

Writing Autobiographies of Nations

A Comparative Analysis of Constitutional Reform Processes



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	KENYA	BOLIVIA	ZAMBIA
1) Guiding Principles of Reform a) goal b) format c) time frame	a) Attaining democracy; Constitution to be a representation of the majority of Kenyans; Peace and national unity. b) The Constitution of Kenya Review Commission researched the issues and prepared a draft bill as a starting point. c) No time frame set in advance.	a) Transform and construct a New Bolivian State. b) The Constituent Assembly was installed by a special law in Congress. The Assembly had set rules to formulate constitutional principles, which would be presented to the people in a referendum. c) Time frame by law is a calendar year. Prolongation of 6 months was with two-thirds majority approved in Congress.	a) Consolidation of democracy. b) A popular body, including both political society and civil society organisations, called the National Constitutional Conference drafts a constitution. c) No time frame set in advance.
2) Agency of Reform a) name b) mandate c) members d) committees and decision making	a) National Constitutional Conference. b) Agreeing on the constitution. c) 629 members; 223 of the National Assembly, 210 elected by County Councils, 29 of the Review Commission, 41 from political parties, 126 from civil society organisations. d) 13 committees and a Conference Consensus Building Group to build inclusive consensus for the plenary session.	a) Constituent Assembly. b) Setting internal regulations, reception of initiatives, draft of provisional texts per committee, discussed in the plenary Assembly. c) 255 members; 70 three persons groups, of which 2 of the governing political party and 1 of the smaller political party, the other 45 in groups of 5 per district, 2 of the winning party and the other three to separate parties. d) 21 committees, which were to prepare provisional texts to be discussed in the plenary session, to be approved with a 2/3 majority.	a) National Constitutional Conference. b) Discuss and adopt a new draft constitution. c) 502 members; largest groups: 158 Members of Parliament, 73 local councillors, 48 party representatives, 79 CSO representatives. d) 11 separate committees discuss and in plenary sessions not more than 100 of 502 can disagree.
3) Acceptation/Implementation	After an unexpected alteration in parliament, the whole document was to be voted on or off in a referendum. 57% of the electorate rejected the proposed constitution.	The texts provided to the Assembly were not discussed with all members present. It is unclear what the exact base of the draft constitution, presented in the referendum, was. A new constitution was in the end approved by popular referendum with 60% in favour.	The National Constitutional Conference can decide to ask parliament to enact amendments, partly through parliament, with some issues presented to the people through a national referendum or present the entire draft to a national referendum.
4) Most Important Actors	Pro: Government supported the altered version of the constitution. Con: CSO and opposition parties did not agree with the last revision.	Pro: Governing party, indigenous CSOs Con: Representatives of the 6 districts of the Half Moon, the valleys with more fertile land and a desire for autonomy. Opposition was excluded from the last gathering of the Assembly.	Pro: Governing Party MMD, Patriotic Front members, Law Association of Zambia Con: Catholic Church, Protestant Church, NGOCC Patriotic Front (partly), because of exclusion of socio-economic rights in Constitution.
5) Civic Participation	Civil society organizations were consulted by the Constitution of Kenya Review Committee in the preparatory phase. CSO actively campaigned in opposition at the time of Referendum.	The public was consulted through hearings and had the possibility to send in initiatives. Local gatherings, lectures and seminars were also organized. Every committee had to do this once a week.	The people are informed through live transmissions, weekly wrap-ups and phone-in discussions on radio and television. A referendum is still possible, as the process is still going on at time of writing.

ECUADOR	ZIMBABWE 1999/2000	ZIMBABWE CURRENT
<ul style="list-style-type: none"> a) Reform of the political party system. b) A Constituent Assembly collected initiatives, discussed these to be presented to a plenary Assembly which voted over it and presented it to the people in a referendum. c) a 180 day time frame was set with a maximum extension possibility of 60 days, which was used for more inclusivity. 45 days were set for the referendum. 	<ul style="list-style-type: none"> a) Majority rule; Fair elections. b) The National Constitutional Assembly and the Movement for Democratic Change called for wide consultations and a National Constitutional Conference, but government opted for a Constitutional Commission of Inquiry that consulted the people, drafted proposals to be discussed at the Constitutional Conference, to be referred to the President for finalization. Then it was presented in a referendum. c) No time frame was set. 	<ul style="list-style-type: none"> a) Shared power in an inclusive government. b) The Global Political Agreement (Sept 2008) includes a section on the constitution and description of a reform process. c) Time frame is set at 18 months; 2 months for the erection of a Select Committee, within the next three months an All Stakeholders Conference to be held, public consultation within the next 4 months, draft constitution within following 3 months, to be presented and discussed in Parliament, and within three months a referendum.
<ul style="list-style-type: none"> a) Constituent Assembly b) Research, discuss, form and decide upon a new draft constitution. c) 130 members; 82 of governing party (MPAIS), 18 by opposition and rest to other small factions. d) 10 committees of 13 members which made proposals per theme for the plenary assembly, to be approved by 66 of the 130. There was a coordinator between the President of the country and the Assembly delegates. 	<ul style="list-style-type: none"> a) Constitutional Commission of Inquiry. b) Appointed and mandated by the President to consult the people and draft a new constitution. c) 400 members; most from the ruling party ZANU PF, 150 Members of Parliament, only 3 Members of Parliament of the opposition. d) 24 members of the Commission disapproved of the draft, not being a just representation of the people's needs and were absent at the hand-over. 	
<p>The population was able to propose initiatives to the Assembly. These were sent in during the time extension, specifically to offer the possibility to include the people's voice. 64% voted in favour of the constitution.</p>	<p>After the proposal was checked by parliament, the document was voted off in a national referendum. The President accepted the defeat.</p>	
<p>Pro: Governing party, trade unions, civil society organizations. Con: Opposition parties, conservative commercial media and church.</p>	<p>Pro: Governing party ZANU PF, its Members of Parliament, the President. Con: National Constitutional Assembly, consisting of churches and civic organizations, opposition party MDC, and activists, on f.i. gender equality.</p>	
<p>CSDs were included in the process through workshops, presentations, receptions. The Assembly also organised civic educational training courses in indigenous languages, for the 1st time.</p>	<p>Both the official and oppositional parties developed active programs for consultation of the people, engaging and informing a large Zimbabwean public in the process of this Constitutional Reform. It revived political pluralism.</p>	

