



PUBLIC PROTECTOR  
SOUTH AFRICA

**PAPER FOR ADDRESS BY ADV K MALUNGA: DEPUTY PUBLIC PROTECTOR**

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*“... Constitutionalism”*



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## 1. INTRODUCTION

The general understanding of constitutions is that they constitute the basic foundational norms, laws and customs. Modern constitutions are laws in themselves as well as directives and standards for the making of other laws, policies and practices. At the same time, constitutions are deemed to be the “highest” norms, laws and standards within any sphere of jurisdiction.

For illustrative purposes, it is pointed out that within the international sphere, the Charter of the United Nations is, broadly speaking, the constitution of the United Nations Organisation. Similarly, at the regional level the Constitutive Act of the African Union<sup>4</sup> that consolidated and superseded the Charter of the Organisation of African Unity<sup>5</sup> and the Abuja Treaty<sup>6</sup> is the African regional constitution.

According to Prof. Shadrack Gutto Professor and Editor Institute for African Renaissance Studies the majority of modern constitutions, whether new or amendments of old ones, incorporate certain minimum core content. The following are the most common elements in the minimum

core content:

- (i) the structure of government;
- (ii) human rights, fundamental freedoms and responsibilities;
- (iii) distribution and separation of powers between the executive, legislature and judiciary;
- (iii) entrenched independence of the judiciary and the independence of the prosecuting authorities and other law enforcement organs of state;
- (v) entrenched independence of the legislatures;
- (vi) entrenched independence of national institutions responsible for elections, human rights, anti-corruption and abuse of power;
- (vii) regulation of the public service, the security and defence organs;

- (viii) the system of monetary policy determination and collection and distribution of revenue; and
- (ix) the manner of concluding treaties and status of international law.

Prof Gutto continues that

*“...constitutions are rightly or wrongly associated with governance that adheres to the letter and spirit of the constitution – in other words, to **constitutionalism**. Real fidelity to constitutionalism means that even under “emergency” situations, when there is a threat to public order or state security, commitment to core values of democracy and human rights are retained.*

*Constitutionalism* is about fidelity to both the letter of the constitution and the core values and principles upon which a constitution is based. The spirit of a constitution is expressed in, amongst others manifest deeds, policies, laws, regulations and the manner of their implementation or practical realisation.

In Makwanyane case Justice Akermann explained that *Constitutionalism* in our country was not brought about by the adoption of the Constitution as the highest law of the country, but that *“Constitutionalism arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance.”*

Some experts maintain that the common denominator of the different approaches or conceptions of constitutionalism consists of the three pillars constitutionalism - it requires adherence to the rule of law, imposing limits on the powers of government and the protection of human rights<sup>1</sup>

Constitutionalism therefore refers to the rules of law, especially to the Constitution which is the supreme law in most countries. Secondly, and closely related, formal limitations on political power is regarded by writers such as McIlwain<sup>2</sup> as *the most ancient, the most persistent, and the most lasting of the essentials of true*

<sup>1</sup> Rosenfeld, M., “Modern Constitutionalism as Interplay between Identity and Diversity”, in Rosenfeld op.cit. 3-5, 28.

<sup>2</sup> McIlwain, CH., Constitutionalism: Ancient and Modern, New York: Cornell University Press, 1947, 22; Mangu op.cit.105

*constitutionalism. Other writers such as According to Zoethout<sup>3</sup> and Boon, are of the view that “constitutionalism expresses the conviction that no government should ever have unlimited power to do whatever it wants, since every political system is likely to relapse into arbitrary rule, unless precautions are being taken.*

According to the experts such as Rosenfield the final objective of the rule of law and the limitation of powers is the protection and the promotion of human rights (third pillar of constitutionalism.

