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SOME LESSONS ON CONSTITUTION-MAKING FROM ZIMBABWE

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The former (and late lamented) Chief Justice of South Africa, Justice Ismail Mohammed, once observed that:

> "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed, it is a 'mirror of the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government."

Further, as van der Vyer has warned, "... a superimposed constitutional formulae or constitutional arrangements that ... do not address the real causes of discontent, are sure to generate their own legitimacy crisis".[1] It follows that the development of an appropriate procedure for constitution-making is of the greatest practical importance. This short comment seeks to examine critically the much-publicized efforts in Zimbabwe to develop a new autochthonous constitution and to draw some lessons therefrom.

The debate on a new constitution for Zimbabwe to replace the 1979 independence document commenced in earnest in 1997 when a grouping of various civic organizations that included churches, political parties (although crucially not the ruling party, ZANU(PF)) and human rights groups formed the National Constitutional Assembly (NCA). Fuelled by concern over the steady accumulation of presidential power through a series of constitutional amendments, they campaigned for a fully representative constitutional assembly tasked with drawing up a new constitution. In response, and apparently with the intention of maintaining control over both the review process and the contents of the new constitution, President Mugabe established a Constitutional Commission (CC). This was done using his powers under the Commissions of Inquiry Act and this had two significant consequences. Firstly, it allowed the President to determine the size and make-up of the Commission. Secondly, the Commission was merely tasked with submitting a report with recommendations for a new constitution to the President and he was under no legal obligation to accept any or all of the recommendations.

The Constitutional Commission

The membership of the CC emphasized the intention of the President to maintain control of the whole process. A High Court judge, Justice Godfrey Chidyausiku, who was seen as a close ally of the President, chaired it[2] whilst the great majority of its 500-strong membership were ZANU(PF) members or supporters. These included all 150 members of parliament (of whom only three

[1] J. van der Vyer, "Constitutional Options for Post-Apartheid South Africa" (1991) 40 *Emery L.J.* 745, 822.

[2] Perhaps not entirely coincidentally, he was subsequently appointed Judge President (head of the High Court) and thence Acting Chief Justice.

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supported other political parties).[3] Others invited by government to participate came from a cross-section of society. These invitations raised mixed emotions. Some felt it appropriate to "work from within" the commission in an effort to improve its performance. Others refused to participate in what they saw as a fundamentally flawed process, and this led the NCA not only to decline to participate but to carry out its own consultation process with the people and to publish its own draft constitution.

The work of the CC raises three issues of general importance.

Determining and distilling the views of the people

In an effort to make the process truly participatory, the CC developed an outreach programme involving commissioners touring the country holding public meetings in all 11 provinces at which people were invited to give their views on the contents of the new constitution. According to the official figures this attracted significant numbers of people.[4] To assist people to address key issues, the CC produced a *List of Constitutional Issues and Questions* that was widely publicized in the national press and which was intended to "promote public discussion and debate" on the new constitution. In principle, this was a useful exercise in that it at least provided some guidance to people and organizations as to the key issues that they needed to address.[5] Its practical value was more dubious given that it contained almost 400 individual questions, some of which were more suited to a constitutional law examination than to a public debate.[6]

The very success of the consultation process then raised the critical issue of how to distil the "will" of the people from the thousands of submissions received. This was the task of the nine thematic committees[7] of the CC based on the reports of the public meetings and other submissions. This proved problematical. Not surprisingly, the reports demonstrated a wide range of views on several important issues with phrases such as "the majority of the participants stated . . ."; "there was a view that . . ."; "a strong minority advocated . . ." being commonplace. In such circumstances it was quite possible for a reasonably competent drafter to produce several very different constitutions and find justification in the submissions made to the commission for each one of them. As noted below, this is precisely what happened as regards the "Corrections and Clarifications" made to the original draft constitution.

[3] According to one senior government minister, the reason for including all members of Parliament was to ensure a "Yes" vote in the referendum on the new constitution: Private communication to the author, July 1999.