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Preface

Constitutions are the 'autobiography' of a nation, South African Constitutional Court Justice Albie Sachs once aptly formulated. This metaphor nicely captures that constitutions describe how the relationship of a state and its citizens is organized while it is the result of the historic context that produced the constitution.

Next to elections, constitution-making processes have become a highly contested political terrain in many young democracies. Much attention in literature is given to the content of constitutions but less is known about what constitutes a successful constitutional process. Where do constitutional reform processes go wrong? Why are reviews of constitutions so much contested? What lessons can be learned?

Successful constitutional reform processes are those that succeed in cementing the relationship between citizens and their state and make positive contributions to nation-building. As will become apparent from the various chapters, constitutional reform processes have often failed to contribute to democratic consolidation. Too often, a lack of trust and constructive cooperation between different stake holders fails to build the consensus that is needed to produce a new constitution. In this regard, this publication might offer a better understanding of the potential pitfalls and obstacles related to constitutional reform processes instead of presenting best practices.

The initiative for the handbook comes from the experience gained in the partnership between the Netherlands Institute for Multiparty Democracy (NIMD) and political parties engaged in reform processes in young democracies. This experience is made available and accessible through the NIMD

Knowledge Centre and in the dialogues facilitated by NIMD.

NIMD hopes that the publication will be helpful in the planning and management of future political constitutional review processes. Also, we hope that it will trigger responses from practitioners to build on and expand the knowledge base made accessible through the NIMD Knowledge Centre. Your responses and reflections are most welcome at: www.nimd.org. Additional copies of this handbook can also be acquired through this internet address.

NIMD is grateful for the trust of its partners to share the experience recorded in this handbook. I am especially grateful to Justice Albie Sachs for his exquisite contribution to this handbook, to Prof. Reginald Austin for his oversight of and his learned contribution to this publication, to Patrick Lumumba for his insights of the Kenya experience, Carlos Irahola for his views on Bolivia and Luis Narváez-Ricaurte on Ecuador. Thanks to Martin van Vliet for transforming the idea into a book, and all his energy towards the chapter on Zambia and additional editorial work. Also Lizzy Beekman, thanks to you for all your efforts on the editing. Also, I like to acknowledge the valuable contributions of NIMD colleagues Jan Tuit and Suzanne van der Velden. Responsible for the final production of the handbook was Silvia Rottenberg. It is thanks to her that we now have access to the lessons contained in this handbook.

Roel von Meijefeldt
Executive Director NIMD

Introduction

From a purely technical point of view, writing a constitution is easy. At least, this was the bold statement I made two decades ago to Oliver Tambo, leader of the exiled ANC and head of its newly established Constitutional Committee. He had asked if it was possible to draft a post-apartheid constitution for South Africa. To my rather naive lawyer's mind, building a bridge or even a house was awesomely difficult from a technical point of view. However, to be able to write a constitution, all you needed was a photocopier, a pair of scissors and some glue. You could then literally cut and paste provisions from existing constitutions to produce a brand new one, and ink-in a few words here and there to give it some local character. (And today it is even easier: you can go to the internet where you have 200 national constitutions to choose from.)

As we discovered, however, constitutions simply cannot be cobbled together in this way. Nor is there such thing as a standard, one-size-fits-all, fungible constitution, whether democratic or otherwise, for all countries. By their very nature, constitutions emerge at moments of profound importance in the life of the nations to which they apply. The particular historic imprint will go well beyond the name of the country and the preamble. As Mies van der Rohe said of the exquisite buildings he sought to design, God is in the detail. Every aspect, every word in a constitution can have an impact on every other aspect. Moreover, constitutions have a specific spirit and tenor. This will have emerged from intense intellectual and social combat and will reflect 'the balance of forces' at the moment of drafting.

In the memorable words of Ishmael Mahomed, then Chief Justice of Namibia, and later Chief Justice of South Africa:

"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 reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside..."

As it turned out, the Constitutional Committee of the ANC decided that the country's constitution should not be produced unilaterally by the ANC, but rather be the outcome of an inclusive national process undertaken in conditions of freedom. The result was that we South Africans had talks about talks about talks, then talks about talks, and finally talks. This lasted years. Then, when the talks became full-scale negotiations, a whole new process evolved. There were many interruptions, with massacres, breakdowns and rolling mass action. It took the invention of a new concept of decision-making by 'sufficient consensus' and the development of a two-stage process of constitution making, to achieve the necessary breakthroughs.