*Constitutionalism encapsulated all the values that Nelson Mandela and the overwhelming majority of the South African people fought for. They wanted the rule of law and not an “empire of man”. They fought for a government with limited powers, representative of the people, working for the people and accountable to them. They demanded the recognition and the protection of the rights of all the people, White, Black, Indians or Coloured, and all the rights, civil, political, individual social, economic, cultural and collective or people’s rights*

*Prof Andre Mbata Mangu*

## **2. INSTITUTIONS AND MECHANISMS FOR STRENGTHENING CONSTITUTIONALISM AND DEMOCRACY**

Prof Mangu stated during the 20 years celebration of the Constitution during an event in New York that Nelson Mandela and the South African people fought for democracy, which is also related to constitutionalism.

The different conceptions of democracy revolve around democracy as defined by US President Abraham Lincoln in his famous Gettysburg speech of 19 November 1863 when he referred to “the government of the people, by the people and for the people”. In as much a democracy requires respect for human rights, the rule of law, and the limitation of the government that is elected by the people and is accountable

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<sup>3</sup> Defining constitutionalism and democracy: An introduction”, in Zoethout, CM et al (eds), Constitutionalism in Africa. A quest for autochthonous principles, Gouda Quint-Deventer, 1996, 1, 11; Mangu op.cit.105.

to them, democracy and constitutionalism are interrelated. Constitutionalism and democracy are mutually dependent and reinforcing.

Entrenching the independence of national institutions responsible for elections, human rights, anti-corruption and abuse of power is one of the main features of modern constitutions. However, there is consensus amongst constitutional experts that independent electoral bodies alone are not enough in ensuring good democratic governance. Other mechanisms and institutions, especially the ones responsible for the promotion and protection of human rights and the fight against corruption and abuse of power, are also needed. Independent and efficient judiciaries and other dispute resolution forums are also essential.

Democracy comes from the Greek words demos meaning people and kratos meaning authority or power." Other definitions include

"...government which is conducted with the freely given consent of the people."

"...a system of government in which supreme authority lies with the people."

"Rule by the people in a country directly or by representation."

"The form of government in which political control is exercised by all the people, either directly or through their elected representatives."<sup>i</sup>

The word democracy itself means rule by the people. A democracy is a system "where people can change their rulers in a peaceful manner and the government is given the right to rule because the people say it may."

As noted by IDASA<sup>ii</sup> references to the notion that "the people" are the foundation of democracy is repeated numerous times in South Africa's historic documents such as the Freedom Charter. Drafted in 1955, the Freedom Charter provided a vision of a non-racial democratic South Africa, in which the people would be the guiding voice of government. Now our country's Constitution carries a preamble that begins with the words,

*We the people of South Africa...to:*

*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*

*Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*

*Improve the quality of life of all citizens and free the potential of each person;  
....”*

Definitions of democracy can easily be long and elaborate. For the purposes of this analysis I prefer to confine myself to some of the basic attributes of democracy that serve as fundamental preconditions for its legitimacy and effectiveness, including

- Equality
- Fair Elections
- Accountability
- Representative government
- Transparency
- Multi-level court system
- Respect for human rights -Checks and balances
- Freedom of expression
- Consultation of the people
- Tolerance
- Majority rule
- Community-mindedness
- Protection of minorities
- Open-mindedness

The Constitution provides the basis for the character of the state that is envisaged for the realisation of the constitutional vision of the country, to the extent of dictating that the state must be democratic, uphold the rule of law and operate on the basis of openness, transparency and accountability ethical standards which the executive should uphold and which include acting in the public interest.

Experts agree that the very essence of “democracy” is based on the premise that those elected to form a government shall govern "so long as they can protect the interest of the people or the trust the people have placed in them" This is how the concepts of democracy, rule by consent, and good governance came into existence in the theory and practice of government.

