motivations, fears, interests, behavior and choices of constitutional design and the contents thereof during the process. Three overarching questions are addressed, namely: Were constitutional making processes in post-colonial Zimbabwe people driven; Does representative democracy work in Zimbabwe and how does constitution making process influence the legitimacy,

⁸National Constitutional Assembly Report, 2012

⁹CISOMM (Civil Society Monitoring Mechanism) (2011) Annual Review of the Performance of the Inclusive Government of Zimbabwe: February 2010–February 2011. Harare: , report No 5, p. 13

¹⁰Human Rights Watch 2011

¹¹ Final COPAC Report (June 2013) p. 18

¹²Ibid, p. 73-5

ownership and adoption of the final constitution?

Literature Review and Theoretical Aspects in View

Constitution-making in Zimbabwe

Since the 1990s, a cocktail of studies dealing with the discourse of constitution making has been produced. Serge¹³ submitted that by the turn of the twentieth century, emphasis in constitutional studies was in the main focused on the final contents or provisions of constitutions with no or limited scrutiny of processes. This narrow view was drastically challenged by Ihonvbere¹⁴ who reasons that the process by which constitutions are made is considered just a subject of investigation as the content of constitutions. Ihonvbere¹⁵ describes it as the 'new-constitutionalism' as it is akin to democratic constitution making which Kaime¹⁶ describes as 'legitimacy led issues'. Be that as it may and as what Ihonvbere¹⁷ posits, constitution making processes are today viewed as important to the strength, acceptability, and legitimacy of the final constitution. At the pith of the notion of democratic constitution making, is therefore the concept of popular participation as well enunciated in the famous case of Marshall vs. Canada¹⁸. It was held in this case that the Mikmaq tribal society's right to participate in constitution making was an undoubted part of public affairs and that Canada was in violation of article 25(a) of the UN International Covenant on Civil and Political Rights by not allowing the society's right to participation in the making of the country's constitution. In this light, the involvement of the masses in constitution making process is believed not only to bestow legitimacy but also guarantee the people's sense of ownership of the constitution and their ability and willingness to defend it. An interrogation of Zimbabwe's post-colonial constitution-making begs the question whether there are normative guidelines against which constitution making in Zimbabwe can be judged. Although there are no universally accepted norms and standards that apply to constitution making¹⁹ [3] different modalities and methods of constitution making have been adopted by different countries. Mulisa²⁰ opines that the starting point for any constitutional system is necessarily a political fact and the process is a political decision that aims at addressing a political and sociological fact often known as the Grundnorm by Hans Kelsen²¹. Kelsen²² argues that the Grundnorm determines the process and the content. There seems to be a consensus among constitutional scholars that people are the custodians of democracy and should be involved at all stages of constitution making. Mwale²³ argues that the process must empower the masses rather than inhibit them by creating platforms and avenues for individual efficacious involvement. A Zimbabwean prominent judge, Ben

¹³Supra, p. 8

¹⁴Supra, p.8

¹⁵Supra, p.9

¹⁶T. Kaime, (2006), Book review of Comparative Constitutionalism and Good Governance in the Commonwealth: an Eastern African Perspective, p. 50 (1) *Journal of African Law*, 86

¹⁷Supra, p. 44

¹⁸Human rights Committee, CCPR/C/43/D/205/1986 in December 1991

¹⁹Mulisa, (2009) Public participation in constitution-making: A critical assessment of the Kenyan experience, UWC, South Africa, p. 22

²⁰Ibid

²¹The Grund-norm is like the prior Constitutional question that needs to be answered. It is like the foundation and the basis of the constitution process and substance.

²²E McWhinney Constitution- making: principles, process and practice (1981) 12.

²³S Mwale Constitution review: The Zambian search for an ideal constitution making, paper presented at the 10th African Forum for Catholic social teaching (AFCAST) working group meeting, 02 may 2006, Nairobi Kenya 2.

Hlatswayo, succinctly summarizes the point by stressing that 'modern ideas on constitution making place emphasis on popular participation and wide spread consultation in order to produce a constitution and which the people feel is truly their own'²⁴. This says that citizen's level of involvement in the process of constitution making determines the legitimacy of the process. Professor Hansungule²⁵ points out that there is also growing and peremptory need to ensure the active involvement of civil society organizations. Members of the civil society should be allowed to present their views both on the content and the process of constitution making. According to Mulisa²⁶ the South African constitution making process demonstrated the important role of the civil society in constitution making. The submissions by gender activists groups and other civil society organizations clearly had an impact on the constitution making process. Professor Hansungule²⁷ maintains that since most African societies are divided along ethnic lines, initiatives from civil society groups will address divisions. The capacity of these civil society organizations to listen and represent their people is drawn from Bratton's argument that ethnic heterogeneity in leadership and staffing is as relevant to maintaining legitimacy in civic organizations as in the African state²⁸. Notwithstanding that the notion of public participation has not been fully defined, it is, however, a concept that is widely recognized by both international and regional legal instruments. Participation purports the legitimating of a new political order by creating a link between the framers of the constitution and the public²⁹. The right to constitution making is derived from the right to democratic participation as provided under the United Nations Declaration of Human Rights. Article 21 of the United Nations Declaration on Human Rights recognizes the concept of public participation as 'democratic participation' where as Article 25 of the International Covenant on Civil and Political rights provides for every citizen's rights to take part in the conduct of public affairs³⁰. Article 13 (1) of the African Charter provides for public participation. The content of public participation has been expanded and developed to include other rights like political equality, freedom of speech and association³¹. De Villiers submitted that in the context of constitution making, public participation has been viewed to include openness throughout the constitution making process, access to information and shared responsibilities between the government and the civil society³². In this light, therefore, effective public participation implies the involvement of the public at all stages of the constitution making including in the selection of members of the review process. Therefore, there is imperative need to involve the people at all levels whether in a constituent assembly or through a referendum³³. Constitutional development in Zimbabwe, and in particular, the COPAC led process