Five years of intense political activity, which included the holding of the first non-racial, democratic elections in our country, were to pass before we finally got the Constitution of South Africa. And, even that was delayed when the Constitutional Court, of which I was a member, declared the draft of the constitution that had been accepted by a huge majority in Parliament, to be unconstitutional! That, of course is another story. Nevertheless, I mention the South African experience to underline the point that, although technically constructing a constitution is much easier than building a house, the actual process of getting the constitution that

a country wants and needs, and of doing so in the right way, is invariably extremely difficult.

The fact is that constitution-making processes in different parts of the world will each have unique features. While constitution makers will borrow and lend unashamedly from each other, they will each have to create a modality and format that corresponds to their own particular situation.

This is well illustrated by the post-colonial constitutions in Africa. While all had a particular character marking the moment of national exuberance at achieving sovereignty, they also reflected the unilateral manner in which they had come to be written. Lancaster House in London provided not only the physical home in which the constitutions of former British colonies were created, but also a strong post-colonial, and some would say, neo-colonial, intellectual and ideological spirit. To take just one example, at a time when the voice of women was hardly being heard, provisions that excluded land law and family law from the operation of the equality provisions in the Bill of Rights ended up giving strong constitutional protection to patriarchy.

Post-colonial constitutions also came into being at the time of the Cold War. One longs for someone to write authoritatively about the impact of the Cold War on constitutional democracy in the developing world. During the Cold War period, India and Sri Lanka were virtually alone in resisting authoritarian rule in Asia, and then, not without wobbles. In Africa, the effect of the Cold War was devastating. Newly independent countries quickly found themselves lined up on one side or the other of the global divide. Both the Great Powers wanted strong men with whom they could deal, and whom they felt they

could trust. Opposition groups were automatically seen as siding with the enemy, that is, with communism or else with imperialism. Authoritarian rule, frequently of a military nature, became the norm, not the exception.

I had the extraordinarily rich and intense experience of living and working in the Peoples Republic of Mozambique during the revolutionary years after Independence. The endeavour to unite o povo Mocambicano (the Mozambican people) in a class-based, non-racial, non-tribal and non-regional political system, had immense appeal. However, it turned out to be unsustainable and eventually tragically counter-productive. Who knows whether without the internationalisation of political conflict produced by the Cold War, the Mozambican system could in terms of its own logic and experience have developed a large degree of political pluralism and openness? The reality, however, was the eruption of an externally-supported and savage civil war that almost tore the country to bits. The new constitution based on multiparty democracy was born bitterly and in blood.

In South America, too, at the time of the Cold War, one military dictatorship after the other was installed to ensure that the continent remained securely on the side of one of the Great Powers. New post-dictatorship constitutions were ultimately secured only with great sacrifice and frequently through the incorporation of heavy and destabilising compromises. There was nothing normal about the achievement of normality. Indeed, the very concept of normality itself became highly contested. And, being post-dictatorship was not enough. New challenges were to emerge. Strong popular forces contested what they considered to be unduly hegemonic and partisan influences built into the very

structures of institutions which, while on their face appearing to be neutral, in reality protected both ancient and new oligarchs.

History tells us then, that little scope exists for the export, import and implantation of standard form constitutions. As the chapters in this book show, there are undoubtedly certain common problems that arise in all constitution-making processes, whatever the country and whatever the moment. Yet, however similar these problems might be, the differences will be even more startling. At one level, all the protagonists will seek to use universally accepted concepts of freedom, democracy and respect for fundamental rights to advance their particular claims. At another level, however, each will introduce specific elements that they regard as vital to the protection of their own specific interests or the interests of the people as conceived by them. That is as it should be, provided that appropriate means are ultimately found to transcend purely partisan interests without pretending they do not exist.

Indeed, the strength of the ultimate constitutional compact will be directly proportional to the intensity with which the protagonists engage with each other and confront the thorny issues that divide them. Not every issue has to be resolved by the constitution itself, but agreement at least has to be reached on the processes to be followed and the norms to be applied for achieving the resolution of these difficulties. What can be said with confidence, however, is that the more participatory and inclusive the process, the more likely will it be that the final product corresponds to the real needs of the country. And, one may add, the greater the probability of the constitution enduring.

We live in an age of increased preoccupation with constitutionalism throughout the world. This book contains five invaluable studies about constitution-making processes, three in Africa and two in Latin America. It makes an important contribution to direct South-South dialogue. The authors are to be commended. They have added rich new textures to a debate of continuing global concern.

Albie Sachs
12 March 2009

Constitutional reform processes

Reginald Austin

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What is a constitution?

Constitutions are primarily about political authority and power within a state; where it is located, and how it is conferred, distributed, exercised and limited among the separate organs of the state and in relation to its subjects.

Constitutions deal with both the substance and procedures regarding these matters. They may be unwritten and conventional or, as is most common today, a formal, written document. Apart from setting out specific legal norms, they will often state more declaratory ideological principles on state power and authority.

In the 20th century, the ending of the major European Empires, the reaction to fascist aggression of World War II, the declaration of United Nations Charter, and the break-up of the Soviet communist bloc resulted in the establishment of dozens of embryonic democratic states. It became assumed that the basis of the power and authority of a state's rulers should be with the consent of citizens, or as it is expressed in Article 21(3) of the 1948 Universal Declaration of Human Rights, *The will of the people shall be the basis of the authority of government; this will shall be expressed by periodic and genuine elections...*

This principle was given further effect by Article 24 (a) of the 1966 UN International Covenant on Civil and Political Rights which entered into force in 1976, providing that *Every citizen, shall have the opportunity ... to take part in the conduct of public affairs either directly or through freely chosen representatives.* This principle forms the basic relationship between citizens and state. When it is set out in a national constitution, it results in a contract between a government and its people.

