

LOCATING THE DICTATES OF ARNSTEIN'S LADDER OF PARTICIPATION IN THE ZIMBABWE STATE

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ABSTRACT

Arnstein's Ladder of Participation presents a normative framework for effective citizen participation. The last three decades in Zimbabwe and the dynamic nature of Zimbabwean politics has made good governance and democracy elusive. At the same time, citizen participation and freedoms such as those of assembly, association and the right to participate in the governance of the country has equally been compromised. Existing legislation has exacerbated the situation. Through existing legislation and effecting amendments to existing legislation there has been brazenly violation of civil liberties, eroding political space and limiting political activity. The paper highlights the significance of Zimbabwe's new constitutional dispensation as it seeks to observe civil liberties on the backdrop of the dictates of the Arnstein's Ladder of Participation and how it resides in the Zimbabwean political environment.

1. Introduction

Citizen participation and the dispensation of civil liberties as well as democratic rule in Zimbabwe is a topic that has incited much scholarly debate. Political developments during the last three decades of Zimbabwe's post-colonial history have left a lasting impression on democracy human rights, civil liberties and citizen participation on the backdrop of a devastating economic environment. These processes have been put to the test as the country failed to live up to its liberation struggle promises of creating a democratic and egalitarian society, based on socialism. This paper seeks to show the extent to which legislative provisions have failed to provide a manifestation of the liberation struggle ideals of the country, notably the provision of a democratic society and a prominent role of citizens in influencing public policy. Additionally the paper highlights the gravity of gross breach of

legal provisions that are meant to promote human and civil rights. In trying to respond to these aims the paper responds to the question:

To what extent has legal provisions provided for civil liberties and citizen participation in governance processes in Zimbabwe over the last three decades?

2. A historiography of Zimbabwe

Zimbabwe is a country in the Southern African region which achieved political independence from British in 1980 amid much fanfare and pomp as citizens were promised civil liberties by their political leadership. The constitution adopted then, the Lancaster House Constitution presented was a flagship that presented all the civil liberties that people of the country had craved for over the decades of colonial rule. Post-colonial started undertook several reforms that ranged from gender, constitutional, agrarian as well as electoral reforms as these sought to respond to citizens' demands for an egalitarian society in the country. However, rampant corruption practices, arbitrary decisions by the ruling party ZANU PF and increased gross human rights violations resulted in gradual disconnect between the ruling elites and the general citizenry. Increased demands for further reforms saw the emergence of a pro-democracy civil society that sought to engage the state towards the realization of and respect for civil liberties. This increased ZANU PF unpopularity among the electorate as evidenced by deteriorating performance in various electoral processes, especially from the mid-1990s at a time when a pro-democracy movement began to gain in popularity among an equally disgruntled citizenry that was becoming disillusioned by high poverty levels due to flawed policy implementation by the ruling elites. Most of Zimbabwe's political woes emanated from skewed policy implementation on the backdrop of an increasing despotic and desperate regime that utilized its mandate to enact laws to promulgate restrictive legislation that sought to disenfranchise eligible members of society; curtail civil liberties and perpetuate gross human rights violations, all in quest of clinging to power. As a result several political and economic developments occurred as the regime sought to fight for its political survival. Consequently, successive and partisan constitutional amendments that sought to legitimise controversial actions, notably the expropriation of commercial farms were enacted. Other amendments aimed at gagging civil society activity as civic groups campaigned for the unbundling of political processes. The civil society movement helped the situation by alerting the international community, resulting in pro-people legislation being enacted and binding to

all member states, including Zimbabwe. The Southern African Development Committee (SADC) ended up enacting legislation that compelled member states to conduct free, fair and transparent elections that would present the voice of citizens.

3. Citizen Participation as a tenet of democratic practice

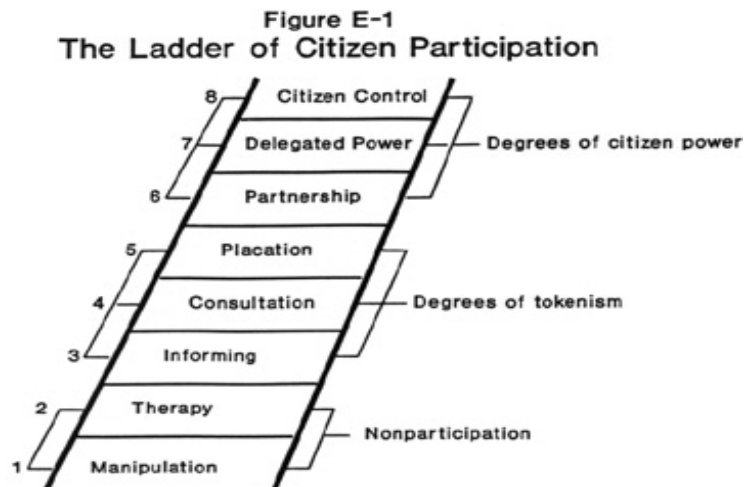
Available literature has shown that about 2500 years ago, before the internet age, Athenians had developed a system of self-government that they called democracy which basically relied on active citizen participation for both direction and decision-making. A few millennia later, the founding fathers of the United States built a country around the proposition that government must be responsive to the needs of its citizens. They envisaged that for democracy to flourish and thrive, citizens must take an active part in public life, sharing their ideas and opening their minds to the opinions of others, and taking ownership in the well-being of the country (Meskell, 2009:24). This is how citizen participation took root within the democratic discourse, with multilateral institutions such as the World Bank and the IMF adopting it among its array of conditionalities for aid to countries. Consequently, it has come to be accepted that citizen participation provides private individuals with an opportunity to influence public decisions and has long been a component of the democratic decision-making process (Cogan and Sharpe, 1986:283). Active participation has also been found to meaningfully tie programmes to people (Speigel, 1998:7). Consequently, despite the angle from which one looks at citizen participation, it all boils down to community involvement in the decision-making processes.

The preparedness of citizens to participate in public projects can be used as a barometer to measure public opinion and responsiveness in policy formation for informing regulators of exactly where “...volatile public backlash is likely to occur and for winning the sympathies of a few influential citizens...” (Irvin and Stansbury, 2004:58). However, citizens do not participate just for the sake of participating in whatever programme or process.