[4] According to the applicants papers lodged with the High Court of Zimbabwe in *Mushayakarara* v. *Chidyausiku* 2001(1) ZLR 248, 4321 meetings were held nationwide, which were attended by 556,276 people, 150,000 people attended special meetings and there were 7,000 individual submissions.

[5] A useful example is that of local government. The Lancaster House document was silent on the issue and the CC specifically sought views on the levels of government. The Urban Councils Association of Zimbabwe, amongst others, lobbied hard to have local government enshrined in the new constitution and this was agreed to. Ironically, last-minute confusion over the drafting led to the wrong provisions on local government appearing in the final Report of the CC.

[6] For example: "Should the amendment process for the constitution be simple or should it be difficult? Why?" and "What state structures should Zimbabwe have? Why?".

[7] These were on the separation of powers, executive organs of state, independent commissions, citizenship, fundamental and directive rights, levels of government, public finance and management, customary law, and transitional mechanisms.

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This means that unless a constitutional commission is demonstrably independent, its membership fully representative of civil society and its deliberations transparent, the drafting process is susceptible to manipulation and can easily result in the imposition of the President's (or government's) preferred constitutional model under the guise of being an autochthonous document. In this context the South African approach to the constitution-making process is instructive. It teaches us that to meet the needs of the widest possible segment of the population and to make the widest possible consultations meaningful, the method of consultation must be properly structured. This approach provides for the selection of a group of experts, representative of all the political parties operating in the country and the other stakeholders, that is tasked with drawing up a draft constitution: i.e. not a body of the "ridiculously unwieldy size"[8] as in the case of Zimbabwe. The drafting is informed by theme committees whose main task is to gather, collate and refine the views of the political parties and the public on specific issues and submit them to the constitution-making body. Crucially, the draft constitution as established by the constitution-making body is based on a list of constitutional principles established and agreed to by all the stakeholders *before* the drafting exercise commences. It should also be accompanied by commentaries on each of the provisions contained in the draft constitution analysing the various aspects of the constitution, highlighting options and identifying problems and difficulties that might be incurred in the application of the various suggested provisions. Such a document should then be subjected to public scrutiny and analysis in a forum such as a constitutional assembly, which has specifically been elected to elaborate the constitution. This approach gives the ensuing debate structure along specific constitutional themes. The existence of a draft serves to limit the perimeters of discussion to constitutional issues and avoid the practice of petitioners addressing the commission on every aspect of human endeavour.

Utilizing comparative experiences

Access to comparative experience is extremely useful during a constitutional review process. In this respect African states provide a wide range of experiences and lessons on what to do (and what *not* to do). Where local expertise is limited, calling on international legal experts to provide comparative material and analysis is also helpful.

In Zimbabwe, and in an apparent effort to provide legitimacy to the process, the Constitutional Commission invited international constitutional experts "to exchange ideas and experiences with commissioners and to provide comments and a critique of the draft constitution".[9] This was always an unlikely scenario, especially given the tight time-frame involved. In the end, the experts came for a few days in November 1999 (i.e. shortly before the Commission finished its work), and by that time it was too late for them to have any impact. An added complication was that, even at that stage, there was no draft document available for them to examine!

[8] A fact seemingly admitted by the Chairperson of the CC: see the judgment of Bartlett, J., in *Mashayakarara* v. *Chidyausiku N.O.* above at 251.

[9] See letter of invitation from the Chairman of the Commission to the experts. For the record, the author declined to attend the conference.

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Adopting an appropriate time-frame

Another criticism of the constitution-making process concerned the very tight timetable imposed by the President for the CC to complete its work. This was quite unacceptable for the timetable for constitutional reform is always a matter for agreement between all stakeholders. On such a vital matter there is nothing positive to be gained from undue haste and, in the present case, it only enhanced the perception that the President was intent on pushing through his own constitutional and political agenda.[10]

Reporting to the President

The final Report of the CC was never put to a formal vote but was adopted "by acclamation" according to the Chairperson. This despite the presence of a number of dissenting voices. It was then swiftly transmitted to the President for his approval. The draft constitution submitted to the President by the CC was in many respects a progressive and impressive document and might well have formed the basis for a new constitutional order.[11] But the draft did not satisfy the President.[12] Despite prior assurances to the contrary,[13] a few weeks later the *Government Gazette* published what were termed "Corrections and Clarifications" to the document. It is worth setting out the explanation for the reasons for such changes, which were widely published in the national press:

