

# Constitutionalism and the new Zimbabwean constitution.

MADEBWE, T.

2014

## Constitutionalism and the new Zimbabwean Constitution

Tinashe Madebwe\*

### 1. Introduction

Codified constitutions are arguably the most celebrated type of Constitution in the world.<sup>1</sup> This is probably because codified Constitutions are contained in one document called 'The Constitution.'<sup>2</sup> As such, they offer a primary and singular source from which 'constitutional' provisions can be gleamed, making such Constitutions accessible and clear to citizens and to the world at large.<sup>3</sup> Beyond this however, codified Constitutions are also celebrated because of their symbolic value.<sup>4</sup> Here, it is worthwhile to consider that codified Constitutions typically emerge, and succeed, following an upheaval, the classical example of which is a revolution.<sup>5</sup> As such, codified Constitutions are celebrated partly because they represent the turn to new constitutional dispensations in which things will be 'different' from the way they were previously. This symbolism is not to be discounted. Various states, most recently South Africa and Iraq, have relied on the symbolic value that codified Constitutions hold as the backbone for the transition to constitutional democracies which have united peoples across the nation and been regarded as a beacon of hope and change.<sup>6</sup>

Importantly, the celebration that typically accompanies codified Constitutions should not be taken to mean that other types of Constitutions are of a lesser standard.<sup>7</sup> Various jurisdictions the world over rely on other types of Constitutions which, while not codified, are still the basis on which model constitutional democracies have been fashioned. This is the case in states such as the United Kingdom and New Zealand which feature written Constitutions that are not codified.<sup>8</sup>

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<sup>1</sup> LLB, LLM (Rhodes University) PhD (University of Strathclyde). Lecturer, Public Law Department, Midlands State University.

<sup>2</sup> A.W. Bradley and K.D. Ewing *Constitutional and Administrative Law* (12ed) (2007) 4-5.

<sup>3</sup> M. Ryan *Unlocking Constitutional and Administrative Law* (2ed) (2007) 13.

<sup>4</sup> Bradley and King, (n 1 above) 7.

<sup>5</sup> H. Barnett *Constitutional and Administrative Law* (4ed) (2003) 9.

<sup>6</sup> Ryan, (n 2 above) 11-12.

<sup>7</sup> Ryan, (n 2 above) 11.

<sup>8</sup> Barnett, (n 4 above) 8-15. Ryan, (n 2 above) 13-15.

<sup>9</sup> Ryan, (n 2 above) 13.

Of note, the fact that these other types of Constitutions achieve the same results as codified Constitutions points to the well established fact that, it is not the set of codified or un-codified principles that a state refers to as its Constitution that determines whether that state will successfully transition to a constitutional democracy based on constitutionalism.<sup>9</sup> Instead, whether a Constitution forms the backbone of a state's transition to a constitutional democracy is significantly more dependent upon its capacity to capture the essence behind Constitutions. This essence has most commonly been referred to as constitutionalism.<sup>10</sup>

Constitutionalism has traditionally been difficult to narrow down into a few select phrases.<sup>11</sup> Despite this, it has previously been argued that 'constitutionalism suggests the limitation of power, the separation of powers and the doctrine of accountable responsible government.'<sup>12</sup> As such, it can reasonably be noted that there are two central requirements to be met if any semblance of constitutionalism is to be attained.<sup>13</sup> The first requirement of achieving constitutionalism is ensuring that state power is not vested in a single institution which can arbitrarily use that power.<sup>14</sup> To this end, a long-standing ideal of constitutionalism is that state power should be separated among central institutions along legislative, executive and judicial functions.<sup>15</sup> This is part of a system that ensures that the three institutions 'check' and 'balance' each other's respective competencies.<sup>16</sup> Closely related, upholding the rule of law through ensuring that no-one is above the law and that opportunities for arbitrary decision-making are limited, is also widely considered to be a central feature of constitutionalism.<sup>17</sup> A second requirement for achieving constitutionalism is that states should feature a system of securing the accountability of the state to the governed. In part, this is achieved through the turn to the rule of law which calls for government to be subject to law.<sup>18</sup> More commonly however, this is attained when the citizenry can directly hold the state to account for its actions through their

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<sup>9</sup> Barnett, (n 4 above) 6.