4. Arnstein’s Ladder of Participation

Arnstein’s Ladder of Participation presents one of the most vivid practical examples of the different stages that governance can take place. It is common knowledge that while some states are die-hard dictatorships, others attempt to hoodwink their citizens as well as the international community that they are complying with democratic best practices and

benchmarks by holding regular elections. The difference between genuine democracies and such states is that the prevailing political environment in such states is not conducive for holding free and fair elections. Such states present a token form of democracy. Then there are those states which genuine democracies which engage their citizens to contribute to policy formulation and implementation. Such states enable citizens to be actively participate the political processes. At institutional level, Arnstein presents a hierarchical structure portraying participation in three phases- *nonparticipation*, *tokenism* and *citizen power*. Arnstein argues that institutions can either make decisions without involving citizens, can consult citizens as a formality or can empower citizens to take control of all decision-making processes. Through the '*ladder of citizen participation*' Arnstein's (1969:34) presents citizen participation in hierarchical order and as existing in degrees of development as follows:



Adopted from Arnstein's Ladder of Citizen Participation (1969).

Arnstein (1969:32) portrays participation as existing in three tiers. At the bottom of the ladder is ***non-participation*** where decisions are made from the top and handed down to citizens. On the second tier, herein viewed as representing a ***degree of tokenism***, the quality of participation is through informing and consulting citizens without giving assurances that their contributions will be considered for decision-making purposes. This tier consists of merely *informing* citizens of decisions already made by the ruling elites; *consultation* as a formality without guaranteeing that the contribution of citizens will be taken into consideration; as well as *placating* involving mollifying, pacifying and appeasing citizens without due respect for

their contribution in policy formulation in public affairs. As a result, merely informing (as a formality), consulting as well as placating citizens are gimmicks at the epi-centre of the degree of tokenism. The third tier consists of a degree of citizen power in which citizens play a role in decision-making processes. It should be noted that while citizens play a pivotal role in this level of participation, but the ruling elites have the final say, which makes this tier an enhanced form of tokenism, though citizens are portrayed as partners in making decisions though they cannot entirely influence policy formulation and implementation. Although citizens are portrayed as partners in decision-making processes, it is decisions palatable to the ruling elites which will be adopted as policy and eventually as law. Additionally, although there is an element of delegation of tasks to citizens, the ruling elites retain the mandate to deal with high profile issues.

The bottom-line presented by the Arnstein's Ladder of Participation is that in a democracy, citizen participation is the prime political practice which every democratically-elected government should strive to achieve both in principle and in practice. The ladder puts citizens at the epi-centre of decision making processes. On the contrary the failure by the state to give citizens the right to free political choices and decision making powers presents an unacceptable form of a governmental dispensation. Arnstein's Ladder of Citizen Participation encompasses these arguments by consolidating the various arguments into three core values that inform citizen participation or lack of it thereof. According to Arnstein (1969) in a political dispensation, there is no participation at all; participation comes in the form of tokenism or there is citizen power. Under non-participation, the political practice is characterised by manipulation of citizens by the ruling elites. Under the tokenism stage, citizens are merely informed by the government of what programmes the government intends to undertake without seeking public opinion. Under citizen power, communities are given the opportunity by legislation to contribute or influence decision-making processes.

All these governance processes exist within a legislative context which provides for a regulatory framework that govern citizens' behaviour. The legislative regime can either be restrictive and prohibitive or contribute to the creation of an enabling political environment.

This paper uses Arnstein's Ladder of Participation that presents a democratic best practice to establish the extent to which legislation in Zimbabwe has sought to promote or hinder civil liberties and enhance democratic practise. In addition, a plethora of existing legislation in

Zimbabwe is presented to ascertain the extent to which these conform to the democratic best practices of governance, thereby putting the country's legislative regime to the test. The emphasis of this paper is on the extent to which the legislative regime allows for the dispensing of civil liberties, rights and freedoms to citizens to influence public decisions.

5. A Historical Preview of Legislative Framework in Zimbabwe

What should be acknowledged from the onset is that the legislative framework in Zimbabwe has been dynamic with recent developments experiencing a new constitutional regime that put to rest the various pieces of legislation. However in an endeavor to establish the set of legislation that had obtained over the years, it is imperative to discuss the different controversial regulatory and legislative frameworks that informed the socio-political dispensation from the early 1980s. The last two decades in Zimbabwe have experienced unprecedented political, economic and social developments at a time when global political changes for democratic rule were sweeping across the globe. With the collapse of the Berlin Wall and the subsequent collapse of the Soviet Union impacted on global politics with democratic governance coming to the fore as the internationally accepted ideology, thereby putting despotic regime in a precarious position. This led to increased opposition to most despotic regime on the globe, especially in Africa. The impact of the collapse of the Soviet Union also changes the face of global politics in support of democratic rule. These developments have informed the enactment and/amendment of existing legislation that showed the politicization of public institutions at the detriment of the civilian population in the country. These constitutional developments showed the extent to which the political dispensation strived for political survival on the backdrop of an increasingly restive population which responded to democratic decay that characterized political developments from the mid-1990s. Since the manifestation of a pro-democracy civil society movement in the country, citizen participation in governance processes in Zimbabwe had been under severe threat. Public participation in any facet of life became guided by pieces of legislation that prescribe certain anticipated behaviours from the general populace. Over the years, laws have been put in place to protect citizens, but with time, these laws have been amended to curtail human rights and hurt the very people that they were intended to protect. To understand why government have reneged on its wartime promises of creating a free society for its people, one needs to reflect on the recent developments, starting with the growing in

prominence of the Zimbabwe Congress of Trade Unions (ZCTU) and the subsequent formation of a broad-based opposition political party-the Movement for Democratic Change (MDC). The popularity of the MDC has been reflected by the fact that it commands a lot of support from almost the whole spectrum of civil society, ranging from labour and student movements, religious groups, and independent media houses¹. Additionally, it has been able to amass the most electoral results since 2000 which has culminated in electoral disputes with other political parties. This explains the MDC's impressive performance in municipal and parliamentary elections at its inceptions and during its heydays. The success of civil society to convince citizen to refuse the endorsement of the government-sponsored Draft Constitutional in a referendum in 1999 dealt a heavy blow on the state because it exposed the despotic nature in which the government had dealt with the issue of constitutional reforms. The results of the Referendum also indicated that civil society can at times have stronger voice than the state. The "farm invasions" that came hard on the heels of the formation of the MDC and the results of the Referendum were intended to punish the white commercial farmers who had bank-rolled the formation of the MDC and had also influenced farm workers in voting against government's intended endorsement of the Draft Constitution. The government began to perceive the white commercial farmers, civil society and the MDC as "enemies of the people". To the government, it has been alleged that Britain, the former colonial master, was behind the funding of various groups to effect regime change.