The status of most written constitutions is that they are 'the highest law of the land', overriding all ordinary legislation. Thus, the creation and reform of a national constitution is vital for lasting peace, good governance and stability of a state and should ideally be an honest expression of a national consensus. This underlines the importance of the requirement of Article 24 (a) of the Covenant that citizens participate 'directly or indirectly' in public affairs, a critical part of which is the constitutional process.

Context

The 'third wave' of democracy washed away numerous authoritarian regimes. Over 90 countries have witnessed a transition to democracy between 1974 and today.¹ Around 70% of the countries in the world are formally considered as democratic. Whereas three-quarter of African leaders left office following

¹ Diamond (2008)

a (violent) coup or assassination in the 1960s, 1970s and 1980s, this figure went down to 19% between 2000-2005.² At the start of this year, many African countries had organised not less than four elections since the early 1990s.³ Only a few African countries had not organised multiparty elections at all. Throughout Latin America, dictatorships were overcome in most countries during the 1980s with a return to elected democracies. Many countries, however, failed to reform their political systems and failed to recognize that democracy requires maintenance and renewal to be consolidated. It resulted in popular demands for new dispensations and constitutional reforms. Popular support for democracy is substantial according to opinion polls conducted by Gallup, the Latinobarometer and Afrobarometer. Turnout figures during elections also point to reasonable levels of support. The re-introduction of multiparty democracy in many countries therefore initially leads to widespread optimism.

Democracy requires maintenance and renewal

Yet, although multiparty elections can be said to have become fairly institutionalised, authoritarian characteristics have showed patterns of continuity. In many Latin American countries, the transition from autocracy to democracy failed to ensure significantly improved representation and the inclusion of the majority of citizens. In Africa, the balance of power between the various government branches did not change significantly as the Executive continued to dominate society. Though democracy might have become the only game in town in many countries, the rules of the game are often not that democratic yet. Despite a successful transition to multiparty democracy, consolidating democracy has thus proved more challenging. In the late 1990s, not less than thirty democracies on the African continent were rated only 'partly free' or 'non-free' by the Freedom House index.

Rules of democracy are not always democratic

One of the key challenges for the consolidation of democracy in young democracies concerns the establishment of a legal framework truly conducive to multiparty democracy that is legitimate in the eyes of the vast majority of citizens. In many young democracies, constitutional reform processes aimed at further entrenching democracy have therefore been initiated.

A legal framework is essential

Often, academics, democracy advocates and others have put much emphasis on the (ideal) content of such a newly drafted or revised constitution. Obviously, constitutional choices made with respect to the division of power in society, the Bill of Rights or the electoral system have an enormous impact on the functioning of a democracy. Yet the *process* based upon which constitutions are reviewed or new constitutions are drafted has proved to be at least as important. That is, the process greatly influences the legitimacy of the final document.

The process of constitution reform influences its legitimacy

If the process of constitutional review is seriously contested and flawed, it will be difficult to obtain a constitution that stands the test of time and creates an acceptable contract between a government and its people. As Albie Sachs notes in his preface to this handbook: *By their very nature, constitutions emerge at moments of profound importance in the life of the nations to which they apply.* Since there is so much at stake within a constitutional reform process, it is also of crucial importance that all major stakeholders (or at least a substantial majority) *endorse* the entire process prior to its implementation. Various reform initiatives have been brought to a standstill before being completed precisely because of controversies in the process.

The process should be endorsed by the major stakeholders

² Posner & Young (2007)
³ Lindberg (2006)

Partisan interests may hijack the reform process

Next to elections, constitutional reform processes have become major terrains for political contestation in young democracies. Many reform processes have failed to strengthen democracy as they became hijacked by partisan interests. While constitutional reform processes have the potential of balancing power in society and strengthening democracy, political elites have also demonstrated great capacity to use these reforms in order to entrench their own particularistic interests to the detriment of society and the democratisation process at large. A reform process that is accepted by all stakeholders and that guides the reforms in such a way that individual stakeholders are able to find compromises and build consensus is thus of great importance for democratic consolidation.

Purpose of handbook

Case-studies

The purpose of this handbook is to examine, through case studies in Bolivia, Ecuador, Kenya, Zambia and Zimbabwe whether and if so how, the Covenant's injunction for participation in the reform process, as an important part of 'public affairs', has been met. In particular, consistent with the mandate of NIMD, the study is focused on the role of political parties in this process and what the lessons are in the cases provided.

The examination is considered timely for, among other reasons, the fact that the quantitative surge of new constitutions in Africa and Latin America, proclaiming their commitment to multiparty democratic government, has not, according to some critics, resulted *per se* in a wave of quality democracies. Instead they are sometimes considered as 'hybrid-democracies', 'countries with constitutions but without constitutionalism', or 'failed democracies'.