> "It is common cause that any *draft* is by definition subject to improvement by way of grammatical and factual corrections as well as linguistic clarifications in order to avoid any doubt about the meaning of what is in the draft. The corrections and clarifications below were done on the basis of the records of the Commission as contained in the Commission's Committee minutes and published in the Commission's 1,437 page Social Report. It's all there for the asking and there is nothing new because the record is public and therefore speaks for itself.
>
> Only people with literacy problems or hidden political agendas will find it difficult to tell the otherwise clear difference between corrections and clarifications on the one hand and amendments on the other. Don't be misled."

In the circumstances this writer must own up to a literacy problem or to some hidden political agenda (both of which he was previously unaware). In reality, the "Corrections and Clarifications" made several significant changes of substance to the recommendations in the Report, including the introduction of compulsory military service and a prohibition on same-sex marriages. Above all, a new provision providing for the compulsory acquisition of agricultural land for re-settlement without compensation was introduced. Although it also appears that the Constitutional Commission was never formally consulted on these changes, the subsequent referendum was held on the basis of the draft CC constitution as amended by the "Corrections and Clarifications". Such action is unlikely to

[10] The haste was, at least in part, due to the desire of the President to have the new constitution in place before holding a general election with the compulsory land acquisition provisions being the bait with which to lure the rural voters.

[11] For example, it contained a wider-ranging Bill of Rights than that in the present constitution, limited a President to two terms in office and placed strict limits on the number of government ministers.

[12] For example, at the Congress of his ZANU(PF) party, he reportedly described the section dealing with land acquisition as drafted by the CC as "stupid": see *Financial Gazette* 6 January, 2000.

[13] Commissioners were reportedly assured by the chairman of the CC that the new Constitution which they formulated would not be tampered with: see "New Constitution Will Reflect Findings" *The Herald*, 31 August, 1999, at 1.

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increase confidence in the "people-driven" nature of the constitution-making exercise.[14]

The Adoption of the New Constitution

It was always the intention that the ZANU(PF)-dominated legislature would adopt the new constitution. However, the President decided beforehand to seek public support for the document through a national referendum. The decision to seek the approval of the people on the constitutional process is now provided for in several African constitutions, including Malawi, Uganda, Seychelles and Lesotho. These rightly recognize that the holding of a national referendum on a new constitution is an invaluable exercise in that decisions by referendum are the most legitimate of all because they encourage the full participation of the people.[15] It also provides a greater chance that the proposed document will receive the sort of serious, critical and objective public consideration which it deserves and counters executive efforts to have it approved via a compliant legislature.

The problem with the Zimbabwean referendum exercise stemmed from the fact that it was a purely consultative exercise, with the President being under no legal obligation to abide by the result. Further, he was entitled to place before the electorate whatever document he wished. This was made clear following a legal challenge by some constitutional commissioners to the referendum on the ground that the draft constitution being placed before the electorate had not been properly adopted. In rejecting the submission, Bartlett, J., in the High Court stated:

> "[The President] is not, in my view, required to put before the voters a constitution approved by the Constitutional Commission. *He is entitled to put forward any draft constitution he so wishes* to ascertain the views of the voters. It may or may not be considered unwise to make changes to a document produced by a body specifically set up to produce a draft constitution, but it is certainly not unlawful."[16] (my emphasis)

To add to the concern about the nature of the vote, the significant number of Zimbabweans living abroad were disenfranchised, ostensibly due to "logistical" problems.[17] Further, in the weeks leading up to the referendum the government-controlled media mounted one of its most intensive-ever publicity campaigns in support of a "Yes" vote. At the same time, the Zimbabwe Broadcasting Corporation was seemingly reluctant to allow airtime to the NCA, which was campaigning for a "No" vote.[18]

In the February 2000 referendum voters were asked whether they wished to replace the 1979 Constitution with the "New Democratic Constitution". The

[14] The "pick and choose" approach of President Mugabe was reminiscent of the position in Zambia. In 1972 the Chona Constitutional Commission recommended that the new constitution provide a maximum of two terms of office for the president. President Kaunda swiftly rejected this and then remained in office for a further 19 years.