In a **Constitutional democracy**, the framework of Constitution and law exemplifies essential elements of good governance and accountability by, inter alia -

- a) Prescribing the powers of government and the procedure of exercising powers.
- b) Ensuring equal treatment and equal protection of law.
- c) Guaranteeing protection against arbitrariness of government and excess of administrative powers.
- d) Creating accountability mechanisms for the exercise of powers and formulation of policies to the people/ representatives of the people
- e) Ensuring procedural transparency of exercising all administrative powers., and
- f) Providing remedies against any kind of maladministration and injustice done to the aggrieved

### **3. THE IMPORTANCE OF CHAPTER 9 INSTITUTIONS SUCH AS THE PUBLIC PROTECTOR IN THE ADVANCEMENT OF CONSTITUTIONAL DEMOCRACY**

Recognising that the task of ensuring adherence to the Constitution and good governance could not be guaranteed by the traditional institutions such legislature, courts and tribunals alone, Chapter 9 of the Constitution created a multiplicity of institutions to protect and promote the rights of specific constituencies in South Africa, each of them with a specific mandate, including the Auditor-General, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board), the Commission for Gender Equality and the Human Rights Commission, as well as the Public Protector. These Institutions are referred to as Institutions Supporting Constitutional Democracy (ISCD)

ISCDs such as the Public Protector are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers



and perform their functions without fear, favour or prejudice. In terms of section 181(3) of the Constitution other organs of state, through legislative measures, have to assist and protect the aforementioned institutions to ensure their independence, impartiality, dignity and effectiveness.

The late President Nelson Mandela accurately described the role of these institutions as additional measures to guaranteed democracy, human rights and the rule of law. This is demonstrated in the following statement made by him during the International Ombudsman Institute conference in South Africa.

*“Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities’ are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.*

*An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those are the Public Protector, the Human Rights Commission, the Auditor-General, the Independent Electoral Commission, the Commission for Gender Equality, the Constitutional Court and others.”*

In this context the Constitutional mandate of the Public Protector to “*strengthen Constitutional democracy*”, is based on the recognition by the architects of our constitutional order that the transformation of democracy into the Constitutional promise of a better life for all South Africans, requires governance that is dependent on mechanisms, processes and institution through which citizens and groups can articulate their interests, exercise their legal rights, meet their obligations, mediate their differences and a develop tolerance to accept the things that we cannot change.

But the traditional democratic avenues of accountability -both in respect of ensuring accountability, and providing remedies to the aggrieved persons commensurable to the volume of irregularities - have become increasingly inadequate with the growth of state activity, expansion of government bureaucracy and the points of contact between citizen and the state. An important aspect of the role and functions of the ISCDs is therefore to bridge that gap by serve as **Accountability Institutions** with the power to scrutinise executive action and the conduct of organs of state and public bodies against Constitutional imperatives aimed at the promotion of the values of human dignity, equality, non-racialism, non-sexism, the supremacy of the Constitution, as well as upholding the rights of citizens and the basic values and principles governing public administration

Constitutional Institutions such as the Public Protector are therefore at the heart of the promotion of democracy, good governance, efficient administration and protection of human rights that is directly linked to the issue of power relations between the political executive and civil society and oversight institutions. It is fundamental to the democratic system of governance that those, to whom powers and responsibilities are given, exercise them in the public interest justifiably and according to the law, and more importantly, are answerable to the public for the actions of government. The Public Protector therefore at the heart of the promotion of democracy, good governance, efficient administration and protection of human rights that is directly linked to the issue of power relations between the political executive and civil society and oversight institutions. It is fundamental to the democratic system of governance that those, to whom powers and responsibilities are given, exercise them in the public interest justifiably and according to the law, and more importantly, are answerable to the public for the actions of government.

#### **4. THE ROLE AND PLACE OF THE PUBLIC PROTECTOR IN THE PROMOTION OF CONSTITUTIONALISM AND DEMOCRACY**

##### **4.1 Mandate**

The Public Protector South Africa is part of a global family of what is traditionally referred to as “Public Service Ombudsmen”. Chapter nine of the South African

Constitution of 1996 provided for the establishment of the Public Protector as one of the institutions that strengthens the constitutional democracy of the Republic and came into existence in October 1995.

