
Process matters as much as substance

*A new constitution is no panacea for Zimbabwe, writes **Gugulethu Moyo**. Principles are important for a democratic society, but a deal brokered behind closed doors will not solve the crisis of legitimacy.*

Questions about a new constitution are a recurring feature of debates about how to begin repairing the damage in Zimbabwe. At the heart of the current malaise lies the simple truth that Zimbabwe needs fundamental political change – a different contract between the government and the people. Constitutional reform will not, of itself, resolve the crisis. But it can help develop a set of principles around which to build a more cohesive society.

In September 2007, parliament ratified Constitutional Amendment 18 with support from both the ruling party and the opposition. MDC and ZANU-PF leaders explained that the cross-party deal, following negotiations mediated by South Africa, was a necessary compromise. The agreement has been interpreted as a sign that mediation by the Southern African Development Community (SADC) is succeeding.

Just days after details of Amendment 18 were announced, stories were leaked to the press that the bargain struck in Pretoria reached well beyond what had been made public.

However much a deal on the constitution may seem to the politicians to be necessary and inevitable, important constituencies back home are not convinced. Regardless of the substance, further constitutional arrangements made in closed negotiations without the participation of a broad spectrum of people will lack democratic legitimacy.

Proponents of constitutional reform who have not been party to recent negotiations have a different definition of success. The National Constitutional Assembly – a broad-based lobby group which includes church leaders, journalists, lawyers, academics and grassroots activists – have been largely consistent in their hopes and ambitions. Their most important demand is that reform should be a democratic process. They want an open, deliberative constitutional assembly in which popular participation essential.

In the wake of Amendment 18, a little perspective helps. Since 1999, the Movement for Democratic Change (MDC) and its allies in civil society – led by the National Constitutional Assembly – insisted that constitutional reform should not become the property of any party or group of parties. Zimbabwe needs a new people-driven constitution, framed through an inclusive and participatory process. For eight years, the MDC refused to condone any process dominated by the ruling party.

During that time, ZANU-PF and its hegemony have at least paid lip service to joining negotiations on anything and everything *except* the process of constitutional reform. On the critical issue of the constitution, the ruling party has not surrendered control. ZANU-PF is not ready to allow others to jeopardise a system carefully devised to legitimise and prolong its rule.

A wedge in the door

Regional leaders exerted pressure on politicians from both sides. No-one wanted to be seen to refuse to compromise in a process on which so much depends. Proponents of Amendment 18 argue that these reforms pushed a wedge into the door which, once opened, will lead ineluctably to further reform.

I find it hard to find grounds for this optimism. Concessions from the ruling party have been strictly limited to very narrow improvements in the electoral system. Amendment 18 has scarcely reduced the constitutionally privileged role of ZANU-PF.

The political process which will follow the constitutional revision has yet to run its course. It has been suggested that the two sides are hopeful they can devise a new constitution by the close of negotiations in October 2007. If these reports are correct, the participants are missing the point. A constitution should not be written in a few weeks by a handful of politicians at a conference table.

An enduring constitution requires the long ordeal of developing broad public consensus and building trust. Given the deep cleavages in society and the popular loss of trust in political institutions, it is unlikely that consensus can be achieved in a short period.

There are obvious parallels with the process which devised Zimbabwe's current constitution, brokered at Lancaster House in 1979. The independence document was as

much the outcome of a peace process as an effort to draft fundamental legislation. Preoccupation with securing a ceasefire after a bloody civil war may have prevented a constitutional process more conducive to striking a balance between conflicting interests.

Then as now, those at the negotiating table were political leaders – all men – from rival factions: Prime Minister Abel Muzorewa; his deputy, Silas Mundawarara; Ian Smith, former prime minister of the Rhodesian government; Robert Mugabe and Joshua Nkomo, for the Patriotic Front. The British government, represented by Lord Carrington, played a dominant role as mediator. No other groups were represented.

At the start of the Lancaster House talks, Lord Carrington made clear that he wanted to settle the constitutional questions quickly before moving on to the “more difficult problems” of transitional arrangements for an all-race election. Compromises were agreed which subsequently became a barrier to progress: for instance, the deeply entrenched protection of white-owned farms became a source of strife.

The interests of the mediator prevailed over those of the parties who would have to live with the consequences of these constitutional arrangements. In 1985, Robert Mugabe announced plans to amend the constitution to create a one-party state. Albert P. Blaustein, an American constitutional lawyer who acted as advisor to Muzorewa, wrote in a letter to the *New York Times* that Mugabe’s intentions had been “readily predictable” at Lancaster House. Muzorewa had wanted a clause to guarantee the right to form political parties, but Blaustein claimed that “hidebound British lawyers objected – arguing that this was not in accord with their traditional independence constitutions”.

More haste, less speed

Then as now, pressure to end the crisis carries the risk of miscalculation. An important lesson from history is that what appears to work in the short term, may fail over time. Constitutional reform must confront both the needs of the present and the demands of the future. Zimbabweans must learn from past mistakes and avoid the pitfalls which follow from the combination of crisis talks with constitution-making.

Zimbabwean politics has suffered a crisis of legitimacy at least since the elections of 2000. A constitutional process which includes a broad spectrum of political and civil society actors and restores public confidence in the political system is necessary to overcome the legitimacy deficit. For this reason, Zimbabwe’s political parties should

be encouraged to agree first on a democratic process to guide constitutional reform, and only then on the principles.

This process must incorporate mechanisms for Zimbabweans to express their views about the rules by which they consent to be governed. If constitutional reform is perceived as an attempt foist something on the people, the proposals of a political elite will be rejected – as occurred in 1999, when the government’s attempt to adopt a new constitution was defeated in a referendum.

Debate about constitutional questions, inevitably, brings to the forefront divisive issues that political leaders may wish to avoid – as constitutional activists have discovered before in Zimbabwe, often at great personal cost. Addressing divisive issues is the purpose of all constitutional debate. The difficulty of this process is no justification for any attempt to curtail participation from the public.

In his role as regional mediator, South African president Thabo Mbeki should encourage Zimbabweans to take the path he advocated when his own country faced the challenge of crafting a new constitutional settlement. In his then role as the ANC’s secretary for international affairs, Mbeki argued for the merits of an inclusive constitution-making process: “Free and popular participation is vital to the making of a constitution that has legitimacy in the eyes of the people,” he argued in 1990. This legitimacy was “central to the exercise of democracy and to stability in a post-apartheid society”.

Ultimately, the text of any constitution will be less important than the commitment of Zimbabweans to abide by its principles – in bad times as well as good. For this reason, the process matters as much as the document to the final outcome. Acrimony vented during negotiations makes it more, rather than less likely that a settlement will stick.

Emotions inevitably run high, as hopes and fears loom above the negotiating table. The sanguine can take heart from knowing that the painstaking work of reaching consensus is not about spectacle or individual triumph. Enduring constitutions rarely emerge in a burst of glory.

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