<sup>10</sup> Barnett, (n 4 above) 5.

<sup>11</sup> Barnett, (n 4 above) 5-6. Ryan, (n 2 above) 15.

<sup>12</sup> Barnett, (n 4 above) 6.

<sup>13</sup> See however, Ryan, (n 2 above) 11.

<sup>14</sup> Ryan, (n 2 above) 60-92.

<sup>15</sup> E. Petersmann 'How to Reform the UN System? Constitutionalism, International Law and International Organizations' (1997) 10 *Leiden Journal of International Law* 421, 426-428.

<sup>16</sup> Petersmann, (n 15 above) 425.

<sup>17</sup> E. Petersmann 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 *Michigan Journal of International Law* 1, 13, 17.

<sup>18</sup> Ryan, (n 2 above) 11.

exercise of justiciable fundamental rights as well as through the provision for access to judicial review of the legality, rationality, and procedural fairness of state decisions.<sup>19</sup>

While these requirements may be central to the attainment of constitutionalism, it does not necessarily follow that if a Constitution should carry provisions which meet these requirements, that Constitution will facilitate a state's progression to a constitutional democracy based on constitutionalism. History is littered with examples of Constitutions which have incorporated provisions which are consistent with these two requirements but cannot reasonably be regarded as having formed the backbone of constitutional democracies based on constitutionalism. This suggests that the determination of whether the set of principles which a state refers to as its Constitution provides for these two qualities of constitutionalism alone is not an adequate measure of whether a Constitution can form the backbone for a country's transition to a constitutional democracy based on constitutionalism. Instead, the better measure of whether a Constitution secures constitutionalism is whether that Constitution actually ensures that citizens live in a state in which: there is separation of power; the rule of law is upheld; and in which citizens are actually able to hold the state to account for its decisions.<sup>20</sup>

This dynamic between Constitutions and the attainment of constitutionalism is particularly interesting in the Zimbabwean context in light of the fact that the country enacted a codified Constitution in May of 2013.<sup>21</sup> This Constitution is the second of its kind in the post independence era, having been preceded by the 1979 Lancaster Constitution which ushered in political independence and sustained the Zimbabwean legal system for the past three decades. The turn to such a codified Constitution was easily justifiable on varied grounds. Most obviously, this turn to a codified Constitution was driven by the need to establish a clear and accessible Constitution to replace the previous codified Constitution which had become bulky, unclear and inaccessible.<sup>22</sup> In addition, that former Constitution had increasingly become shrouded in controversy, largely due to extensive amendments to its provisions.<sup>23</sup> Most importantly, the old constitutional setup had become the centre for political contestations, and resultantly, could not

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<sup>19</sup> S.B. Prakash and J.C. Yoo 'The Origins of Judicial Review,' (2003) 70 *The University of Chicago Law Review* 887.

<sup>20</sup> Ryan, (n 2 above) 11. Barnett, (n 4 above) 9.

<sup>21</sup> Constitution of Zimbabwe Amendment (no.20) Act 2013.

<sup>22</sup> 1980 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

<sup>23</sup> At least 19 amendments were made to the Lancaster House Constitution.

be regarded by all and sundry as the embodiment of constitutionalism in Zimbabwe. In this context, it certainly made sense to pursue another codified Constitution as the symbol of constitutional democracy in Zimbabwe.

Considering this, it is hardly surprising therefore that in the time since it came into effect, the Zimbabwean Constitution has been rightly celebrated for its symbolic value as the beacon of hope and change. What has been overlooked, considering that the turn to a codified Constitution was intended as a much needed step in the country's transition to a new kind of constitutional democracy based on constitutionalism, and that codification of a Constitution is not a necessary condition for constitutionalism, has been thorough analysis of whether the new Constitution can rightly be regarded as a progressive step in the country's entrenchment of constitutional democracy based on constitutionalism.