is reviewed under the microscope of the preceding debate and this study advances the notion that constitution making in Zimbabwe has been confined to the legitimization of the elite's interests by the masses more than the people-centered and driven wishes and aspirations of the same. Hence democratic Constitution making in Zimbabwe seems to have, as conceded by Serge³⁴ and supported by this study, created only a consensus among the political elite and to have ignored the vast majority of the population's contributions during conferences and consultations thereby defeating the very purpose for which popular participation was advocated in the first place. The notion of what kind of interests, representative groups should advance is a contested arena in theoretical discourse of constitutional making. According to Carroll³⁵ the realist theorists appear to converge around the elite theory of constitution making. He argues that realists believe that it is an integral element of constitution making process for representatives to advance personal interests and those of their respective groups' while idealists assert that the only motivation should be the common good of the state not individual or group interests. Carroll³⁶ further argues that the belief in popular involvement in constitution making, which is a tenet of new constitutionalism, aims at making sure that the constitution embeds common interests of the people not interests of a few. Therefore, in new constitutionalism as the idealists posit, representatives are expected to advance the interest of the general public not their own. In that breadth, it is the argument of this researcher that constitutional making in Zimbabwe has failed to adhere to the democratic and pluralist view as purported by the protagonists of the constitutional making processes and that the Zimbabwean people have been systematically cornered to endorse the elites' interests. This paper is undertaken through the lenses of two major theories of constitutional making. These are the elite and the democratic theories. However, the theories better reflect on the findings of this study when juxtaposed to the two broader corresponding realist and idealist theories. John Locke and other Enlightenment thinkers, such as Voltaire, Montesquieu, and Jean Jacques Rousseau, created theories of democracy and elitism, realism and idealism that guided the Founders as they shaped the new government of the United States in the late 18th century³⁷. The elite theory posits that a republic cannot claim to be a democracy if only a few people actually make political decisions, even if they are elected by the people? The elite theory further holds that a representative democracy is not really based on the will of the people, but that there is a relatively small, cohesive elite class that makes almost all the important decisions for the nation³⁸. Elite theorists argue that the founders believed that a privileged majority should rule in the name of the people with a controlled amount of input from citizens. Democratic theory has two basic models: Direct democracy³⁹ where citizens debate and vote directly on all laws. It requires a high level of participation in constitution making, and is based on a high degree of confidence in the judgment of ordinary people. Representative Democracy⁴⁰ is an indirect democracy in which people elect representatives to make laws and set policies. A representative democracy, then, is a compromise between a direct democracy and an authoritarian elite rule, and has become the most accepted form of democracy in the world today. Consequently, this study goes further to locate the COPAC led process in the relevant

²⁴Mawire, (2009), Democratisation and constitutionalism through constitution-making process in Zimbabwe

²⁵M Hansungule 'Experiences at Constitution-making in SADC: The Zambian experience (2004) 28.

²⁶Supra p.134

²⁷Supra p.137

²⁸S De Villiers, (2001), A people's government: The people's voice p.159.

²⁹G Hyden & D Venter, (2001) Constitution-making and democratization in Africa, p. 20.

³⁰V Hart Democratic constitution making: (2003), p. 5 available at <<http://www.usip.org>> (accessed 5 October 2013). See also United Nations Human Rights Committee General Comment on Article 25 of the ICCPR, 12 July 1996 about citizen participation of public affairs especially in choosing and changing their constitution.

³¹Supra p.6

³²De Villiers, p. 159

³³Y Ghai, Paper presented on the Constitution reform process: Comparative perspectives 'towards inclusive and participatory Constitution making' (3-5 August workshop), 2004 Kathmandu, Nagarkot.

³⁴Supra, p. 11

³⁵Carroll, J.J. (1985), "Constitution-Making Role and Delegate Behavior". *Polity*, Vol. 17, No.3, pp. 586-594.

³⁶Ibid

³⁷Carroll (1985), p.590

³⁸Ibid

³⁹Ibid

⁴⁰Ibid

elite cohesion, which is founded in the elite theory, given that the Select Committee of Parliament which spearheaded the writing of the new constitution was composed of politicians from three ruling political parties at that time whose consensus emerged more around their common interests as ruling elites than as representatives of the masses. As intimated earlier elsewhere in this study, the elite and democratic theoretical discourse of place of politics and interests in constitution making is situated in the idealist-realist debate. The idealists who are inclined to the democratic theorists argue for the separation of partisan politics from the process of constitutional making because the process requires that the player make objective rational decisions. Carroll⁴¹ explains that the idealist perspective is based on the idea that constitutional conventions should be above politics which derives from jurisprudential notion that a constitution is supreme law document which embodies principles upon which society approaches consensus. This higher law designation expects delegates to constitution making process to make objective, rational decisions free from the pull and sway of partisan politics. Their role should be a deliberative one in which rational consideration of the issues takes precedence over the demands of friendship, political parties, work groups and any other sections of the state⁴². The realist perspective which is akin to the elitist theory holds the contrary view. Constitutional making is not a neutral process and therefore partisan forces are part of the process⁴³. In this view, constitutional making is not independent of the identities of parties taking part in the process. Influence of partisan interests is considered normal and a way towards the making of the constitution. The constitution is thus a product of the rulers' interests and as a result realists, who buttress the elite theory of constitution making, view partisan influences and personal appeals for support as legitimate. Chunga argues that the realist perspective is descriptive of tendencies in most constitutional making processes⁴⁴. The realist perspective, however, loses the very heart of the constitution making, which is making a higher law. Therefore, if practice of constitution making proceeds on assumptions of realists, there is a risk of the process being swallowed by dominant partisan interests of the ruling elite since no efforts would be made to insulate against these demands. This, as separately argued by Kanyongolo [4]⁴⁵ and Ndulo⁴⁶ [5] is a threat to the spirit of democratic constitution making since it requires that people own the constitution and take responsibility against its violation.