The unfolding of the above events led government to adopt a pessimistic view of civil society groups, Britain and its western allies as well as opposition political parties, especially the MDC. The pretext for the attempt to bringing civil societies into the sphere of the state is often given as their financial mismanagement, the lack of control with their funds². But the reality behind the attempts are linked to a fear by government of the potential NGOs have for organizing people outside the state structures, and secondly that NGOs with the change in donor policies with emphasis on building civil society institutions now receive funds which earlier would go to government projects³. Thus, civil societies can be seen to be in direct

¹ Sachikonye, L.M. (ed), (1995).Democracy, Civil Society and the State, Social Movements in Southern Africa. SAPES: Harare.

² Raftopoulos, B. and Phimister, I., (1987). Keep on Knocking: a History of the Labour Movement in Zimbabwe, Baobab Books. Harare.

³ World Bank Country Report, 2004: Governance: The World Bank's Experience, World Bank, Washington, DC.

competition with government over donor funds (ibid). New legislation and amendment to existing laws reflected vindictiveness on the part of government, for the laws were now geared at restricting citizen participation in governance and policy processes as well as downplaying their popularity. While laws are meant to protect the populace, the amendments to existing laws and the enactment of new laws provided government with a tool through which it could deal with the perceived “enemies of the state” and proponents of “regime change”. This paper will mainly deal with legal enactments and amendments that took effect soon after the formation of the MDC, a result of concerted effort by the generality of the Zimbabwean citizenry. This is so because the formation of the MDC reflected the extent of citizen participation and broad support enjoyed by this new political formation. The following are key legislative framework that this paper attempts to critique and how the content of these pieces of legislation influenced civil society involvement in public affairs.

5.1 The Constitution of Zimbabwe (1979)

The Constitution is the supreme law of the land and it is against this background that all national legislation emanates from, and should conform to it. Clapham (1992:44) notes that “...the formal constitution of the state should in principle provide the ultimate legal framework through which rational-legal behaviour is defined”. Proponents of constitutionalism concur with this notion by pointing out that “...constitutions lay down the overall nature and the characteristics of political institutions in elaborate detail, and hold promises of institutionally guaranteed civil liberties and political democracy”⁴. Constitutional provisions include civil, natural and political rights, which all citizens are entitled to, irrespective of religion, colour or political affiliation. Through registering and allowing civil society continued existence, the State is creating an avenue for civil society participation in national programmes that help in realizing societal objectives such as poverty alleviation, the observance of human rights, upholding of democratic principles and even environmental and HIV/AIDS awareness campaigns. On the contrary, constitutions “...are tailor-made to fulfil specific political purposes and to present a mere cloak of legitimacy to norms and practices

⁴ Kamrava, M., (2000), Political Culture and a New Definition of the Third World, *The World Quarterly*, Vol. 16, No. 4, December. 2000

otherwise considered as unpopular and illegitimate”⁵. In the Zimbabwean situation, one vivid example of this is the, Constitutional Amendment 17 of 2006 which authenticated the confiscation of formerly white-owned commercial farms, contrary to property rights that the former owners had over their properties. From then onwards, a plethora of the same nature and sophistication were enacted to fulfil specific political ambitions. From the content of the Constitution, there is very little evidence to suggest that it dispenses the privilege of citizens to participate in the administration of the country or to influence public policy. Most of the greater details for providing citizen entitlements are left to subsidiary legislation, such as the Electoral Act. The Constitution realised this political motive through legal provisions such as Acts and Bills, some of which are as follows:

5.2 The Private and Voluntary Organizations (PVO) Act (1996)

Community-based organisations (CBOs) provide a vital component of citizen participation through which communities can interact in an endeavour to influence public policy. The Private Voluntary Organizations Act of 1996 requires all organisations that provide welfare services or treatment or “any activities that uplift the standard of living of persons of families” to register with the government. Registration is not automatic, and the government has a right to deny an organization’s right to exist after examining the organizations’ financial books and records. Until recently, this last provision had not been enforced, but from November 2002, government requires that all organizations not registered under the PVO Act should immediately cease operations or face arrest. Under the PVO Act, the Minister of Public Service is tasked to oversee the registration/deregistration of civic and private/voluntary organizations and their compliance with the various sections of the Act. The Act allows for the formation of a civil society umbrella body-National Association of Non-Governmental Organisations (NANGO) to oversee the running of all civic organizations. However, the Minister of Public Service is involved in the appointment of Board members; an issue that civil society has said undermines the autonomy of the whole spectrum of civil society and compromises their decision-making process. The PVO Act makes specific reference to; and reservations about, foreign funding to civic groups. In the latest amendment to the Act, it has banned all foreign funding to civic organizations. NGOs

⁵ See 4 above

have reportedly expressed concern that they were particularly concerned with amendments to the Act since it “...signalled the eagerness of the state to control the growing NGO sector and, in particular, the funding being channelled into these organizations at a time when its political legitimacy was being undermined by a growing economic crisis”⁶. The PVO Act does not need one to closely analyse it to realise that it seeks to curtail civil liberties by limiting the freedom of non-state actors from operating without interference from the state. Community-based organisations (CBOs) are a conduit through which communities can influence public policy and their curtailment by the state through the PVO Act indicates the lack of commitment of the state to liberalise the operation of communities, thereby curtailing citizen participation.

5.3 Urban Councils Act (1996)

Localities, both rural and urban are governed by appropriate local government legislation. The World Bank (2007:195) argues that “...local government has the power to manage its own fiscal revenues and expenditures, subject to national framework conditions”. On the desirability of local government institutions suggestions are that local government institutions are “...a desired and natural outgrowth of trends towards fiscal decentralization, intended to reduce central [government] control in favour of local preferences that foster allocative efficiency”⁷. Consistent with this argument is that the greatest priority [for any state is] to establish a legal and policy framework consistent with decentralization and local autonomy⁸. They further argue that such legal framework should be “...used as a guide to measure progress in promoting administrative autonomy, fiscal autonomy, public property rights and decentralisation of services”⁹. The attainment of political independence in Zimbabwe in 1980 brought with it a number of local government constitutional reforms. Post-independence amendments to the Urban Councils Act (1973), Chapter 214 resulted in the decentralization and democratization of the Local Government system at that level by removing racial

⁶ Raftopoulos, B. (2000). *NGOs, the State and Politics in Zimbabwe*: Baobab Books. Harare, p36

⁷ Leach, M., Bloom, G., Ely, A., Nightingale, P., Scoones, I., Shah, E., Smith, A., (2007), *Understanding Governance: pathways to sustainability*, STEPS Working Paper 2, Brighton: STEPS Centre, 2007.