In terms of Section 182(1) of the South African Constitution of 1996, the Public Protector is vested with the powers to investigate the conduct of government, government departments, government agencies, government officials and bodies performing public functions that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial. The Public Protector may not investigate decisions of a Court of Law and must be accessible to all persons and communities.

The Constitution anticipates mandate expansion through legislation, and legislation passed since establishment 15 years ago has resulted in the Public Protector being a multiple mandate agency with the following 6 key mandate areas:

- a) Maladministration and appropriate resolution of dispute the Public Protector Act 23 of 1994(PPA). The maladministration jurisdiction transcends the classical public complaints investigation and includes investigating without a complaint and redressing public wrongs(Core);
- b) Enforcement of Executive ethics under by the Executive Members' Ethics Act of 1998(EMEA) and the Executive Ethics Code (Exclusive):
- c) Anti-corruption as conferred by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCAA) read with the PPA(Shared);
- d) Whistle-blower protection under the Protected Disclosures Act 26 of 2000. (Shared with the Auditor General and to be named others;
- e) Regulation of information under the Promotion of Access to Information Act 2 of 2000;(PAIA) and
- f) Review of decisions of the Home Builders Registration Council under the Housing Protection Measures Act 95 of 1998.

Except under the EMEA, anyone may lodge a complaint with the Public Protector against any organ of state and the service is free. The complainant need not be a

victim of the alleged improper conduct or maladministration. The Public Protector may institute an investigation on own initiative and does not need to receive a complaint.

This office is independent and impartial, subject only to the Constitution and the rule of law. The Public Protector is appointed for a non-renewable period of seven years.

The Constitutional mandate of the Public Protector to investigate and report on improper conduct or improprieties in state affairs, and the imperative to be accessible to all people, translates to a multi-pronged approach to handling complaints. In complying with its oversight function and its role in reconciling the citizens with the state, the Public Protector seeks to ensure that transgressions by organs of State must be corrected, that a proper diagnosis and correction of any administrative inadequacies should also be conducted and that proper redress is provided in cases requiring remedial action, as envisaged in section 182(1)(c) of the Constitution . It aims to assist the State in good governance practice.

#### **4.2 1 st pillar of constitutionalism- Monitoring compliance with and respect for the Rule of law**

The Constitution provides the basis for the character of the state that is envisaged for the realisation of the constitutional vision of the country, to the extent of dictating that the state must be democratic, uphold the rule of law and operate on the basis of openness, transparency and accountability ethical standards which the executive should uphold and which include acting in the public interest.

In the recent judgment by the Constitutional Court in the ALLPAY case it was reiterated by the Court that the Rule of law is a founding value of our constitutional democracy. According to the Court it implies that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. “The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.” Public functionaries, as the arms of the state, are further vested with the

responsibility, in terms of section 7(2) of the Constitution, to “respect, protect, promote and fulfil the rights in the Bill of Rights.

The Constitutional Court also emphasised that the focus of the rule of law is upon controlling the exercise of official power by the State. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions. Government is not above the law, but is subject to it.

Renewed emphasis on efforts to strengthen the rule of law is in large part driven by a “new consensus on the importance of statebuilding and governance”, which in essence implies that those that we have elected and authorised to manage the affairs of our country, shall govern “so long as they can protect the interest of the people or the trust the people have placed in them” This is how the concepts of democracy, rule by consent, and good governance came into existence in the theory and practice of government. “Constitutional Democracy” in our case is based on the premise that those elected to form a government must do so in a manner ensures that our hard earned democracy becomes a reality in the lives of every south African and deliver on the Constitutional promise of a better life for all.