Methodology

In this study the qualitative the qualitative approach is largely employed because the study aims at exploring subjective experiences and the meanings attached to the experiences of various stakeholders or actors in the process of the constitution review. The qualitative approach also allows a thorough probe into the forces behind the behavior; motivations and choices of constitutional design made by actors in the COPAC led process [6]. The study is conducted at national level. The first group of respondents constitutes key informants who will be purposively sampled whereby those considered as rich sources of information on the subject are interviewed. These include representatives of political parties that made submissions to COPAC,

⁴¹Ibid

⁴²Ibid

⁴³Chunga JJ (2009) Politics of Constitution making in Democratic Malawi: A stocktaking of new Constitutionalism, University of Malawi, p.22

⁴⁴Ibid

⁴⁵Kanyongolo, F.E. (2007). The Constitution in Patel N and Svasand, L. (Eds). Government and Politics in Malawi. Blantyre: Kachere Books.

⁴⁶Ndulo, M (1996). Constitution Making in Africa: Assessing both the Process and the Content Public Administration and Development, 21, pp.101-117.

COPAC members, COPAC secretariat, academics and members of the civic society. The political parties selected for the purposes of this study are some of the ones that sent delegates to both the 1st and 2nd All Stakeholders' Conferences held at the Harare International Conference Center (HICC) on the 1st of July 2009⁴⁷ and the 21st of October 2012⁴⁸ respectively. These are, among others: ZANU-PF, MDC-T, MDC-N, Mavambo/Kusile/Dawn, MDC 99 and the Zimbabwe Democratic Party. The other phase involves the views by people who made contributions to COPAC on issues under review. These are selected through pure random sampling, which is a method whereby a particular number is picked randomly from a chosen district. In this study, 100 ordinary people, regardless of their class and status in society per every province are sampled. The sample is for purposes of determining the level of participation across the country and distribution across the country's administrative provinces. The submissions were aired during participation in ward based focus group discussions during COPAC out reaches. The civil society bodies also formed a coalition to coordinate their input into the process; it was the leadership of this network that was sampled at national level. All respondents were sampled for their direct involvement in the constitution-making process in order to get their experience, evaluation and sentiments regarding the process. It also helps to assess the environment in which the submissions were made [6]. The data collection methods range from In-depth interviews with the relevant key informants to the review of documents and administering questionnaires. In-depth interviews help to get first-hand information pertaining to how and why stakeholders viewed the process, other stakeholders, and the Constitutional issues under review COPAC members were also interviewed with a view of understanding how they managed the process including submissions they used in the drafting of the final document based on those submissions. Academia, civic society and experts in the fields of politics and law were also interviewed to provide the technical assessment of the process and find out their contribution towards broadening public participation. The key informants include representatives of political parties that participated in the outreach consultation focus groups in various wards across the country. They provide information regarding why they made particular proposals; whether they regarded the COPAC and the process as legitimate and appropriate. Members of the COPAC are also interviewed to understand how the commission managed the process including submissions to arrive at recommendations, and find out measures put in place to make the process democratic.

Analysis of Zimbabwe's Post Colonial Constitutional Development-Major Findings

Introduction

This chapter analyses the degree of popular participation and stakeholder inclusiveness of the constitution review processes since 1979. It goes beyond the level of participation to also discuss whether the people's views were really incorporated in the final constitution in a manner that warrants the conclusion that the constitution was reviewed by Zimbabweans. This participation is also analyzed in terms of the public's involvement, especially during the COPAC led process [7]. Actors, including constitution-making management, consulted populations as well as delegates to constitutional conferences are identified and analyzed to find out if their involvement in the process reflected more of the constitutional aspirations of the masses than the ruling elites. The chapter considers a brief history of constitution development in Zimbabwe by analyzing the Lancaster constitution and

⁴⁷Final COPAC Report, P.14

⁴⁸Final COPAC Report, p.58

the non-adoption dilemmas faced by the Constitutional Commission and NCA drafts. It goes further to discuss at length the procedures, actors and the political implications that obtained during the COPAC process. This discussion constitutes the COPAC's conduct focusing on how independent and objective it was. This is followed by the examination of the management of the COPAC constitutional conferences to find out if they ensured that they were meaningful deliberative forums. The discussion goes further to examine the degree and nature of participation and the factors that affected the same before concluding the chapter.

Constitution development in Zimbabwe-A brief history

Zimbabwe became independent on the 18th of April 1980. The constitution that came into force on that day was a product of negotiations between the internal settlement government of Bishop Muzorewa and Ian Smith and the national liberation movement led by President Robert Mugabe and the late Vice President Joshua Nkomo⁴⁹ [8]. The negotiations were held in 1979 and chaired by the British government. They were conducted at Lancaster House in London and accordingly the Independence Constitution is referred to as the 1979 Lancaster House Constitution. This remained in force until the 22nd of May 2013 but it had been amended a record 19 times⁵⁰. All the nineteen amendments made to the Lancaster House Constitution had been piece-meal and were affected by Parliament; hence there was no comprehensive reform of the Zimbabwean Constitution since 1980. An attempt to overhaul the constitution was made in 1999-2000. In May 1999, the government appointed a 400-member Constitutional Commission to review the Constitution. This Commission was boycotted by a coalition of civil society organizations under the umbrella of the National Constitutional Assembly (NCA), an NGO which had been formed in 1997. The NCA criticized the Constitutional Commission as partisan and lacking independence. When the Constitutional Commission presented its draft constitution to a referendum in February 2000, it was rejected. The government accepted the verdict and the draft constitution were shelved. All elections that followed the referendum of 2000 have been violent⁵¹. It is therefore not surprising that the period from the 2000 referendum to the 2008 elections culminated into the establishment of the COPAC in 2009 as that period was characterized by vigorous pressure for a new constitution [9].