As such, this paper critically assesses whether the 2013 Zimbabwean Constitution can reasonably be regarded as such a progressive step in the country's progression to a constitutional democracy based on constitutionalism. As part of conducting this assessment however, it is useful to note that even a cursory look at the Zimbabwean Constitution suggests that it seemingly meets the requirements of constitutionalism. In one sense this is because the Zimbabwe Constitution reads very much like the South African Constitution which has arguably been the backbone for that country's transition to a constitutional democracy based on constitutionalism. In another sense the fact that the 2013 Zimbabwean Constitution, in much the same manner as its 1979 predecessor, meets the requirements of constitutionalism can *prima facie* be inferred from the fact that the Constitution carries provisions which: call for the separation of powers; require that the rule of law be upheld and, bestow justiciable fundamental rights on citizens in a manner that enables them to hold the state to account for its decisions.

Despite this, it merits reiteration that the inclusion of provisions which meet the requirements of constitutionalism in a Constitution does not mean that constitutionalism will be attained. As such, the paper focuses attention on whether constitutional provisions which seemingly meet the requirements of constitutionalism in the Zimbabwean Constitution actually secure constitutionalism for Zimbabwean citizens. In pursuing this objective, the paper practically evaluates the context in which the Constitution was introduced, and critically assesses the extent to which constitutional provisions which call for separation of powers and the rule of law actually ensure that Zimbabweans live in a context in which power will be separated, and the

rule of law upheld. In addition, the paper critically assesses the extent to which provisions in the Constitution which empower citizens to effectively hold the state to account, actually place citizens in a position to do so. In conclusion, the paper rounds out the discussion with an assessment into whether the Zimbabwean Constitution can form the backbone for the country's transition to a constitutional democracy based on constitutionalism.<sup>24</sup>

## 2. Pursuing constitutionalism in Zimbabwe

It is important to note that Constitutions are 'not the act of a government, but of a people constituting a government, and a government without a Constitution is power without right.'<sup>25</sup> As such, Constitutions are best regarded as 'dynamic organisms which are dependent for much of their meaning on and relevance on the societal framework which surrounds them.'<sup>26</sup> Simply put, if a Constitution should achieve constitutionalism, it is necessary for citizens to be placed in a position to be able to interact with the Constitution and understand and appreciate the important role they play in challenging state authority and holding the state to account for its decisions. With this in mind, it is interesting to note that Zimbabwe has always had a codified Constitution which purported to be an expression of the people's will.<sup>27</sup> However, the former Constitution, which was in effect since independence, had been amended so extensively that its clarity and accessibility to citizens had been compromised. Most importantly, there was no referendum before the 1979 Constitution was adopted, and this can justify the argument that its priority was political independence than attaining the essence of constitutionalism.

Importantly, it certainly seems to be the case that the 2013 Zimbabwean Constitution has addressed these deficiencies with the former Constitution through, the crafting of clear and accessible provisions which meet, at least in theory, the requirements of constitutionalism to the extent that they advocate the separation of powers, the rule of law, and through placing citizens in a position to hold the state to account for its decisions. Despite this, the 2013 Zimbabwean Constitution can hardly be said to capture the people's will to progress to a constitutional democracy based on constitutionalism. This is because the turn to a new Constitution was, arguably, not driven by citizens as a way of starting afresh in a constitutional dispensation which

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<sup>24</sup> Ryan, (n 2 above) 11.

<sup>25</sup> Ryan, (n 2 above) 11. Barnett, (n 4 above) 7.

<sup>26</sup> Barnett, (n 4 above) 9.

<sup>27</sup> 1979 Lancaster House Constitution, published as a Schedule to the Zimbabwean Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom).

would secure the separation of power among state institutions so that these institutions' opportunities for arbitrary exercises of power would be limited while giving citizens a real opportunity to hold the state to account for its decisions.<sup>28</sup> Instead, the political tensions and polarization preceding the turn to a new Constitution which characterized constitutional discussions and outreach programmes meant that the Constitution-making process was essentially driven by politicians in a politically chaotic but non-revolutionary context.<sup>29</sup> The participation of the citizens in this transition to a new Constitution was registered through the condition that the coming into effect of the Constitution was based on a 'yes' vote in a referendum. However, drawing from anecdotal evidence, it certainly appeared that even as citizens voted 'yes' to the Constitution, most did so based on political affiliation and fear of political reprisals rather than the desire to participate in the making of a new Constitution which would usher in a new constitutional dispensation.