The study focuses on the influence of the process on the constitution and its legitimacy

Thus, the question arises: are there identifiable reasons for the problems, successes or failures in this 'generation' of constitutional states? This has been a major, long-standing enquiry among students of comparative constitutional law and politics. But, rather than examining the substantive content of their constitutions or the explanation, this study's focus is concentrated upon the *processes by which the constitutions are made or reformed* for possible explanations and lessons. How might the process itself have shaped the constitution and its legitimacy, for better or worse?

The process of setting up a constitutional conference, for example, involves many potentially critical issues such as location, the representative quality of the participants, the voluntary nature of the participation, the agenda of the conference, the time-frame of consultations, discussions and decisions, the security or vulnerability of participants, etc. In this publication, the focus lies on political parties, but civil society as a partner in most of these processes is also discussed.

Core issues

The case studies in this publication focus on the history of the national constitutional processes, the influence of traditions, institutions, precedents, and the social, political contexts in which constitutions were or are formed and reformed. The roles, if any, of the various modalities by which the constitutional process can be pursued are described. These may vary considerably: from the exclusive, elitist monopoly of legislatures as the sole mode of reform, typical of systems

influenced by the Anglo-Saxon model, through various degrees of a broader involvement of society. These might be executive-controlled consultations, commissions of inquiry, national constitutional commissions or more realistically extended participation, such as constitutional assemblies or conferences empowered to recommend reforms or even authorised to make a constitution.

Here again, any experience of political parties' responses to such situations, and how they and civil society exploited or sought to drive the processes are considered. Ideally, the constitution reflects a balanced compromise of a society's conflicting interests, thus ensuring peace and stability as a legitimate and representative expression of those interests and a mechanism for maintaining that balance. Though there may be useful examples of how this balance has been achieved elsewhere, there is no pre-ordained stereotype or blueprint for the ideal constitution making and reform process.

Political parties are most likely to be actively involved in the reform process. Other organised special interest groups, including religious bodies in civil society, find a place in the more inclusive processes. Individuals sometimes also influence the process as consultants, especially in a globalized world where comparative studies increasingly shape policies and institutions, including in the field of constitutions.

Likewise, the role of the international community through bilateral and multilateral activity can have a major and varied role in and influence on the reform process. These are not only intergovernmental organisations such as the UN and the European Union, but also international NGOs whose agendas focus on constitutional issues. The practice of such bodies as the Regional Courts of Human Rights applying the international treaties have also inspired national judiciaries, acting in their interpretative or constitutional review roles, to adopt progressive reformist positions with significant but mixed results.

The five studies examine constitutional processes currently on-going in Latin American and Africa. All have a common history of colonial rule, a heterogeneous population, and exposure to autocratic, enlightenment and Marxist concepts and practices of government. In addition, the management of state power in Bolivia and Ecuador was marked by anti-colonial, as well as repeated civil wars. Kenyan and Zimbabwean independence also involved a period of armed resistance and violence, while Zambia achieved independence by negotiation and without resort to arms. All of them have been, and still are, involved in highly contentious constitutional reforms involving different approaches and processes to constitutionalism and democracy.

There is no blueprint for ideal constitution making and reform process

Actors are political parties, special interest groups and individuals

Role of the International Community

The cases provide contentious reform processes



KENYA

Capital

(and largest city) Nairobi, 1°16'S 36°48'E

Official languages

Swahili, English

Government

- President
- Prime Minister

Semi-presidential Republic

Mwai Kibaki
Raila Odinga

Independence from the United Kingdom

- Date December 12, 1963
- Republic declared December 12, 1964

Political Parties (election results 2007)

Parties Seats

Orange Democratic Movement 99 – Party of National Unity 43 – Orange Democratic Movement-Kenya 16 – Kenya African National Union 14 – Safina 5 – National Rainbow Coalition-Kenya 4 – Forum for the Restoration of Democracy-People 3 – National Rainbow Coalition 3 – Chama Cha Uzalendo 2 – Democratic Party 2 – New Forum for the Restoration of Democracy-Kenya 2 – Party of Independent Candidates of Kenya 2 – Sisi Kwa Sisi 2 – Forum for the Restoration of Democracy-Asili 1 – Forum for the Restoration of Democracy-Kenya 1 – Kenya African Democratic Development Union 1 – Kenya African Democratic Union-Asili 1 – Kenya National Democratic Alliance 1 – Mazingira Green Party of Kenya 1 – National Labour Party 1 – People's Democratic Party 1 – People's Party of Kenya 1 – United Democratic Movement 1 – Total: 207

Kenya's quest for a constitution

Patrick Lumumba

Summary

Kenya's constitution making process that ended with a national referendum in 2005 is a classic example of the difficulties of constitution making in a relative peaceful time. Divergent political interests and political intrigues can stand in the way of unanimity for even a national project of great significance, such as a new constitutional dispensation. Although the institutional set-up of the review mechanism itself guaranteed both inclusiveness and autonomy, particularistic political interests did manage to derail the constitutional review process.

However, it has a silver lining to it because the case illustrates some of the pitfalls and minefields that other countries can learn from as they embark on constitution making. These include ensuring creation of a stable political order, recognizing ethnic diversity, strengthening legal and institutional foundations and accommodating governance systems that are in harmony with people's aspirations.

1. Kenya's socio-political context

Kenya lies across the equator on the East Coast of Africa. It borders Somalia, Ethiopia, Sudan, Uganda, Tanzania and the Indian Ocean. The country covers an area of 583,000 km². Its current population is estimated at approximately 37 million. Capital city Nairobi has a population of approximately 3.5 million people. The other main urban areas are Mombasa, a port on the Indian Ocean and Kisumu, on the shores of Lake Victoria.