⁸ See 7 above

⁹ Smith, F.H (2003). ‘Rationality in Policy Making Considered’ in *Journal of Public Administration* .Vol.38, No. 3, September 2003

discrimination pertaining to representation and tenure in urban areas¹⁰. This amendment to the Act led to the incorporation of former local government areas (African townships) into Urban Council areas¹¹. Democratization of the Urban Councils also resulted in the enfranchisement of rent paying lodgers who did not have the vote under the colonial Local Government system¹². Decentralisation of decision-making processes from central government to urban councils has resulted in increased public participation in policy formulation and development¹³. However it has also been noted that “...the policy formulation process in Zimbabwe is largely top-down in nature, thereby rendering citizen participation in the process a reaction to policy proposals from the top”¹⁴. On the contrary, there has been justification for the top-down approach being practiced by some governments, on the understanding that “...government officials are the ones who have the information on what resources the central government will make available for the implementation of development programmes and projects, so they are justified to make critical decisions regarding these programmes and projects if they are to be funded”¹⁵. However, the democratization of urban councils has been frustrated by “...the relatively stronger hand from central government which gives the Minister of Local Government and Urban Development] the right [and powers] to remove an elected [Urban] Council where it is felt that the elected officials are not in line with people’s wishes”¹⁶.

This is an enabling Act of Parliament, which empowers ratepayers in urban areas to form resident associations that would represent ratepayers’ interests. These can even summon political leadership to discuss ratepayers on issues affecting them, such as the unwarranted hiking of rates, as well as poor service delivery. These residents’ associations have; in recent years, encouraged citizen participation and have even assumed political powers, which include fielding mayoral candidates, as well as showing direct interest in the running of city

¹⁰ Wekwete K (2006). “Urban local government finance in Zimbabwe: The case of Harare City Council” in Public Administration and Development, 12(1): 97-110.

¹¹ See 10

¹² See 10 above

¹³ Makumbe, J. (1996). Participatory Development: The Case of Zimbabwe, Human Rights Bulletin, March 1996, pp.21-25.

¹⁴ See 13 above

¹⁵ Hyden, G and Braton, M (eds) (1993): Governance and Politics in Africa, Lynne Rienner, Boulder, Colorado, USA

¹⁶ Ministry of Local Government, Urban and Rural Development Report, 1985(MLGRUD/SALA,) p16

councils and rural district councils. They are empowered to summon political leadership to discuss ratepayers concerns such as those pertaining to rates, and service delivery. These residents' associations can also be involved in the civic affairs of their respective urban centres and can even field mayoral candidates. The Urban Councils' Act facilitates citizen participation in the affairs of urban councils through involving ratepayers in such civic matters as the design, and implementation of the budget process. However, through the Act, government retains much of the decision-making powers. The Minister of Local Government is empowered to decide on the suitability of an elected Mayor and to dismiss him/her as well as to appoint a Commission to run the affairs of a given Town or City. This has tended to discourage citizen participation because ratepayers' choice of a Mayor should not necessarily be the one preferable to the Minister of Local Government. From the look of it, the Urban Councils Act provides token participation in that it does not require community participation to pass legislation, but only consults communities after the by-laws have been enacted. There is no guarantee that citizens' input is ever considered or incorporated into the ensuing legislation.

5.4 NGO Bill (2004)

The NGO Bill became one of the most controversial pieces of legislation in the country and a blow to the operations of the NGO sector. As a result of the controversy surrounding this Bill, it never saw the light of day as it was shelved indefinitely. This new legislation attempted to ban foreign NGOs concerned principally with "issues of governance", and NGOs receiving foreign funding for "promotion and protection of human rights and political governance issues" will be denied registration. The changing context of state and NGO relationships will be adversely, especially in cases where international tourism is a revenue generator for both the private sector and government. Environmental NGOs, which have also been carrying out feasibility studies on environmental conservation programmes would also be negatively affected and environmental programmes stalled. Certain provisions in the bill, which include setting up a regulatory council that can decide whether a particular NGO will be registered or not, will be set up through this piece of legislation.

Meanwhile, NGOs likely to face closure after the law is enacted said they would oppose the enactment of the Bill into laws¹⁷. If the government proceeds with making some aggressive amendments to the Bill, some humanitarian NGOs such as those working to address the needs of disabled persons in Zimbabwe will be affected (ibid). However, of concern would be the effect on the beneficiaries, because government alone cannot sustain most of these programmes. It needs input from civil society. Even relations between the Zimbabwe government and many UN agencies will be strained since most of poverty-alleviation and environmental, and HIV/AIDS programmes were being funded by UN agencies. Given that the NGO sector depends on foreign funding, and disallowing or abolishing such funding would be tantamount to killing the sector and subsequently blocking the only conduit through which citizens can provide checks and balances on the operations of the state.

5.5 The Public Order and Security Act (POSA) (2005)

The Public Order and Security Act (POSA) has been viewed mostly by the NGO sector and citizens as reincarnating colonial legislation, especially the Law and Order Maintenance Act (LOMA) of the 1960s which was meant to curtail the movement of the black population which had been increasingly restive on the face of repressive colonial regime. Therefore, it came as a surprise that a similar piece of legislation was enacted in a democratic dispensation. POSA comprises a number of sections, which prescribes certain expectations and compliances. Part 1 interprets the Act, while Part 2 enumerates that action that it regards as ‘offences against constitutional government and public security’, which include sabotage, acts of terrorism, possession of dangerous weaponry as well as undermining the authority of or insulting the President. Scholars have made use of terms such as ‘sabotage acts of terrorism, possession of dangerous weaponry as well as undermining the authority of or insulting the President gravitate any action that a person does in good faith¹⁸. Under Part 2 of POSA publishing or communicating false statements prejudicial to the state constitutes an offence. Under Part 3, POSA calls for police clearance for any one or group that intends to hold a public gathering. Public gatherings under this Act include political, religious and