Lancaster Constitution-A constitutional imposition by the ruling elites

This is the 1979 document agreed at Lancaster House in London after the liberation war. It came into force on the 18th April 1980. As intimated earlier, it was amended 19 times. In 1980, it provided for a parliamentary executive system of government headed by a Prime Minister. It guaranteed the white minority twenty seats in parliament and there was a bi-cameral legislature [10]. The head of state was a nonexecutive president. Some provisions were entrenched, such as the protection of private property which was designed to protect the minority white commercial farmers⁵². While the Lancaster Constitutional Conference was a noble one, as it marked the central watershed for the black majority self rule, many a scholars viewed it as a congregation of a

few interested ruling elites from two sides of a warring political divide. Mupanduki⁵³ argues that while the Patriotic Front leaders argued for a radical restructuring of agriculture on a communal basis, the Rhodes on the contrary, tacitly supported by a Muzorewa delegation, envisaged a modified form of the existing system of white-dominated land ownership. Among other controversial constitutional features were the citizenship provisions, a Declaration of Rights, and pension guarantees⁵⁴. With the election completed, Zimbabwe would take the decisive step toward sovereign independent status under the ruling elite inspired Lancaster House document not a Zimbabwean Constitution that reflected the deep seated wishes and aspirations of the weary and war ravaged citizens back home. Thsuma as quoted by Mupanduki⁵⁵ argues that the willing-buyer-willing seller principle enshrined in the constitution was the main obstacle to successful land reform and was a far cry from what the black majority had waged war for as it protected the interest of white, large-scale commercial farmers and prevented the government from buying enough land to meet the increasing needs of a landless growing population [11]. Thus, the agreement on land reached at Lancaster House was itself been a compromise, and one in which the Zimbabwean negotiators had little choice but to accept as they were in a hurry to assume the reins of powers and end the war. It is therefore not surprising that Mandazaopines that the constitution hampered the progress toward justice and political reconciliation by entrenching a special parliamentary position for whites. How could the mass have the power but not the wealth?⁵⁶ Worse still, as already noted, whites were guaranteed representation in the Parliament far beyond their proportion of the population. Some 6000 white farmers owned farms with an average size of 6000 acres, comprising the best half of the arable land in the country. 800,000 African farmers scratched a living out of the sand and rocks that constituted the other half⁵⁷. The Constitutional amendments that followed also proved that the Nationalist leaders who negotiated at Lancaster were determined more about perpetuating their hegemonic interests than 'constitutionalising' the people's wishes. The far-reaching 1987 amendments consolidated the ruling elites' Lancaster gains by the introduction of the executive presidency⁵⁸. Entrenched clauses expired in 1990 and in their place new provisions were put, with the case in point being that which enabled the president to significantly influence the legislative branch of the state through: the power to make appointments to the senate; dissolve parliament should it pass a vote of no confidence in him or her; and to revoke an individual's seat in parliament if the parliamentarian concerned ceases to be a member of the political party on whose ticket he/she was elected⁵⁹. The judicial branch was similarly subject to executive control: the president controlled the appointment and removal of judges, commissioners, chiefs of the security services and other public figures, and could therefore unilaterally reconstitute various state bodies in pursuit of personal or partisan ends [12]. A case in point was President Mugabe's unilateral decision to extend the terms of office of the heads of five national security services by two years in February 2012⁶⁰ without consulting his fellow principals in the GPA. In view of the preceding analysis of the making of the Lancaster constitution, it can reasonably

⁴⁹Matinenga E (Adv), (2013). Constitutional Review Process in Zimbabwe, Paper presented on the occasion of the 14th Annual General Meeting and Conference of the SADC Lawyers Association (SADCLA), 2-3 August 2013, in Lilongwe, Malawi, p. 2

⁵⁰Ibid

⁵¹Chisaka C (2000) Did the Constitution Correctly Interpret the Views of the People? *Social Change*, p. 5

⁵²Ibid

⁵³Mupanduki, M.T (2012), An analysis of the nature of and remedies for corruption in Sub-Saharan Africa: Focusing on Zimbabwe, University of Texas, Dallas, USA, p. 75-82

⁵⁴Ibid

⁵⁵Ibid

⁵⁶In general see W.J. Chambliss and R.B. Seidman, *Law, Order and Power* (2nd edition)

⁵⁷Mupanduki, *Supra*, p.79

⁵⁸Constitutional amendment No. 7

⁵⁹Constitutional Amendment No 10

⁶⁰Chisaka C, (2000), P. 7

be argued that the Lancaster document and the process that produced it was not a product of the masses, as it was negotiated in the comfort of the splendor of the British metropolitan London. The outcome fell short to reflect the very wishes and aspirations of the Zimbabweans who had waged a decade long war against white settler hegemony. The process adopted and the provisions entrenched only put paid to the theoretical underpinning that constitutions are elite driven rather than democratically enacted [13]. The power brokerage tag synonymous with the Lancaster constitutional conference rubbishes the democratic theory of constitution-making be it direct democratic or representative democratic theories, as the Patriotic Front leaders who were supposed to represent the people appeared to be drawn conveniently more to assuming the reins of power than echoing the wishes and aspirations of the masses back home.