While there are over 70 ethnic groups in Kenya, five of them constitute 70% of the total population: the Kikuyu, Luo, Luhya, Kamba and Kalenjin. Not one single group constitutes a majority. The Kikuyu were most directly involved in the independence struggle and still hold a dominant position in public life. The Luo significantly contributed to Kenya's anti-colonial efforts with renowned politicians as Oginga Odinga. The Kalenjin, although smaller in numbers, are also considered an influential political faction with former President Daniel Arap Moi amongst its members. The main ethnic groups are geographically based to some extent, with Kikuyu homeland centred around Mount Kenya, Luo territory on the shores of Lake Victoria and Kalenjin living mostly in the Rift Valley.

Kenya attained independence in 1963 as a multiparty democracy under a parliamentary system. Only one year later the two leading parties Kenya African

In the early 1990s
multiparty politics
re-emerged in Kenya

National Union (KANU) and Kenya African Democratic Union (KADU) merged to make Kenya a *de facto* one party state. This situation was shortly disrupted by the rise of the Kenya People's Union (KPU) between 1966 and 1969, but then prevailed until 1982. In that year, the constitution was amended to formally introduce a one party state, limiting political activity to KANU only. In 1991, multi-party politics re-emerged in Kenya.

Kenya has a presidential system in which the president is directly elected, has a five-year mandate and a maximum of two terms. The winning candidate needs a qualified majority to obtain a seat in parliament and at least 25 per cent of the votes in at least five of the eight provinces. The president controls the calendar of the parliament and has constitutional powers to prorogue or dissolve parliament at any time. The executive power is balanced by a legislature that is semi-independent. Members of Kenya's unicameral, 210-seat parliament are elected in a 'first past the post system' for a five-year term. 12 additional members are appointed by the president commensurate to their parliamentary representation. Ministers and deputy ministers are to be collected from members of parliament without replacement.

A powerful Presidency

The over-concentration of power in the presidency and a 'first past the post' electoral system, combined with political mobilisation along ethnic lines has led to a volatile zero-sum political power game among the elite.

2. Historical overview of constitutional reform processes in Kenya

The 1963 Independence
Constitution has been
amended 39 times

The clamour for a new constitutional dispensation in Kenya is a product of the 'assault' on the constitution from the early years of independence. The independence constitution of 1963 was fundamentally a document accepted by the politicians of the day in the spirit of *seek ye first the political kingdom and the rest will come later*. These politicians did not embrace pillars like a bicameral parliament or a parliamentary system, for that matter. Since independence, the constitution has been amended 39 times during its 45 year history.

The first Constitutional
amendment led to an
increase of Presidential
power

The first ten amendments to the Constitution, implemented in 1969, were far reaching and touched on all the pillars of the Constitution: the Executive, the Legislature, the Judiciary and Devolution. They emasculated all arms of the state and concentrated power in the Executive arm. The result was referred to by legal scholars and political commentators alike as an imperial presidency.

Subsequent to a failed coup in 1982, a one party state was formally introduced closing the modest democratic space that was left. The ruling party KANU, lead by Daniel Arap Moi, became the main political engine and made state organs subservient to its dictates. The constitution was amended to remove tenure of judges, and detention without trial became a common occurrence. Early processes of constitutional reform were clearly used to entrench Executive dominance over society.

However, a struggle against the Moi regime soon emerged and boiled over after the infamous 1988 queue-voting debacle where the absurdity of the KANU-led

politics took its ugliest form. Although there were obvious shorter queues for the government party, it won. Electoral Commissions stood in askance and watched helplessly in the face of an all-consuming – no-nonsense brooking Executive. However, the changed international politics after the collapse of the Berlin wall in 1989 and Kenya's thirst for change energized the clamour for it. The call for a new constitutional dispensation became one of the main strategic reform objectives. Moi succumbed to calls for the re-introduction of multiparty politics, not because of love for country but because the dictates of local politics and the new world order gave him no choice.

Local politics and a new world order led to the re-introduction of a multiparty system

The events heralding this re-introduction revealed three streams of pro-democracy groups. First were the emerging civil society and the religious sector that had no immediate or direct interest in politics but demanded a new constitutional dispensation. Second were individuals within KANU who, having read the signs of the times, were ready to jump ship and join the winning side. And, third were politicians who had been punished by the Moi Regime through detention or criminalized politics. It is noteworthy that these defining events were taking place a year before the elections in 1992.

Supporters were civil society, former KANU politicians and suppressed activists

While the first stream from civil society and the clergy rightly asserted that the country's salvation lay in a new constitutional dispensation before the 1992 elections, the newly converted politicians, most of whom were themselves born and bred in KANU, thought the re-introduction of multiparty politics spelt death for KANU. Under the aegis of the all-encompassing Forum for the Restoration of Democracy (FORD), this group thought that the KANU would lose the elections. However, the KANU habits, still deeply ingrained, led to a divided opposition as FORD split into FORD-Asili, FORD-Kenya and the Democratic Party (DP). Amidst the rancour of politicians, the constitution took back stage.