In this context, the attainment of constitutionalism was particularly dependent on placing Zimbabweans in a position to interact with the Constitution and understand and appreciate the important role they were required to play in challenging state authority and holding the state to account for its decisions. Specifically, and in line with the requirements of constitutionalism noted above, the attainment of constitutionalism under these circumstances was contingent upon ensuring that citizens would live in a state in which power was actually separated in a manner which limits the potential for arbitrary exercises of power, and in a state in which citizens could hold the state to account for its decisions.

### **2.1. Separation of powers and the rule of law**

In assessing whether the 2013 Constitution secures constitutionalism for citizens through ensuring that citizens live in a country in which state power would be separated so as to limit the

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<sup>28</sup> Barnett, (n 4 above) 9.

<sup>29</sup> See, 'Vote 'NO' to draft Constitution: Madhuku' *Newsday* (Zimbabwe) 15 March 2013. Madhuku in his capacity as chairperson of the National Constitutional Assembly, observed that: "A democratic constitution must be people-driven. This is a constitution being imposed on us by three political parties, yet the people are bigger than these parties. No political party or group of political parties must be allowed to give the country a constitution. A constitution must come from the people." See also Zimbabwe Election Support Network: *Zimbabwe Constitution Referendum Report and Implications for the Next Elections* 16 March 2013. The Report observed (p7) that 'This process took almost three years due to deeply rooted and widely polarised views mainly between the two MDC formations and the ZANU-PF party'

potential for arbitrary use of power in a practical way, it is important to consider that, over the course of Zimbabwe's constitutional history, the separation of powers had deteriorated. Indeed, there had been periods in which it seemed that state institutions worked in concert in a manner that allowed arbitrary exercises of power to go unchecked with the result that citizens were deprived of exercising their rights and deriving the full benefits that such rights bestowed on them.<sup>30</sup>

As such, it is certainly a welcome development that the 2013 Zimbabwean Constitution contains various provisions which separate state power among the different state institutions, ensuring that power is not pooled in one institution.<sup>31</sup> For instance, section 3 (2) (e) of the Constitution explicitly provides that 'the principles of good governance which bind the state and all its institutions and agencies of government at every level, include observance of the principle of separation of powers.' More comprehensively perhaps, chapters 5, 6, and 8 of the Constitution separate and direct the constitution and powers of the executive, legislature, and judiciary respectively. Notable provisions in these chapters relate to: the creation of a Constitutional Court to sit atop the country's court structures as the highest court in all constitutional matters;<sup>32</sup> the qualification that Executive authority derives from the people of Zimbabwe, and must be exercised in accordance with the Constitution;<sup>33</sup> and the directive to Parliament to ensure that the provisions of the Constitution are upheld, and that the State and all its institutions and agencies of government at every level act constitutionally and in the national interest.<sup>34</sup>

Furthermore, the Zimbabwean Constitution also explicitly provides for the rule of law as a means of guarding against government overreaching. For instance, the Preamble notes the need 'to entrench democracy, good, transparent and accountable governance and the rule of law.' Furthermore, section 3 (1) (b) provides that 'Zimbabwe is founded on respect for...the rule of law.' The Constitution also provides for the rule of law in less explicit ways. For instance, this is apparent through the prohibition, in section 86 (2), on the arbitrary limitation of fundamental rights. Separately, provision for the rule of law in the Constitution is also apparent from

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<sup>30</sup> See for example, *Mike Campbell (Pvt) Limited and Another v The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07.

<sup>31</sup> Ryan, (n 2 above) 60.

<sup>32</sup> See Section 67, and Section 65.

<sup>33</sup> See Section 88 (1) and (2) of the Constitution.