¹⁷ Naidoo, K and Doube, C.2007. “The Crisis for Civil Society in Zimbabwe”, in *Journal of Civil Society Law*, Vol. V, Issue 2, April 2007.Catholic University of America: New York, p 89

¹⁸ See 13 above

social gatherings. In order to preserve public order, police are given the authority to change the venue or other logistical aspects of the meeting, prohibit the meeting entirely, or prohibit all public meetings in a particular police district for up to three months. These sections of POSA have been used to decline or shut down several public meetings, including those held by elected MDC officials to report to their constituencies. The police are not required to give reasons why meetings are considered threats to public order nor do they suggest conditions under which the meetings could be held. The Act gives the police arbitrary powers such as the authority to change the venue or other logistical aspects of a meeting, prohibit the meeting entirely, or prohibit all public meetings in a particular police district for up to three months.

In practice, police does not sanction any meeting presumed to threaten public order and this is referred to in Section 19, which discourages “gatherings conducive to riot, disorder or intolerance”. Part 5 requires that people carry identity documents with them and empowers the police to cordon and search individuals and residences. Part 6 authorizes the Attorney-General to prosecute those suspected of having breached any section of POSA and calls upon the defence forces to assist the police when the need arises. It also gives the police powers of search, seizure and forfeiture. In the face of this legislation, many civic organizations and opposition political parties have found it very difficult to reach out to their constituencies without committing a breach of one of the sections of POSA. Freedoms of speech, movement and association have also been curtailed by sections of this legislation and this has made the work of much of civil society difficult. Some sections of civil society have regarded POSA as a draw back to their attempts to contribute to a democratic dispensation and to engage government on vital issues such as the cultivation of a democratic culture among the citizens and enlightening people of their rights as citizens, through outreach programmes. Consequently, POSA has shown the failure by the state, not only to stay away from colonial legislative practices, but to desist from rejuvenating colonial practice to deal with an increasingly restive population demanding the restoration of democracy. It has also shown that the post-colonial state has accepted that the most effective way of dealing with a restive population is through heavy-handedness.

5.6 Access to Information and Protection of Privacy Act (2005) AIPPA

It is generally accepted that access to information empowers citizens and enables them to make informed political decisions. Martin and Feldman (1998:1) note that countries“...which are committed to democratic good governance should adopt a legal regime that promotes access to information”. They further maintain that access to information is “...the ability of the citizen to obtain information in the possession of the state” (1998:1). AIPPA is a legal instrument that enables the government to monitor and control the flow of information in the country. In enacting the legislation, the government argued that it wanted to prevent the publication of information that is “...manufactured and can be manipulated into a lethal weapon for our downfall”¹⁹. Under Part V, sections 38, 39 and 42, the Act prohibits the publication of unverified stories. The Act is also empowered to register and deregister journalists or deny them a practicing licence without giving reasons. This implies that journalists can be co-opted or taken advantage of in order to retain their practicing licences, in contravention of ethics. These ethics are further compromised in that the government can determine what should be reported and what should not. Prohibitive punishment for breach of these laws has seen many journalists getting arrested and independent newspapers closed down, like in the case of *The Daily News*, which was closed in 2004, after it was accused of reporting in favour of anti-government forces. The government has also taken advantage of AIPPA to deny prospective independent newspapers and radio stations practicing licenses, arguing “...the local media should not be owned by foreigners”²⁰. This is in breach of citizens’ right to information. AIPPA has also adversely affected relationships with other countries because it prohibits foreign diplomats from making speeches at their National Day events. Amendment to AIPPA makes the practice of journalism without accreditation a criminal offence punishable by up to two years in prison. Civic organizations are also not allowed to be involved in politics of the country or to make political statements or to leak any information outside the country. Civic organizations are also not allowed to be involved in politics of the country, to make political statements, or to leak any information outside the country.

¹⁹ See 6 above, p 39

²⁰ See 13 above, p 27

Under AIPPA, practicing journalism should be by registration under the Media and Information Council (MIC), which gives or denies practicing licences to both journalists and media stations alike. It also licenses or denies to license radio stations. Under MIC, many prospective radio stations have been denied the chance to practice. Journalists operating without licenses are subject to heavy fines and/or imprisonment. These restrictions on journalism also apply to non-journalists collecting information for other private purposes. From the content and practice of AIPPA, it can be inferred that it has been aimed to stifle debate and open discussion on political developments in the country as well as curtailing citizens from making informed political decisions.

5.7 Interception of Communications Act (2007)

Just like AIPPA, this Act sought to stifle debate on political developments in the country by legalising interception of private information by the state. Such practice would instil fear in people who will then be unable to share private information knowing fully well that the state can interfere with their privacy by intercepting their communications. The Act seeks to "establish an interception of communication monitoring centre whose function shall be to monitor and intercept certain communications in the course of their transmission through a telecommunication, postal or any other related services system". Through the Interception of Communications Act²¹, the government strives to regulate the interception of communications through constitutional provisions protecting the privacy of communications, and requisite laws and regulations to implement the constitutional requirements regards the Act with apprehension. The Act violates the human rights of Zimbabweans and many international Conventions such as the Universal Declaration of Human Rights, which states, "No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks on his integrity or reputation. Everyone has the right to the protection of the law against such interferences or attacks." Various civil society groups have rejected the Interception of Communications Act citing its infringement on fundamental human rights and contravening *Section 20* of the Constitution of Zimbabwe which prescribes that every individual has a right to privacy. As a result the Interception of Communications Act can be viewed as a brazen attempt by the state to not instil fear in people but limit public

²¹ Interception of Communications Act, 2007

debate on political developments, which would eventually have a debilitating effect on citizen participation in governance processes.

5.8 The Broadcast Services Act (BSA) (2000)

Broadcasting enables citizens to be informed of developments within and without the country. Therefore it would make sense that such a facility be open to public scrutiny and participation. This can be achieved through opening up the airwaves to other players to operate broadcast stations to help inform the public which is common practice in democracies. The world over, countries that are called democracies insist on the independence of the media, both in principle and in practice. Frequency allocation, licensing of broadcasting investors, as well as technical administration of broadcasting is usually the prerogative of a broadcasting authority. Political control of broadcasting has always been regarded as an abridgment of the right to freedom of expression, in any society that claims to be a democracy. Zimbabwe's constitution proclaims that it is a republic and therefore in absolute or significant control of the broadcasting media by government has often resulted in the monopolization of the media by government. Zimbabwe is itself a classic case in point. Independence of a Board is measured by a variety of yardsticks, but in particular by the appointment process and the security of tenure of office. Executive appointment is certainly not on its own, a basis for declaring a Board partisan and partial.