As opposition politics took root, civil society and the clergy remained faithful to their call for a people-driven constitution while the political class moved to seize power via the ballot. When general elections were called in 1992, the divided opposition lost and soon realized that the country's true salvation lay not in changes designed to lull the country into a false sense of change but in a total overhaul of the constitution. The period between 1992 and 1997 was therefore characterized by fervent calls for a people-driven constitution. In 1995, the then President, Daniel Moi, suggested that he would call in foreign experts to review the constitution. If he had done so immediately, perhaps that route would have been taken. However, it was a typical ruse designed to cool political temperatures and buying time.

The constitution was placed on the agenda, but tactics were used to slow the process down

In 1996, events took a different dimension, with the clarion call 'no reform no elections'. Street protests and state violence characterized the period leading up to yet another tranquilizer, baptized Inter Party Parliamentary Group reforms (IPPG). The IPPG reforms entailed a number of reforms which focused on sedition, detention without trial and public gatherings. With it, the KANU regime again poured cold water on the constitutional reform and, once again, the political class jumped the ship of reform and took the lifeboat of political interest, which unfortunately did not dock at their political port of hope – success in the 1997 elections.

After the 1997 elections, the political class in the opposition, for a second time, realized that piecemeal legislative amendments would not solve the governance issues, so this time around, the pressure for review took a firmer course. Initially, the government, through parliament, took the initiative and enacted the constitution of Kenya Review Commission Act, which provided for the creation of a commission of fifteen commissioners to be appointed on the basis of expertise and provincial representation. The commission, which was to be served by a full time secretariat, was to collect and collate views from Kenyans and to produce a draft Bill for alteration of the constitution, which would receive the final endorsement by parliament. In protest, civil society, the clergy and a large segment of the opposition refused to participate in what was then referred to as the '*Parliament Process*' because it was judged to be Executive-controlled and therefore not people driven. The protesting group congregated at Ufungamano Hall, a facility owned by the National Council of Churches of Kenya (NCCK) in Nairobi, forming what they named the 'People's Commission' but which was eponymously christened the 'Ufungamano Initiative.'

Two parallel initiatives tried to revive the issue of constitutional reform

With two parallel initiatives, the '*Parliamentary Process*' claiming legal legitimacy and the Ufungamano Initiative claiming moral authority, Kenya was at daggers drawn. However, the situation was to receive a major boost when Yash Pal Ghai, a renowned Kenyan constitutional lawyer then teaching in Hong Kong, was appointed as the chairman of the Parliamentary Process. He immediately took the position that the two processes had to be merged as a condition precedent to a unifying review process. Through intense shuttle diplomacy, a merger was brokered. The CKRC Act was amended to ensure 'people' participation in all stages of the process, and further to accommodate some commissioners drawn from the Ufungamano Initiative.

An expert lawyer merged the two initiatives

The commissioners' number thus increased from fifteen to twenty-nine including the Attorney General and the Secretary as *ex officio* Commissioners.

At the time of crafting the CKRC merger Act in 2000, it was also agreed and understood that the process would be entrenched in the constitution to immunize it from political mischief. This was not to be. This omission would prove costly.

Omitting the entrenchment process in the constitution was a mistake

The still ongoing constitutional reform process in Kenya builds on the legacies of previous attempts. As was demonstrated in this chapter, these reform processes:

- Were initially captured by ruling elites striving to secure their particularistic interests by strengthening the powers vested in the Executive to the detriment of effective democratic checks-and-balances.
 - Gradually became the main political arena where confrontations over Kenya's democratic consolidation process surfaced between the ruling elite, pro-democracy groups within society, opposition blocks and international donors.
 - Finally resulted in a review mechanism in 2000 that was more inclusive than ever before and seemed to have been granted sufficient institutional autonomy.
-

3. The modality chosen for the constitutional reform process 2000-2005

The road to Kenya's constitutional review process between 2000-2005 has been marred by suspicion and some would say an absence of sustained political goodwill. However, the Act that was to govern the current reform process was detailed and provided hope. After President Moi had frustrated a timely reform prior to the 2002 elections, popular expectations rose when the opposition National Rainbow Coalition (NARC) fought and won the 2002 elections on the platform of delivering a new constitution within 100 days.

Institutional set-up of Kenya's constitutional review process

The guiding principles of the process leading to a new constitution indicated that this process should:

- Be democratic, by ensuring the involvement of the largest majority of Kenyans
- Lead to a final product that guaranteed peace and national unity in order to safeguard the peoples' well being. It therefore aimed to establish a system of government that enshrined good governance, constitutionalism, the rule of law and gender equity as its essential ingredients.

These overall principles thus guided the institutional set-up of the constitutional reform process. Initially, a panel of experts was suggested as a medium of review. Others expressed the need for a constituent assembly. The panel was rejected as elitist and the constituent assembly was rejected, as this set up would only be suitable in countries with a breakdown of constitutional order. Ultimately, the following institutions were given specific mandates to carry out Kenya's review process:

- a) *The Constitution of Kenya Review Commission (CKRC)*
- b) *The Constituency Forums*
- c) *The National Constitutional Conference*
- d) *Parliament*
- e) *The referendum*

a) The Constitution of Kenya Review Commission (CKRC)

This primary organ of review consisted of 29 commissioners (of whom two, the Attorney-General and the Secretary were *ex officio*). Commissioners were appointed by the President upon nomination by the National Assembly, taking Kenya's regional and ethnic diversity into account. The President appointed the chairperson from among the commissioners. The commission reflected Kenya's ethnic, geographical, cultural, political, social and economic diversity, and the principle of gender equity. Commissioners were appointed because of their legal qualifications or experience in public affairs. Their tenure was to last until the conclusion of the review process, while no specific finish and time-line was agreed upon.