Constitutional commission and the NCA drafts' non-adoption dilemmas

The advent of strong opposition in form of the united MDC in 1999 ushered in a stronger determined crusade for a new constitution. Fearing the potential political appraisals from a sundry cacophony of voices agitating for constitutional review, the ZANU-PF government initiated a constitutional reform process to appease them. It was conducted under the auspices of the Constitutional Commission from 1999 to 2000 and was inherently flawed in that it was deliberately concocted to ensure perpetual presidential control⁶¹. It retained the executive presidency but with an executive Prime Minister appointed by the President. It also introduced a two term limit for the Presidency [14]. The bill of rights was not expanded but weakened further⁶². In addition, the commission's mandate was limited to submitting recommendations for a new constitution to the president on or before 30 November 1999, which he was under no legal obligation to accept⁶³. The composition of the commission further betrayed the president's intention to steer a people driven constitutional-reform process; in fact ZANU-PF monopolized the commission's work from the start⁶⁴. It was chaired by high-court judge Godfrey Chidyaisiku, who was seen as a close ally of the president [15]. In addition, while the government invited members from a cross-section of society in an effort to give the commission a semblance of being fully representative, the majority of the commission's 400 members were ZANU-PF members or supporters – for example, all 150 members of parliament were included⁶⁵. (Of which only three belonged to other political parties). The president gave the Constitutional Commission a tight schedule to produce a new draft constitution, increasing fears that he was intent on pushing his own constitutional and political agenda. Not surprisingly, these procedural choices severely undermined the legitimacy of the final draft. The draft contained a wider bill of rights than the Lancaster House Constitution, but failed to provide for a genuinely independent electoral commission⁶⁶. ZANU-PF then campaigned vigorously for an endorsing 'Yes' vote while the MDC and NCA orchestrated a 'No' campaign. 'No' campaigners argued that the Constitutional Commission's draft ignored the provincial and thematic-committee reports that had been submitted, and particularly people's views on the need to limit the powers of the executive and ensure an even balance of power between the legislative, judicial and executive branches of government⁶⁷. The

majority of those consulted clearly wanted a governmental system that was accountable to them through elected representatives in parliament but this was denied them by the Commission. A total of 26 per cent of about five million registered voters participated in the referendum, and the new constitution was rejected by 54.31 per cent of the votes. Buoyed by these developments, the NCA which was formed in 1997 [16] as a civic organization campaigning for the writing of a new constitution initiated a parallel process of collecting the views of Zimbabweans on a new constitution. It produced its draft in 2001. The NCA's main objection to the 2000 draft of the Constitutional Commission was that it retained an all powerful president who was not different from the executive presidency introduced in 1987. The NCA draft provides for a parliamentary executive headed by a Prime Minister. It had a Bill of Rights covering both civil and political rights as well as social and economic rights⁶⁸. The NCA draft differed from the existing constitution and the Constitutional Commission's draft in that it proposed to vest executive authority in a prime minister and cabinet rather than in a president, who was relegated to the role of titular head of state⁶⁹. The NCA draft also removed certain presidential powers and privileges such as the authority to dissolve parliament, grant pardons or to declare war or a state of emergency. Furthermore, the NCA draft provided for a truly independent electoral commission, a human-rights commission, an anti-corruption commission and a strong auditor-general to enhance democracy [17]. It allowed the government to compulsorily acquire land for redistribution provided it paid fair compensation for it⁷⁰. However, the ZANU-PF government ignored the NCA draft and put aside the debate on the new constitution as it was now preoccupied with mooting and implementing power retention strategies after the opposition MDC had vigorously challenged its dominance in the general parliamentary plebiscite of 2000. The rejected Constitutional Commission and the ignored NCA drafts faced two similar scenarios: that they never saw the light of the day. In light of the argument earlier intimated that Constitution-making in Zimbabwe has been at the mercy of the imposition of the ruling elites' interests on the masses, it can be viewed that in case of the NCA draft, no governing elite rulers were involved and therefore the fate of the draft was meant to fail as the government simply ignored the same. This further buttresses the view that successful constitution-making in Zimbabwe can only be realized within the theoretical framework of the elite theory and not the democratic theory which embraces the participation of the masses and civic society organizations. The rejection of the Chidyaisiku Constitutional Commission brings to the fore the applicability of the elite cohesion theory which is an offshoot of the elite theory. According to Lerner et al. the elite cohesion theory envisages a consensus by the ruling elite who may come from different ideological backgrounds but whose common interest is power. It can only be by consensus and compromise of these opposing elites, but motivated by the common interest of power that there can be progress and adoption of policies and laws. Domhoff⁷¹ expands the elite cohesion theory to cover the cohesion between the national, affluent community based capitalists who wield power and the international capitalists who manage major corporations through affluent educated middle class proxies. It is the agreement between these classes, which can ensure progress when there is contestation in the polit. This theory explains well the rejection of the Chidyaisiku Commission Draft as the contents and the process that birthed it was contested by the growing opposition influence comprised of the MDC and a coalition of civic

⁶¹NCA bulletin, June 2001

⁶²Constitutional Commission draft, (200)

⁶³Ibid

⁶⁴Ibid

⁶⁵Chisaka, supra, p.4

⁶⁶Ibid

⁶⁷Ibid

⁶⁸NCA Draft, (2001)

⁶⁹Ibid

⁷⁰Ibid

⁷¹Domhoff W, Who Rules America? (2006),P. 135

societies whose interests were not considered [18]. Therefore, the fact that the ZANU-PF led government did not moot consensus through deliberated and negotiated dialogue with the opposition elites whose growing influence in politics was evident led to the rejection of the Constitutional Commission's draft. This further put paid to the elite theory, under which the elite cohesion theory falls as the leading theory of constitution-making in Zimbabwe. In view of the above rejected NCA and Chidyausiku drafts, the elite theory proves to inform the *modus operandi* of constitution-making. Therefore the democratic theory continues to play second fiddle to the elite theory that evidently and empirically permeates every strata of Zimbabwe's constitutional development discourse since 1979.