The watershed elections of 1980, which resulted in ZANU PF's ascendance to power, were an exercise of the right to freedom of expression. Notwithstanding all its other weaknesses, Zimbabwe's Lancaster House Constitution has a justifiable bill of rights. The right to express one's views and opinions without interference is vital to the nurturing and growth of a sustainable democracy. It is a common acknowledgement that freedom of information is a cornerstone upon which the very existence of a democratic society exists.

The government has deemed it necessary to control information disseminating, an issue which was challenged by the Capital Radio (Private) Limited. In Zimbabwe, the electromagnetic transmission of audio and video signals and the available frequency spectrum is the preserve of the Zimbabwean Government, as prescribed by the Broadcasting Services Act [Chapter 12:01]. Until the judgment in the Capital Radio case², it was a criminal offence for any person to broadcast, both radio and television signals. The Supreme Court has

declared the exclusive broadcasting monopoly of the ZBC invalid. Section 14 and 27 of the Radio communications Act and the Broadcasting Act, respectively entrenched the monopoly of the Zimbabwe Broadcasting Act, in violation of section 20(1) of the Constitution of Zimbabwe, which guarantees the individual's freedom to: "...hold opinions and to receive and impart ideas and information without interference..."²². By its very nature broadcasting monopoly restricts the free flow, quality, quantity and nature of information, available to the citizens of the country. Justification of the monopoly for the broadcasting and canvassing for the enactment of the necessary legal framework regulating electronic broadcasting, and in particular regulating the licensing of broadcasters and the use and allocation of frequencies has been premised on the fact that allocating frequencies to other broadcasters would jeopardise the security of the country³.

The Supreme Court declared that Capital Radio could begin to broadcast, as the legislation entrenching Zimbabwe Broadcasting Corporation's monopoly had been declared unconstitutional. Capital Radio and other persons with broadcasting equipment began radio broadcasts. Political control of broadcasting, which the Supreme Court had struck down in the Capital Radio case, was reintroduced through the Broadcasting Services Act. The Broadcasting Services Act allowed for the creation of a façade of liberalisation, yet placing total control over all broadcasting to the government. The prevailing political and economic situation in Zimbabwe markedly affected the contents of the Broadcasting Services Act. Quite apart from the print media it is with electronic broadcasting, radio and television, that in modern society, the right to freedom of expression is forcefully, collectively and purposefully exercised. Radio Zimbabwe broadcast from Mozambique by ZANU PF unlawfully was pivotal in the party's electoral victory in 1980. It is rather ironic that the same government that ascended to power, in part due to the power of the media, should be seen denying opposition political parties slots to campaign on radio and television.

The right to freedom of expression permits the democratic exercise of choice and unrestrained exchange of information, views and ideas. Regrettably the BSA seeks to control the nature, quality and quantity of information available to the people. It seeks to swamp and replace the citizen's views and opinions with those of one man, the Minister. The monopoly

²² Zimbabwe Broadcasting Act, 2004

over information broadcast is maintained, no longer by the Zimbabwe Broadcasting Corporation but by the Minister. Through the Broadcasting Services Act, the government has effectively dropped all democratic pretensions. The centralizing of absolute power in one person has the potential in theory and in practice, of censoring information available to the public. That the Minister, both as a person and office are not independent of political influence and control cannot be open to serious doubt. If this is accepted, it cannot be disputed that the above mentioned powers are liable to be used to politically discriminate and determine licence holders. Further this political discretion will be used to determine the suspension, cancellation or amendment of licences or those licensees that the Minister decides to economically frustrate or bankrupt.

The desire by government to control the dissemination of information is aptly dramatized by the Minister's position in government. The office of the Minister was created in the President's office. The Minister himself is a presidential appointee, answerable, as all Cabinet ministers to the President. In apparent consideration and reward for accepting the ministerial position, Jonathan Moyo was elevated to become a ZANU PF politburo member. This is in spite of the fact that prior to his involvement with the government over the doomed Constitutional Commission he had not been known as a ZANU PF party member. Further, the Minister's powers under the BSA are not reasonably justifiable in a democratic society. In terms of the Broadcasting Services Act, the Minister is the licensing authority with wide and arbitrary discretionary powers. Very restrictive conditions make it virtually impossible to invest in broadcasting. At law, the restrictive and cumulative powers of the Minister in terms of the Broadcasting Services Act and deliberate delays in issuing prospective broadcasters licences which have arisen as a result of those powers, indicates that the Minister's powers violate Section 20(1) of the Constitution.

It is usual for the licensing authority to be composed of persons with certain and specific broadcasting expertise. This is true for most constitutional democracies and particularly those that obtained majority rule in the last 50 years. Comparisons may be drawn with South African and Malawi. To its credit, the BSA makes no pretence that the licensing authority is independent. It has been stated that the licensing authority should be independent. A law creating a licensing authority susceptible to control and interference by the government falls foul of Section 20 (1) of the Constitution. In the case of Zimbabwe, the licensing and

regulatory authority created is the government itself. There can be no suggestion therefore that the licensing and regulatory authority (the Minister of State for Information and Publicity in the President's office) is independent.

In South Africa, community broadcasting licences are valid for four years, television broadcasting licences for eight years, radio broadcasting licences for six years, a common signal carrier licence for fifteen years and a signal carrier licence given to a commercial broadcaster, is valid for eight years. The State President makes wide consultations before appointing a Broadcasting Council. On the advice of the National Assembly, the President appoints members of the Council. Being the appointing authority the President is empowered after due inquiry to remove a Councillor from office. There is a difference between the South African position and that obtaining in the Broadcasting Services Act in this regard. The President in South Africa has no unfettered discretion to appoint Council members. He may only appoint members from a short list that would have been interviewed by Parliament. The President is not at liberty to appoint party functionaries. In Zimbabwe, the Minister almost single handed, and in consultation with his superior, the President, determines the identity of board members to appoint. In addition the Minister has power to suspend and terminate the employment of the Board members. A very late entry to democratic practice, Malawi set up the Malawi Communications Regulatory Authority [MACRA]. In section 4(3) the MACRA Act states "The Authority shall be independent in the performance of its functions"²³.