<sup>34</sup> Section 119 of the Constitution.



provisions which advocate good governance while admonishing arbitrary rule.<sup>35</sup> In addition, it is recognized in the Constitution that no-one is above the law, to the extent that section 2 (2) provides that the obligations imposed in the Constitution are 'binding on every person, natural or juristic, including the state and all executive, legislative, and judicial institutions and agencies of government at every level, and must be fulfilled by them.' Other relevant provisions are: the directive to the judiciary to ensure that justice must be done to all, irrespective of status;<sup>36</sup> that Parliament has power to ensure that provisions of the Constitution are upheld;<sup>37</sup> and that Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution.<sup>38</sup>

These are certainly formidable provisions. However, whether they will prompt the country's turn to a constitutional democracy based on constitutionalism is questionable. This is because, while these provisions emerged from a seemingly concerted drive led by COPAC<sup>39</sup> and various public meetings held on the Constitution, this did not detract from the fact that, in a real sense, the drive to transition to a new Constitution was a political affair led by politicians.<sup>40</sup> Certainly, anecdotal evidence suggests that, by the time the Constitutional Referendum was held, citizens voted based on the basis of political affiliations rather than the more preferable interaction with constitutional provisions. Importantly, this suggests that even after the country had voted 'yes' to the Constitution, there remained a pressing need to ensure that citizens perceived, understood, and appreciated those provisions which made it into the Constitution so that they could insist on separation of powers and the rule of law in their daily interactions with state institutions. In some ways, the directive in section 7 of the Constitution to the state to promote awareness of the Constitution can be interpreted as prompting the state to lead the public to fully understand, and appreciate these provisions. However, in the light of Zimbabwe's constitutional history, getting the public to understand and appreciate their role in a constitutional democracy required that

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<sup>35</sup> Section 3 (2); Section 9.

<sup>36</sup> Section 165 (1) (a).

<sup>37</sup> Section 119 (2).

<sup>38</sup> Section 88 (1) (a).

<sup>39</sup> Zimbabwe's Constitution Select Committee charged with the drawing up a new constitution for Zimbabwe by the Government of National Unity.

<sup>40</sup> For some relevant press articles see, various posts around the time, available at: [http://www.swradioafrica.com/Zimbabwe\\_News\\_Radio\\_Short\\_Wave\\_politics/copac/](http://www.swradioafrica.com/Zimbabwe_News_Radio_Short_Wave_politics/copac/). See also ZHLR Pre-Referendum Statement available at <http://www.hrforumzim.org/wp-content/uploads/2013/03/ZLHR-Pre-Referendum-Statement.pdf>

significantly more than this be done. Specifically, if citizens were to fully understand and appreciate the importance of the constitutional provisions in the context described above, it was necessary for actual changes to be made from the former approach to state government in which separation of powers had become diluted and the rule of law compromised, to a state in which actual separation was sought and the rule of law upheld.

These changes could have been achieved in different ways. For instance, considering that under the old Constitution, various decisions had been made by the state which seemingly excluded judicial review of legislation for its constitutional compatibility and judicial review of Executive decisions,<sup>41</sup> there could have been efforts made to assert the importance of a separation of powers and the rule of law in at least two practical and perceivable ways.

First, a concerted effort should have been made to publicly and extensively undertake an exercise to review legislation which pre-dated the Constitution for its constitutional compatibility. Here, the goal would have been to ensure, in a manner apparent to the public, that such legislation was repealed. Alternatively, this legislation could have been revised in order to bring it into compliance with the Constitution, while affirming, in explicit terms, the prominence of the separation of powers and emphasizing the important role played by the Judiciary in checking the conduct of the Legislature. Second, the Legislature, acting in concert with the Executive, needed to actively enact legislation giving effect to constitutional provisions. This would have established in an apparent manner that the Legislature and Judiciary would actually act in a manner consistent with the power granted to them in terms of the Constitution. In addition, such a proactive approach would have easily established that both the Legislature and the Judiciary would act in a manner consistent with the Constitution and not in deference to the Executive where it exceeded its authority as provided for in the Constitution.