The COPAC led review process- findings

As intimated earlier, the GPA recognized the inadequacies of the existing Lancaster House Constitution and made it imperative for 'the Zimbabwean people to make a constitution by themselves and for themselves'⁷². This is a marked departure from the prior Constitutional Commission's reform process, which allowed the president to dominate the process. However, the GPA lacked specific details, and the inauguration of the inclusive government, and by extension the implementation of the Article 6 timetable for constitutional reform, was delayed until February 2009 due to disagreements over implementation of the agreement⁷³ [19]. It consisted of 25 parliamentarians selected to reflect parliament's gender balance and the relative strengths of the different parties in both the senate and the house of assembly. Thus COPAC consisted of 17 men and 8 women, 11 members of MDC-T, 10 ZANU-PF members, 3 MDC-N members and 1 representative of the traditional chiefs⁷⁴. However, some civil-society activists argue that ZANU-PF and the two MDC formations captured the constitutional project and narrowed it to a struggle over party-political interests at the expense of the will of the people⁷⁵. The NCA therefore boycotted the COPAC process, and even mooted an alternative people-driven process under the banner 'Take charge!' The boycott was in the main, as was opined by the interim Information and Publicity Secretary⁷⁶ of the now NCA-cum political party, predicated upon the elite composition of the COPAC itself and a cocktail of problems which bedeviled the process. COPAC managed to meet its first GPA deadline by holding its first All-Stakeholders Conference on the 1st of July 2009. The conference was attended by 4000⁷⁷ delegates, including all parliamentarians as well as nominees from political parties and civil society who were also chosen by political parties, and delegates chosen to represent special-interest groups such as war veterans. ZANU-PF and the MDC had been at each other's throats for years prior to their uneasy co-existence in the inclusive government. Predictably, the legitimacy and credibility of the constitutional outreach program was undermined by this polarization, with political-party influence and 'coaching' of participants occurring in some areas alongside violence and intimidation mainly by ZANU-PF supporters and its allies among war veterans⁷⁸. Frequent violent political outbreaks between ZANU-PF and MDC loyalists allegedly interrupted the public

consultations, and presented an obstacle to the active and effective participation of a political neutral citizens in the outreach program. It is further alleged that ZANU-PF used the consultation process to ensure that the draft constitution reflected its preference for a powerful executive president, the removal of the office of the prime minister and the preservation of the current security structures⁷⁹. As if that was not enough, the party also reportedly co-ordinate operation *Vhara Muromo* ('Shut Your Mouth') to suppress dissenting voices during the outreach phase⁸⁰. Worse still, the police allegedly disrupted several MDC-organized preparatory meetings, beat up participants and arbitrarily arrested others. For example, in February 2010 the police disrupted MDC-organised constitutional-reform meetings, beat participants and arbitrarily arrested 43 people in Binga, 48 in Masvingo and 52 in Mount Darwin. ⁸¹ The MDC on the other hand was allegedly widely consulting its 'Western Handlers' on how to proceed in view of the internecine fighting on the difference that arose on the contents and the *modus operandi* preferred by ZANU-PF. Meanwhile, hardliners in ZANU-PF blocked attempted discussion of the contentious issue of security sector reform. Given the sector's violent and partisan involvement in influencing the outcome of previous polls, reforms were widely seen as essential if free and fair elections were to take place. All this undermined prospects for producing a legitimate draft constitution that represents the will of the people and further entrenched the narrow and parochial partisan views of the political parties represented in the COPAC⁸² [20]. The above highlighted predicaments spilled into the drafting process. Three principal drafters: Justice Moses Chinhengo with constitutional experts, Priscilla Madzonga and Brian Crozier led the drafting committee.⁸³ The chief drafters were assisted by 17 constitutional experts – five from each of the three governing parties and two from the council of traditional chiefs. COPAC also enlisted the services of South African constitutional law and constitution-making expert, HassenEbrahim⁸⁴, who brought to the process his experience of constitution drafting in South Africa, Nepal, Somalia and Uganda [21]. The parties represented in the inclusive government, just as they had done during the preceding public outreach program, turned the drafting process into yet another political turf. The deeply polarized political environment, characterized by mistrust between ZANU-PF and the two MDC formations, dominated the process. Critics such as the NCA⁸⁵ charged that the parties are bent on manipulating the constitution-writing process to ensure the incorporation of their positions and elite interests at the expense of reflecting the will of the people. Indeed, after the production of the preliminary drafts of the first four chapters of the constitution. ZANU-PF unilaterally attempted to stop the drafting process and accused the drafters of siding with the MDC by allegedly importing items not raised during the public outreach process. There remained concern that the process would fall victim to partisan capture, with political parties 'smuggling in' points that were not covered during the outreach phase and that the result would be a draft constitution which was acceptable to the entrenched political powers and interests but

⁷²Article XI of the GPA, (2008)

⁷³Matinenga E (Adv). (2013). Constitutional Review Process in Zimbabwe, Paper presented on the occasion of the 14th Annual General Meeting and Conference of the SADC Lawyers Association (SADCLA), 2-3 August 2013, in Lilongwe, Malawi, p. 5

⁷⁴COPAC Report

⁷⁵NCA Report

⁷⁶Interview with Mr. Blessing Vava: NCA Secretary for information and Publicity

⁷⁷Final COPAC Report, page 14

⁷⁸CISOMM 2011 pages 5 and 13; Human Rights Watch, 2011.

⁷⁹CISOMM 2011, page 13

⁸⁰(CISOMM 2011: 13).

⁸¹(Human Rights Watch 2011).