In Zimbabwe, the Broadcasting Services Act is glaringly unconstitutional. It appears that the purpose of the Act is not to regulate the transmission of radio and television signals but to control the information that is broadcast by independent broadcasting stations. The government still abuses the broadcasting facilities of the Zimbabwe Broadcasting Corporation, using the corporation as a propaganda tool for the ruling party. In an effort to facilitate citizen participation in the provision and promotion of relevant information and programmes, the SA Independent Broadcasting Authority Act has made provision for the establishment of the Broadcasting Complaints Commission (BCC). The BCC is an avenue given to the public for their input. In South Africa local content is not legislated in terms of an Act of parliament. The Independent Broadcasting Authority Act

²³ Malawi Communications Regulatory Authority [MACRA] section 4(3)

states that the regulator shall set local content quotas. In practice, and in terms of regulations promulgated, most private broadcasters are required to carry at least 20% South African content and are given two years to implement this quota. Subscription television is usually required to carry 15% South African local content and public television 50%. France is a country, well known in Europe for its strict policy on French local content quotas. It limits television broadcasting to 40% French material and 60% European material. The local content requirements are very restrictive and prevent investment. In Zimbabwe, the existing legislation has pegged local content at 75% for both and radio and plans are underway to put local content at 100%. Local content requirements must not be pedantic. It seems rather obvious that the government is aware of the pathetic state of the broadcasting industry and that the mandatory requirements are deliberately aimed at ensuring that very few companies invest into broadcasting. Yet ironically, Zimbabwe is a county that is desperately in need of investment.

The above critique of the Zimbabwean Broadcasting Services Act seeks to show that the Broadcasting Services Act:

- * Is inherently unconstitutional violating sections 20 and 16 of the constitution of Zimbabwe, which guarantee the rights to freedom of expression and private property, respectively;
- * places absolute and discretionary power upon the Minister;
- * prevents all nature and forms of investment into the broadcasting sector; and
- * in bad faith creates an absolutely useless and irrelevant Broadcasting Authority.

The legislation and practice of the BSA has shown that it does not befit democratic demands of enabling pluralism within the field of broadcasting and allowing input from the populace and has therefore failed the litmus test for a democratic broadcaster.

6. ELECTORAL LEGISLATION

Elections are one of the most vital tenets of democratic rule as they provide the much-needed opportunity for citizens to determine who should govern over public affairs. As a result, Zimbabwe has put in place legislation that governs the conduct of elections in the country.

6.1 The Electoral Act [Chapter 2:13] and the Zimbabwe Electoral Commission Act [Chapter 2:12].

Two electoral laws were passed during the last quarter of 2004, the Electoral Act and the Zimbabwe Electoral Commission Act (ZECA). The Electoral Act is the overall law that governs the conduct of elections in Zimbabwe. The Zimbabwe Electoral Commission Act created the Zimbabwe Electoral Commission (ZEC), in charge of preparing for and conducting House of Assembly (formerly parliamentary), senatorial, presidential, council and referendums as provided for in the Electoral Act.

6.2 Zimbabwe Electoral Act (2006)

The paper has incorporated the Act in this deliberation as it would provide a window of opportunity to establish how the electoral processes at various levels are a manifestation and reflection of the will of the electorate. All this has tended to put the Zimbabwean electoral process into the limelight. The paper therefore intends to establish whether the electoral system can conduct a free and fair electoral process. This paper will also seek to establish the extent to which it abides by the dictates of the *SADC Guidelines on the Conduct of Democratic Elections*, a set of guidelines that all SADC member states should follow when conducting elections.

The Zimbabwean Electoral Act has been at the centre of all the disputed elections over the years due to its partisan nature as it was crafted in such a way that it would not only allow ZANU PF to militarise and politicise the electoral process, but would have the leeway for electoral rigging, vote buying and manipulation of the electorate through politicizing food aid to rural communities. This has rendered the whole electoral process not only prone to manipulation but flawed, thereby eventually short-changing the electorate. The Zimbabwe Electoral Act (2004) is a constitutional provision that provides guidelines on the conduct of elections both at national, provincial and municipal levels. The Act provides for the creation of the Zimbabwe Electoral Commission whose mandate is to conduct elections. This Act establishes an independent authority, the Zimbabwe Electoral Commission, to administer all elections and referenda in Zimbabwe. The Act empowers the State President to appoint members of the Commission. It administers Presidential, Parliamentary, Senatorial and municipal elections (Chapter 2:13, Act 25/2004).

The provisions gave the Commission far-reaching powers over voter education. The Act also barred all foreign support for voter education activities except through the Electoral Commission. Under the Act, the Commission would be empowered to require anyone, other than a political party, providing voter education to furnish it with detailed information, including funding sources. Failure to comply with any one of these laws would constitute a criminal offence, liable to a fine or to up to two years of imprisonment. Much of civil society and NGOs depend on foreign funding. Civil society has therefore tended to view this Bill as government attempts to flush them out of existence and to cause cash flow problems for civic groups. A free election is one in which voters can freely vote for the candidates of their choice. The electoral laws themselves must create a set of rules that allow all contesting parties to compete fairly in the elections and all eligible voters who wish to do so to exercise their right to vote. A fair election is one in which all the processes of the election are fairly and impartially administered. These processes included the registration of voters and election candidates, the voting process and the counting of votes and the announcement of the results. Election candidates and parties contesting the election were required to be given a fair and substantially equal opportunity before the election to campaign and inform the electorate of their principles, policies and promises. This included equal opportunity for airtime on the electronic and print media the most worrisome aspect in the electoral legislation and practice is the role of the executive which plays a prominent role in the general administration of elections, despite the fact that during elections, the Executive will also be contesting the same elections which compromises its neutrality.

6.3 The Principles for Conducting of Democratic Elections

Contained in these laws are principles that enable the conducting of democratic elections. Section 3 of the Electoral Act stipulates the general principles of a democratic election in an attempt to regularise the general conduct of elections to meet recognised standards. These principles include the right of citizens to participate in governance issues directly or through freely chosen representatives. This should be achieved without distinction on any grounds. A person can join a political party of one's choice and has the right to participate in peaceful activities to influence or challenge the policies of government. All political parties shall be allowed to campaign freely within the law and have reasonable access to the media during

election time. The Act defines election time to be 30 days before the polling day for the elections and ends at the close of day or the last day of polling.