## **2.2. Accountability of the state to citizens**

In assessing whether the new Zimbabwean Constitution secures constitutionalism for citizens, through placing citizens in a position to hold the state to account for its decisions, it is important to note that citizens most commonly hold the state to account for its decisions through exercising their fundamental rights, and through pursuing the judicial review of state decisions. In light of the fact that the Zimbabwean Constitution purports to be the basis for the country's

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<sup>41</sup> See for example, *Mike Campbell* (n 29 above).

transition to a constitutional democracy based on constitutionalism, it is hardly surprising therefore that it features provisions which empower citizens to hold the state to account for its decisions. These are mostly contained in the Declaration of Rights in Chapter 4 of the Constitution.<sup>42</sup>

Some of the more prominent examples of rights bestowed upon citizens which empower citizens to hold the state to account are: the rights to freedom of assembly and association,<sup>43</sup> demonstration and petition,<sup>44</sup> access to information,<sup>45</sup> freedom of expression and freedom of the media,<sup>46</sup> and the right to a fair hearing.<sup>47</sup> A particularly important right in this regard, which is deserving of separate mention, is the right to administrative justice contained in section 68 of the Constitution. This right, more directly than most, allows the public to institute judicial review proceeding to challenge state decision-making on the grounds of lawfulness, promptness, efficiency, reasonableness, proportionality, impartiality, and substantive and procedural fairness.<sup>48</sup> In this way, the right ensures that the state at all times remains accountable to the citizenry.

The inclusion of these rights which empower citizens to hold the state to account for its decisions, in the Declaration of Rights is certainly a laudable development which bodes well for Zimbabwe's turn to a constitutional democracy based on constitutionalism. However, it is also worth noting that, 'regardless of the form in which rights are protected in any society, it will be the democratic political process, political practice and norms of acceptable governmental conduct which, while not having the force of law, provide constitutional standards which determine the respect accorded to individual rights.'<sup>49</sup> Considering this, it is quite disconcerting to note that the manner in which these rights have been made available to citizens to use in holding the state to account is hardly sensitive to the Zimbabwean context. Most notably, Zimbabweans are generally not litigious people. This quality was exacerbated under the tenure of the old Constitution when there seemingly grew to be citizen reluctance to take on the task of

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<sup>42</sup> Section 85.

<sup>43</sup> Section 58.

<sup>44</sup> Section 59.

<sup>45</sup> Section 62.

<sup>46</sup> Section 61.

<sup>47</sup> Section 69.

<sup>48</sup> Section 68 (1).

<sup>49</sup> Barnett, (n 4 above) 9.

holding the state to account for its decisions. It is quite telling that under the old Constitution, in those instances where Zimbabweans sought to hold the state to account for its decisions from a rights based perspective, they typically did so through requesting state-affiliated agencies, such as the Environmental Management Agency, to act on their behalf while they took a 'back seat.' Separately, it also needed to be considered that, in spite of the previous Zimbabwean Constitution granting Zimbabweans justiciable rights which they could rely on to hold the state to account for its decisions, Zimbabweans did not extensively rely on these rights to do so. In addition, it is useful to take note of the non-justiciable quality of socio-economic rights, coupled with the fact that these rights were enjoyed by citizens through relevant legislation giving effect to such rights, meant that the impression was cultivated among citizens that the enjoyment of rights was contingent upon the Legislature first giving effect to these rights in Statute. While section 85 of the 2013 Constitution has changed this and granted Zimbabweans a right to enforce all the rights contained in the Declaration of Rights, direct enforcement of their rights in order to enjoy the benefits that they bestow is something Zimbabweans are going to have to learn.

Considering all this, the manner in which rights have been provided for in the Constitution as a means of empowering citizens to hold the state to account for its decisions is unlikely to facilitate the turn to a constitutional democracy based on constitutionalism for at least two reasons. First, the fact that there was no citizen upheaval in the period preceding the turn to the new Zimbabwean Constitution means that, even if a drive is made to enhance public awareness of the Constitution is undertaken,<sup>50</sup> it is likely that in the new constitutional era, Zimbabweans will still shy away from relying on litigation to directly enforce their rights due to their non-litigious nature. Instead, citizens are more likely to continue relying on state agencies protecting their rights on their behalf. Second, the absence of upheaval in the period preceding the 2013 Constitution can be taken to suggest that, while they may have been empowered to directly enforce their rights in section 85 of the Constitution, Zimbabweans will remain committed to relying on legislation giving effect to their rights to derive the benefits their rights bestow on them, instead of directly relying on the rights contained in the Constitution to hold the state to account for its decisions.

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<sup>50</sup> Section 7 of the Constitution.