⁸²Interview with Mr. Blessing Vava- Secretary for Information and Publicity of the NCA

⁸³Final COPAC Report, page 21 and Interview with COPAC member and Chairperson of the COPAC Legal Committee-Hon B. Tshuma (M.P) on 25/02/2014

⁸⁴Interview with COPAC member and Chairperson of the COPAC Legal Committee-Hon B. Tshuma (M.P)

⁸⁵Interview with Mr. Blessing Vava- Secretary for Information and Publicity of the NCA on 25/11/2014

lacking wider public support. After the production of the full draft, there were disagreements referred to as outstanding or 'parked'⁸⁶ issues which were left to be discussed at the 2nd all-stakeholders conference which was largely dictated by the top political players [22]. Following the successful convening of the Second All Stakeholders' Conference from the 21st to the 23rd of October 2012⁸⁷, the delegates made proposals for inclusion in the 18th of July COPAC Draft Constitution. A report of the Conference was duly produced by the Select Committee. In this outcome report there were both areas of consensus and areas of disagreements. Some of the major areas of disagreements, *inter alia*, were in the main, as follows: Clause 2.12 whether or not an Act of Parliament should provide for the National Youth Service; Clause 5.1(2) whether executive authority should vest in the President only or in the President and Cabinet; Clause 5.5(2) in respect of how Vice Presidents are elected or appointed and Clause 5.14(1a) in the case of death or incapacitation of the president how is the successor chosen; Clause 5.24 whether or not the President in declaring war the President should seek approval of Parliament; Clause 8.5 as read with Clause 18.5 of the 6th Schedule pertaining the composition and transitional period of the Constitutional Court, Clause 11.8(4) whether or not a deployment of the Defence Forces outside the country can be rescinded or approved by Parliament or whether Parliament should only be informed; Clause 13.5 whether to retain the AG as in the current constitution or to separate the offices so that the Attorney General becomes the advisor to Government and the National Prosecution Authority assumes the prosecution function; Clause 16.9 and 16.10 whether the Land Commission should be an executive or independent Commission.⁸⁸ In reviewing these proposals, an impasse on how to deal with the areas of disagreements of the conference arose [23]. The Principals to the Global Political Agreement then established a 'Committee of Seven'⁸⁹ to try to unlock the deadlock. The Committee consisted of three Cabinet Ministers, one from each of the parties to the Global Political Agreement, the Co-chairs of the Select Committee on the new Constitution (COPAC) and the Minister of Constitutional and Parliamentary Affairs as the convener and chair. The committee comprised of the following members who are all politicians in their own right: Hon. Adv. Matinenga/ Chairman, Hon. Chinamasa, Hon. Biti, Hon. Misihairabwi-Mushonga, Hon. Mangwana, Hon. Mwonzora and Hon. Mkhosi.⁹⁰ The Committee then met at various locations between the 12th of December 2012 and the 16th of January 2013⁹¹ to consider the proposals of the Co-Chairs of the Select Committee. The meetings culminated in some areas of consensus and disagreements arising out of the Report of the Second All Stakeholders Conference. These areas of disagreements were compiled and were presented to the Principals who met together with the Committee of seven at State House on the 17th of January 2013. Various options were proffered on the different areas indicating that there was no consensus on a single proposal. It was on these issues that guidance and direction from the Principals was required. The principals met together with the Committee of seven on the 17th of January 2013. The Principals, together with the Committee of Seven agreed on major outstanding issues intimated earlier as follows: Clause 5.1(2) to read as follows: '*The executive authority of the Republic shall vest in the President who, subject to this Constitution shall exercise same through his/her Cabinet*'; Agreed to retain Clauses 5.5(2) and 5.14(1a) as in the COPAC draft of

the 18th of July 2012 and in the transitional provisions provide in the following terms: '*Adopt GPA provisions (20.1.8) transitional for 5 years and revert to 18 July 2012, that is, in the event of a vacancy arising in the office of the President, such vacancy shall be filled, within 90 days, by a nominee of the party which held that position prior to the vacancy*' In respect of Clause 8.5 as read with paragraph 18.5 of the 6th Schedule it was agreed that provisions of the COPAC draft of 18th July 2012 relating to Constitutional Court be retained but insert a clause in 18.5 to the effect that; '*Supreme Court to have 9 judges for a transitional period of 7 years who sit as a full bench on constitutional matters.*'⁹²

Analysis of interplay of political interests in the COPAC-led review process

This part deals with the subject of the interplay of politics in the COPAC-led constitution review process in view of the preceding account of the major findings. It examines the extent to which the proposals and demands made by major political parties were a reflection of their respective short-term partisan interests; and how these partisan interests influenced the final constitutional outcome. This helps to illuminate the degree to which the political interests of the elite have overshadowed the wishes and aspirations of the majority in the COPAC-led process [24]. The COPAC-led review of the constitution in Zimbabwe was done at a time of high political tension in the history of the country. It followed the signing of the GPA that ushered ZANU-PF, MDC-T and MDC-M into power. The political environment was characterized by incessant bickering and serious polarization based on different ideological trajectories. Some political parties namely MDC-99, Mavambo Kusile/Dawn and NCA cautioned against relying on Members of Parliament as representative of the people in both the COPAC and the COPAC Management Committee as there were fears that because of the Chidyausiku Commission precedent, the MPs who are politicians on their own right would influence the people and other stakeholders. Moreover, for example, civil society organizations in the country even questioned the necessity of involving the rural masses and the general public in the constitutional review process when at the end of the day parliamentarians, who normally pursue their own agenda, would have the final say on whether the recommendations of the people are to be enacted or not. As intimated earlier, during the process, there were skirmishes between the parties represented in the COPAC. During the constitution review process, it was established that politicians took some positions to serve the interests of their political parties for fear of hostility from their parties and leaders. Analysis of the positions they took to the public and the positions they held privately were contradictory. The publicly avowed position was one held by their respective parties. Therefore, the outcome of the review process is indicative of the motivation of the ruling elites who directly influence the same [25]. This is because politicians (cabinet ministers, legislators and representatives of political parties) constituted 100% in both the COPAC, the COPAC Management Committee and participants in the first and second All-stakeholders Conferences were drawn from political parties and civic society organizations that would be chosen in a partisan manner as these organizations could only be seconded by political parties. At the two constitutional conferences and during consultations, "it was common cause that public forums hardly present individuals adequate freedom to make their own views known on particular sensitive topics, especially when they may affect their respective parties. As a result, participants ended up adopting party positions on certain matters for fear of facing backlash from their