[15] A point emphasized by D. Butler and A. Ranney in Butler and Ranney (eds.) *Referendums: A Comparative Study of Practice and Theory*, Washington D.C., 1978, at 226.

[16] *Mushayakarara* v. *Chidyausiku NO*, above at 252.

[17] See comments of the Registrar-General in *Zimbabwe Independent* 11 February, 2000. He added (as if this made any difference) that the Constitutional Commission had consulted Zimbabweans abroad during the outreach programme.

[18] It eventually took a court order to obtain such access.

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results were remarkable: "NO" votes 697,754; "YES" votes 578,210.[19] Whilst widely seen as a vote on the presidency of Robert Mugabe, the controversial and opaque manner in which the constitution-making process took place certainly also had a significant impact.

The referendum result represented a stunning defeat for the President. His statesman-like speech accepting defeat promised a consensual approach to constitution-making. But this has not materialized. The only constitutional activity has been the passing by the then compliant legislature of another constitutional amendment Bill that incorporated the exact compulsory land acquisition provision as that rejected in the referendum draft constitution. Indeed, in November 2000 the Minister of Justice, Legal and Parliamentary Affairs informed parliament that constitutional reform was now not a government priority.[20] The reason for this *volte-face* lies in the results of the June 2000 general election in which ZANU(PF) lost its two-thirds parliamentary majority. This means that constitution-making now requires a consensual approach: something that the government is apparently not prepared to countenance. Instead, government attention has shifted to attacking the few remaining pillars of the present constitution that have shown any independence, particularly the media and the judiciary.[21]

Conclusion

Whilst there is no one "model" for undertaking a constitution-making exercise, the Zimbabwe experience enables us to highlight some basic principles of "good practice". Firstly, the constitution-making process is never a matter for the President (or government) of the day to control or unduly influence. As the Constitutional Commission in Uganda has put it:

> "The People themselves must be involved in the formulation and adoption of their Constitution because . . . a Constitution imposed on the people by force cannot be the basis of a stable and peaceful Government of the people."[22]

Secondly, an appropriate and structured consultation process must be developed in order to provide all stakeholders with a meaningful opportunity to make their views known. Thirdly, the final document must be the product of the integration of ideas of all stakeholders including the government, all political parties—both within and without Parliament—, the judiciary and legal profession, organs of civil society and individual citizens. Any process that is viewed as being "hijacked" by the President (or government) can lead to political instability and the production of a flawed document. Fourthly, the use of a referendum to validate the proposed constitution is an appropriate way of consulting the people over constitutional reform. Its value comes from providing that the decision of the people is binding upon the constitution-makers. Fifthly, it is necessary to provide a realistic time-frame within which to undertake the constitution-making exercise. Again, this is not for the President (or government) to impose but for general agreement amongst all stakeholders.

[19] There was a low turnout of some 1.3 million out of some 5 million eligible to vote (26%).
[20] See *Parliamentary Debates* 29 November, 2000.
[21] See G. Feltoe, "The Onslaught against Democracy and Rule of Law in Zimbabwe" (unpublished paper but available on the web site of the Commonwealth Legal Education Association: www.clea.org.uk).
[22] *Guidelines on Constitutional Issues* Uganda Constitutional Commission, 1991, 1.

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Developing an appropriate procedure represents the best and most realistic chance of constructing an autochthonous constitution that is both acceptable to the majority of the people and that can stand the test of time. This is a crucial step towards the establishment of an *ethos of constitutionalism*, i.e. a recognition by the people that the document is "their constitution" upon which they were consulted and which they endorse, which contains provisions that are meaningful to them and from which they can derive demonstrable benefits. The resultant document can then become "trans-generational" in that it retains and develops public support over a period of time and thus is able to withstand attempts to undermine it either by "unconstitutional" or "constitutional" means.

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