As such, securing constitutionalism in this context required a decidedly more proactive approach to empowering citizens to hold the state to account for its decisions. For instance, one of the most obvious ways in which Zimbabweans could have been empowered to use their rights to hold the state to account, considering their marked preference for relying on legislation, would have been through quickly enacting new legislation to give effect to fundamental rights or through quickly revising existing legislation to ensure their consistency with constitutional provision. Separately, and considering that the right to administrative justice allowed citizens to hold the state to account in a most direct fashion, efforts could have been made to promptly enact Legislation giving effect to the right to administrative justice as provided for in section 68.

As it stands however, efforts to enact legislation giving effect to fundamental rights have been progressing at a pedestrian pace. For instance, there is as yet, no new legislation relating to labour rights contained in section 65 of the Constitution. Similarly, the existing laws have not yet been revised for constitutional consistency. As a consequence, the pre-Constitution Labour Act<sup>51</sup> remains in effect, to the extent of its consistency with the 2013 Constitution.<sup>52</sup> The same applies with other rights, such as the environmental rights contained in section 73 of the Constitution and the Environmental Management Act.<sup>53</sup> In addition, and despite the explicit directive to the Legislature to implement legislation giving effect to the right to administrative justice in section 68 of the Constitution, this is yet to be done.

### 3. Conclusion

In conclusion, the preceding analysis into whether the Zimbabwean Constitution manages to secure Zimbabwe's turn to a constitutional democracy based on constitutionalism has established that the Constitution carries an extensive array of important provisions which cater for separation of powers, the rule of law, and rights which empower citizens to hold the state to account for its decisions. This is laudable. However, it merits consideration that, Constitutions achieve constitutionalism when there is the active participation of citizens in the regulation of a constitutional state. As such, the measure of whether a Constitution can form the basis for any country's transition to a constitutional democracy based on constitutionalism is whether such Constitution places the public in a position in which they can interact with the Constitution and

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<sup>51</sup> Chapter 28:01.

<sup>52</sup> Section 2 of the Constitution.

<sup>53</sup> Chapter 20:27.

understand and appreciate the important role they play in challenging state authority and holding the state to account for its decisions.

All this is important to consider in the Zimbabwean context because the turn to a new Constitution in Zimbabwe was arguably prompted by politicians and not citizens. In light of the fact that the attainment of constitutionalism is dependent on citizen participation, this necessarily meant that, if constitutionalism was to be attained, it was essential for the Constitution-making process to ensure that citizens appreciated the value of the separation of powers and the rule of law, so that they would actively challenge exercises of power which were in violation of these concepts. This has not been achieved, and in the absence of this, as is presently the case, it is submitted that it remains unlikely that the Constitution will pave the way for Zimbabwe's turn to a constitutional democracy based on constitutionalism regardless of the obvious quality of provisions in the Constitution.

Importantly though, the shortcomings of the Constitution are rooted in the fact that little efforts were made to effectively account for and accommodate the particularities of the Zimbabwean context, notably, the fact that the Constitution did not follow upheaval and that there was no watershed moment which prompted citizens to take an active role in the turn to a new constitutional dispensation, as in South Africa for example. This arguably led to the crafting of a Constitution which, while sound, and points to the pursuit of constitutionalism structurally, omits to account for the fact that the 2013 there was a need to place citizens at the centre of the Constitution and educate them to the important role they would need to play in order for constitutionalism to be achieved.

Looking ahead, it is encouraging to consider that all these issues which seemingly compromise the Zimbabwean Constitution's capacity to facilitate the country's transition to a constitutional democracy based on constitutionalism, are remediable. Indeed, to a significant extent, relevant provisions of the Constitution such as sections 7 and 85, promote public awareness of the Constitution and empower citizens to directly enforce their rights respectively. If citizens should be adequately educated with respect to critical Constitutional roles such as separation of powers, upholding the rule of law, and empowered to hold the state to account for its decisions, the Constitution in its present state carries all the relevant provisions necessary for leading Zimbabwe's transition to a constitutional democracy based on constitutionalism. What is

required for constitutionalism to be achieved now is something beyond anything contained in the Constitution itself.