⁸⁶Final COPAC Report , p 22

⁸⁷Ibid

⁸⁸Ibid

⁸⁹Ibid

⁹⁰Ibid, p 23

⁹¹Ibid

⁹²Interview with Hon B. Tshuma,-Chairperson of the COPAC Legal Committee on 25/02/2014

respective parties⁹³. This implies that the views that party leaders were presenting during targeted consultations where other party members would have been couched and rehearsed and constitutional conferences were not a true reflection of their views but a case of towing the political line out of fear. Consequently it can be argued that the views were not based on reasoning or need to address real and substantial constitutional issues but on interests of powerful politicians. Thus voices of the general public were thwarted by elite interests. The COPAC-led process was also compromised by the overarching influence of the Institutions above the level of COPAC that were established to manage impasses. The three notable ones were the COPAC Management Committee, the Committee of seven and the three principals⁹⁴ themselves. The COPAC Management Committee was made up of senior politicians from the three political parties represented in COPAC who were also Cabinet Ministers. The Committee of Seven was also composed of three Cabinet Ministers representing the three respective parties to the GPA, the 3 COPAC Co-chairs and the Convener and chair who was the Minister of Constitutional and Parliamentary Affairs⁹⁵. Moreover, the 3 Principals were leaders of their respective parties. It is these institutions whose membership is undoubtedly drawn from political parties who were entitled to break any impasses which would arise. The Principals were also the final arbiters as they would be consulted last to deal with serious deadlocks. A good example is of the disagreements, which were purely of a 'political interests' nature that arose at the 2nd All Stakeholders Conference. The Committee of Seven together with the Principals met on the morning of Thursday the 17th of January 2013 and resolved the areas of disagreement on a given take basis and these were around highly contested areas of vested political elite interests: such as the transition, land tenure, executive powers, the Constitutional Court, death sentence and the Office of the Attorney General. This agreement by the warring leaders justifies the elite consensus theory where the final constitution was the outcome of the negotiations among them which is akin to power brokerage by the same at the expense of the aspirations of the public. In light of the discussed, it can be argued that political development during the time of the COPAC review process negatively shaped the perception of some stakeholders regarding the motive of the process. Secondly, it has been observed that there was close correspondence between the interests of political parties and the nature of the submissions they made. It has been also noted that the interest of political parties stifled the true views that people had [26]. Finally, individuals made some constitutional choices based on their political interests as dictated by the political elites not those of their constituents. The argument, therefore, is that if partisan interests dominate the process and determine constitutional choices, with strong parties such as ZANU-PF and MDC-T, bulldozing their interests into the constitution then the essence of people's participation is eroded. The resultant constitution cannot be legitimate and not worth to be called a people's constitution. Constitution making should thus not be reduced to a battle field of power relations of which the product is the reflection of the partisan interests of the most powerful elites. It is also worth noting that overall, the level of participation in the COPAC-led process was low. A total of 1, 118,760 only out of the possible population of 8 million adults in the country made their submissions. From the interviews with the members of the general public in Harare province for example, during the study in Epworth, 70% of the respondents did not know what a constitution is; only 10% had seen a copy of a constitution of which 67% was in English and 33% in other languages.

⁹³Interview with Blessing Vava of the NCA

⁹⁴President R. Mugabe (ZANU-PF), Premiers M. Tsvangirai, Prof A. Mutambara and later Prof W. Ncube

⁹⁵Final COPAC Report , page 23

Without the knowledge of the constitution, it is obviously impossible for one to talk of participating [26]. The fact that most of the available material on the constitution were in English shows the missing effort to make the constitution available to the general public, the majority of which cannot understand English.

Conclusion

Although it has been observed that various stakeholders from diverse quarters including the academia, the clergy, professional bodies, and bureaucrats and that effort was made to get the views of the general public through consultations, it has been presented that there were serious problems with the processes of Zimbabwe's Constitutional review that undermined the representativeness of the same⁹⁶. Firstly, the representation of women in the COPAC and the COPAC Management Committee, and among delegates to the two All-stakeholders Conferences was very low. Secondly, very few Zimbabweans made submissions to the commission. In addition, some of the submissions that were made by the general public were not considered at all. Furthermore, the Stakeholders conferences were substantially sessions for experts and the COPAC to dictate the delegates regarding various constitutional issues not forums for deliberations. The political environment under which constitutional review in Zimbabwe has been undertaken has been very polarized with incidences of violence being prevalent. These problems also dogged the other processes reviewed under this study starting with the Lancaster Conference Constitutional review, followed by the Chidyauyiku Commission and the NCA drafts. This undermined the essence of the people as the major drivers of the Constitutional process in Zimbabwe. These factors are at best, an eloquent testimony to the fact that the COPAC and other preceding processes might have been symbolically representative but substantively limited and hence might seem to have upheld the political interests of the elites at the expense of the masses. The fact that interests, unlike reason, were a dominant motivation for constitutional choices in the Zimbabwean scenarios under study reaffirms the idealist theory of constitution making that political interests need to be regulated. This is against the realist argument that these interests should be considered as rightful components of the process. However, this is not arguing that constitution making should be a technical process. The point is that if selfish elite interests, usually of a political nature are traded, the constitution will be a negotiated one or an embodiment of interests of the powerful elite parties. In this light, the elite theory of constitutional making process continues to dominate the *modus operandi* of constitution making in Zimbabwe's Constitutional development at the expense of the democratic theory, especially in view of the recent COPAC-led process.

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⁹⁶Final COPAC Report, page 24

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