Recent political developments have put Zimbabwe on the world map once again as political parties accused each other of electoral irregularities, just as had happened in 2008. As the centre of the controversy was the way in which the Zimbabwe Election Commission (ZEC), the electoral regulatory body conducted the elections. Subsequently, the Zimbabwe Electoral Act was put to the test both prior to the Harmonised Elections. Despite the fact that the election results had been authenticated by observers, notably the *SADC Observer Mission*, which not only certified the results as authentic but went on to congratulate President Mugabe for securing a resounding victory. Politically-motivated violent acts were not common and peace seems to have prevailed prior, during and on the aftermath of the electoral process. However, some political parties alleged that they were denied access to use media (both print and electronic), as prescribed by electoral laws.

7. Recent Developments in Zimbabwe

Recent Development in Zimbabwe, especially from 2010, has seen the adoption of a new constitutional dispensation (2013) which seeks to liberalise the Zimbabwean citizenry by overturning the restrictive pieces of legislation that violated various civil liberties over the years.²⁴ The new Constitutional dispensation of 2013 has been a landmark development in the constitutionalism discourse of the country because for the first time in the history of the country, civil liberties boast of constitutional protection. Over the years, since colonial days, political and civil as well as socio-economic rights (encompassing civil liberties) of citizens have been creatures of statutes and as such had no constitutional protection. With recent political developments, notably the constitutional reform processes culminating in the enactment of a ‘people-driven’ constitution after exhaustive public consultations, the country can now boast of a fairly comprehensive constitutional order. However, the challenge to the activation of the new constitution to full throttle has been lack of political will to align, reconcile and harmonise the new constitution to existing legislation, most of which run *ultra*

²⁴ See Mapuva, J and Muyengwa-Mapuva, L (2012). “A Critique of Legislation Guiding Civil Liberties in Zimbabwe” *Potchefstroom Electronic Law Journal*, 14 (6) 124-164 (November, 2012).

vires the dictates of the new constitutional dispensation. As such it is incumbent upon the establishment to ensure that the new supreme law of the land and the plethora of pieces of legislation are aligned so as to avoid dissonance and/or discord as well as double standards in the implementation of laws in the country.

8. Comparing the Dictates of Arnstein's Ladder to Existing Legislative Provisions in Zimbabwe

The main thrust of Arnstein's Ladder of participation is that state parties can deal with participation differently. The Ladder presents participation as existing in categories ranging from non-participation, tokenism and citizen control (see Ladder of Participation above), with each category representing a specific political dispensation. Dictatorships are represented under the non-participation classification, tokenism represents those political leaders that masquerade as democracies, while citizen control represents those political dispensations where citizens contribute to the decision-making processes in the country.

Some states, mostly dictatorships view citizens as insignificant and with no capacity to contribute to policy formulation and the general administration of the country. Consequently such dictatorships consider citizens as mere recipients of regulations, which means that citizens are non-participants in the politics of the country or in decision-making processes. This befits Arnstein's *non-participation* stage. The different pieces of legislation in Zimbabwe have attempted to dodge this scenario by putting in place some semblance of seeking to empower citizens either through indirect participation or through consultation. This is a token form of participation with no guarantee that citizens' input would be incorporated into the resultant legislation or decisions. This practice befits Arnstein's **Tokenism** stage which is aimed at hoodwinking the public into thinking that they are participants and/or stakeholders in the administration of the country. In the Zimbabwean context, the character of Parliament was such that only ZANU PF had a majority and would pass laws that satisfied their political aspirations without due regard of the populace. While elections would have provided the opportunity for active participation, events on the ground such as politically-motivated violence and coercion as well as limiting political freedoms resulting in the inability of the general populace enjoying active participation. In other words, Arnstein's *Active Participation* stage has been reduced to tokenism as people have not been free to engage in active political activity. Consequently, it can be argued that the *Active*

Participation stage in Zimbabwe has failed to be fully utilised due to a menacingly political environment. It can therefore be concluded that democracy in Zimbabwe has been increasingly controversial as opposition political parties and civil society organisations have continued to question the way elections have been held over the years.

9. Conclusion

From the discussion above, it can be concluded that while Zimbabwe started off as a healthy democracy with promises of further growth along this route, but skewed policies and failure by the ruling elite to see the writing on the wall that time was up for them to pass on the baton led to deterioration of democracy, especially from the early 1990s. The increased political dynamics from the mid-1990s coupled with increased intolerance among different political players culminated in violence in some cases as well as indecisive elections and the government of national unity in 2009. Some would allege that elections have become a façade to hoodwink the international community into believing that there was active participation yet it was mostly tokenism. Even amendments to existing laws had been vindictive and tended to dis-empower citizens from partaking in matters of public interest. The employment of laws to vindicate against the citizenry has seen the government breaching and reneging on its obligations of serving the populace.

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²⁵Capital radio open to the public, but was later closed down by Government, citing it as a security threat to state security, on the basis that it would temper with frequencies.

³ This was the argument put forward by the then Minister of Information Professor Jonathan Moyo in defence of the Zimbabwe Broadcasting Corporation's monopoly of the airwaves and the need to deny other prospective broadcasters a broadcasting licences.

⁴ This was an argument put forward by The Belize Court of Appeal which argued that "Today television is the most powerful medium for communicating ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium"

⁵ Legal Resources Foundation, *Paralegal Bulletin*, No.20, February 2008

⁶ Voters were required to bring serial numbers of ballot papers that they will have used during the election to the ZANU (PF) party structures in their locality for a possible follow-up to determine who they will have voted for.

List of Abbreviations

POSA-Public Order and Security Act

AIPPA-Access to Information and Protection of Privacy Act

MDC-Movement for Democratic Change

ZANU PF-Zimbabwe African National Union (Patriotic Front)

SADC-Southern African Development Committee

ZEC-Zimbabwe Electoral Commission

ZECA- Zimbabwe Electoral Commission Act

MLGRUD-Ministry of Local Government, Rural and Urban Development

PVO- Private and Voluntary Organizations Act

NANGO-National Association of Non-Governmental Organisations

MACRA-Malawi Communications Regulatory Authority