The rule of law, transparency, and accountability are not merely technical question of administrative procedure or institutional design. They are outcomes of democratizing processes driven not only by committed leadership, but also by the participation of, and contention among, groups and interests in society—processes that are most effective when sustained and restrained by legitimate, effective institutions

From a rule of law perspective, complaint handling by the Public Protector bolsters the notion that government is **bound** by rules, and that there can be an independent evaluation of whether there has been **compliance with the rules**. Government accountability and the right to complain go hand in hand.

Accountability is the process and means by which public services and government are held to account for their actions, ensuring that public resources are being used in accordance with publicly stated intentions, including the (public procurement) values

contained in section 217 and the (public service) standards envisaged in Sect 195 of the Constitution, Batho Pele, etc are being adhered to.

A protected **right to complain** against public institutions is an essential part of accountability is, which implies

- a) the obligation on state institutions to explain and justify conduct.
- b) Interrogation of the conduct and questioning the adequacy of the information or the legitimacy of the conduct
- c) Adjudication by means of finding on the conduct under scrutiny and remedying prejudice and impropriety
- d) True accountability gives visible meaning to constitutional democracy by ensuring that authorities are “fair and take responsibility, acknowledge failures and apologise for them, make amends, and use the opportunity to improve their services”

Prof. John McMillan, former Commonwealth Ombudsman of Australia, noted that public disagreement with government decisions is a disputed right in many parts of the world. *Recognition of the right can be an important marker of whether democracy and the rule of law are being practised.*<sup>4</sup>

Another Colleague, Dr Diamandouros stated that

*“...the emergence of the Ombudsman as an institution distinct from, but complementary to, the courts, capable of serving as a ... mechanism of accountability and control geared to the enhancement of the rule of law and to the protection of citizens’ rights, was both much easier and much more effective. In turn, this made it possible to offer citizens a broader range of choice when it came to choosing between alternative mechanisms of redress and deciding on how best to exercise these rights...”*

<sup>4</sup> **THE OMBUDSMAN AND THE RULE OF LAW** Address by Prof. John McMillan, Commonwealth Ombudsman, to the Public Law Weekend, Canberra 5-6 November 2004



#### 4.3 2<sup>nd</sup> Pillar of constitutionalism- Role of the Public Protector in limiting undue exercise of public Power

In the recent matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 the Constitutional Court emphasised that “one of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy”

The Constitutional Court continued that

***This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.***

The Court then provided the following powerful explanation of the Role of the Public Protector in respect of the exercise of public power

*Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental “embarrassment” and censure. This is a necessary service because **State resources belong to the public, as does State power.** The repositories of these resources and power are to use them, on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector.*

In terms of the Constitution and the Public Protector Act, 1994 the manner in which public Institutions are being held accountable consists of least three elements or stages

1. The most concise description of accountability would be: *‘the obligation to explain and justify conduct.* First of all, it is crucial that the institution obliged to inform the Protector about the conduct of its officials, by providing various sorts of information and documentation about the performance of tasks, about

outcomes, or about procedures. Often, particularly in the case of failures or incidents, this also involves the provision of explanations and justifications.

The conduct that is to be explained and justified can vary enormously, from budgetary scrutiny in case of financial accountability, to administrative fairness in case of legal accountability

2. Secondly, the Public Protector interrogates the conduct and questions the adequacy of the information or the legitimacy of the conduct. “Hence, the close semantic connection between ‘accountability’ and ‘answerability’<sup>5</sup> This usually involves not just the provision of information about performance, but also the possibility of debate, of questions by the Public Protector and answers by the Institution.
3. Thirdly, the Public Protector may make a finding on the conduct under scrutiny. It may approve of an annual account, denounce a policy, or publicly condemn the behaviour of an official or an agency. In making a negative finding, the Public Protector frequently imposes sanctions of some kind. It has been a point of discussion in the literature whether the possibility of sanctions is a constitutive element of accountability (Mulgan 2003, 9-11). Some would argue that a judgment by the forum, or even only the stages of reporting, justifying and debating, would be enough to qualify a relation as an accountability relation.

#### **4.4 The 3<sup>rd</sup> pillar of Constitutionalism: Role of the Public Protector in protecting and promoting human rights**

When making complaints about an alleged violation of human rights complainants are likely to use a combination of the legal support provided by disability organisations, legal aid clinics and citizens’ advice centres. However, two other crucial mechanisms for making these kind of complaints include the Public Protector and the SAHRC. As I will explain below, the Public Protector in particular, has jurisdiction over a range of public sector entities that can

<sup>5</sup> PUBLIC ACCOUNTABILITY, Mark Bovens Professor of Public Administration Utrecht School of Governance E. Ferlie, L. Lynne & C. Pollitt (eds.), *The Oxford Handbook of Public Management*, Oxford: Oxford University Press 2005



negatively affect especially socio-economic rights (e.g. health, education, social services, justice, child welfare authorities).

As a mechanism to deal with complaints about a public authority, the Public Protector may deal with complaints about discrimination in terms of access to public services, unfair treatment by a public office or state body due to disability, or other unlawful actions, especially where local authorities or public bodies, (eg Health or social services) have a direct role in providing support and services to people whose rights are adversely affected by improper conduct in state affairs.

In this regard the Public Protector deals with a number of investigations in relation to the delivery of infrastructure such as roads, public facilities and housing. The key challenges here are the delivery of shoddy workmanship, with impunity and false billing. Procurement processes associated with public infrastructure delivery remain a cause for concern. Cases involving service delivery failures include issues such as:

- Poor services or failure to rectify defective services/ failure to repair (especially in respect of housing and property);
- Lack of service delivery, No sanitation, proper roads, water and electricity.
- Non –payment or delayed payment by the State to service providers;
- Unresponsiveness of municipalities to complaints and grievances regarding service delivery;
- Failure by the State to rectify bona fide mistakes (eg, incorrect billing)
- Failure to attend to damages caused by faulty state equipment and infrastructure failure (drainage, flooding, electrical surges);

Impartial investigations by the Public Protector, based on domestic law (including human rights norms) and possibly also based on international human rights obligations such as the Convention on the rights of People with disabilities, may result in findings and remedial action aimed at enhancing procedures and practice to improve the protection of human.

The manner in which the Public Protector is expected to function presents opportunities for the advancement of both awareness and implementation of human rights obligations. The Public Protector does not only respond to individual complaints but has the power to undertake investigations on her own motion. The Public Protector can pursue matters where it appears that there are underlying patterns and common causes for maladministration. In this way, such a broad and systemic approach can serve as a resource for governmental institutions in identifying and preventing recurring unfairness, inaction and limited state responsiveness to the legitimate expectations of citizens. Own-motion investigations can be used to highlight systemic problems and they are also very useful to tackle problems affecting vulnerable persons who are unlikely or unable to complain to the Public Protector. PWDs are clearly a vulnerable population.

We pride ourselves in the fact that the Public Protector takes the Constitutional obligation to be accessible to **all** persons and communities very seriously. In the 2013/14 financial year close to 2000 mobile clinics were held and 37 million people reached through our outreach activities.

Many of our colleagues around the world are currently involved in investigations involving serious rights violations concerning people with disabilities. The Ombudsman in Ontario is carrying out an investigation into the provinces services to people with intellectual disabilities in crisis situations. The Ombudsman for Ireland is investigating two systemic disability issues relating to social grants. In the 2011-12 reporting year, the British Columbia Ombudsperson investigated numerous cases concerning PWDs in the seniors,

children and youth, driving, health, home support, and income and community support areas.

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<sup>i</sup> Civitas, National Standards for Civics and Government (Calabasas, CA: Center for Civic Education, 1994).  
Namibia Institute for Democracy, Democracy and You: A Guide to Better Understanding (Windhoek: n.p.), 6.

<sup>ii</sup> <http://idasa.wordpress.com/2009/03/16/what-is-democracy/>

Draft