Members could be dismissed only by the Commission itself, and only with a good reason. They were bound by a code of conduct to prevent conflicts of interests and other improprieties. These characteristics were necessary for the discharge of its functions, the principal one being preparation of a draft constitution. The overall mandate and specific tasks of the Commission were framed into different stages:

The basic principles were agreed upon at the outset of the process

Delegates were to be representative of the nation

The President appoints the delegates

No time line was agreed upon

Delegates were bound by a code of conduct

- Stage I – Civic education: preparing the people for participation

The first stage was to prepare the Commission as well as the people for the review. The Commission was to examine its mandate and terms of reference, and conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues. The public was to be enabled to understand and evaluate the present constitution as well as the constitutional experience of other countries. People's awareness of constitutional issues and the review progress were to be facilitated by establishing documentation centres in every district as well as through the electronic and printed media. The Commission fulfilled this mandate through its own efforts and professional input into its progress.

Inclusion of the population

- Stage II – Research, studies and seminars: defining the issues

The Commission conducted many studies on constitutional and socio-political issues in order to define the mandate and make it operational.

Defining the mandate

- Stage III – Public consultations: listening to the people

Next, the Commission consulted individuals, groups and organizations. In this process, the Commission was required to visit every constituency and to write memoranda and record oral presentations in urban and rural areas. After these consultations, the Commission was to prepare its report and recommendations, including a draft Bill to alter the Constitution. The Act required that the Commission's report and recommendations reflected the people's wishes. The expertise and the independence of the Commission ensured that the objects of review stipulated in the Act were addressed and that national interest would override party or factional interests.

The constitution ought to be a reflection of the people's wishes

- Stage IV – Writing the report and preparing the draft Bill

The Commission was required to analyse and collate the views of the public and, on the basis of these, write a report and prepare a draft Bill to alter the Constitution. Pursuant to this aspect of its mandate, the Commission developed an analytical scheme enabling it to process all data received and to present the outcome at national, provincial, district and constituency levels.

Preparation of a draft

- Stage V – Debating the commissioner's report and recommendations

The next stage of the review was distribution of the report, the recommendations and the draft Bill as prepared by the Commission for examination by the public and civil society. This step was to ensure that members of the public were involved in the review process. The documentation centres communicated this through radio, television programmes and numerous publications.

Distribution leading to engagement

It is publicly known that although the Commission ultimately discharged its statutory mandate to the letter, its life was not spared from internal intrigues. Some were 'home-grown' and others were introduced through patron-clientelist manipulation-courtesy engendered by the provincial / ethnic selection of commissioners.

b) Constituency Forum

This Forum was established for every constituency to debate, discuss, collect and collate the views of members of the public. The forums also provided consultation with the Commission. The composition of each forum was determined by the people of each constituency, and their political and other leaders.

c) The National Constitutional Conference, also known as 'The Bomas'

The National Constitutional Conference was to be the most representative body assembled to agree on the Constitution. It consisted of 629 elected members:

- 223 members of the National Assembly;
- 210 representatives of districts elected by the County Councils;
- 29 members of the Commission (as non-voting members);
- 41 persons each representing a political party; and
- 126 representatives of religious, professional, women's groups, trade unions, NGOs and other interests chosen in accordance with regulations made by the Commission.

Once elected, the delegates to the Conference had limited interaction with their electing constituencies, but were guided by the views collected and collated by the Commission. These were made available to the delegates through the National Report, the constituency reports and the audio and video recordings. In order to ensure that the delegates did not depart from the views as collected, the Constitution of Kenya Review Commission enjoined all organs of the review to ensure that the final document faithfully reflected the people's views. The Commission prepared the delegates of the Conference through seminars and workshops.

All views were incorporated

The Conference conducted its affairs through a plenary session of all delegates and through thirteen thematic committees. In accordance with the Conference Rules, all decisions of the committees were discussed and to be adopted by the plenary of the whole Conference. In addition to the thirteen committees, the Conference also established a 'Conference Consensus Building Group' (CCBG) to build consensus on outstanding contentious issues and to report its decisions to the plenary for discussions and adoption. Ultimately, when all committees had discharged their functions, their resolutions were adopted by the Conference on the 15th day of March, 2004.

A consensus building group was formed

Although the National Constitutional Conference produced a draft constitution popularly known as the 'Bomas Draft', discussions leading to this result were highly sensitive – various stakeholders even walked out of the Conference. Following the withdrawal of civil society organizations, the entire government later pulled out when the draft contained clauses that would significantly reduce the mandate of the Executive. The draft was also torpedoed through a number of court cases and statutory amendments. One of these cases questioned the procedure whereby authority was given to parliament to enact the Draft Constitution Bill. Kenya's Constitutional Court then ruled that it was unconstitutional for parliament to usurp the people's sovereign right to replace their constitution and that the people of Kenya had the right to ratify the Draft Bill in a mandatory referendum or plebiscite. Originally, a referendum was to be held only to decide those issues not resolved in the National Constitutional Conference but this was then amended to make the entire document subject to a 'yes' or 'no'.

The referendum was on the whole of the document instead of just some issues

d.) Parliament

Government revised parts of the Draft Constitution related to Presidential power

Unhappy with the document, the government allowed parliament to re-open the constitutional debate and alter the 'Bomas Draft'. Without guiding principles as inclusiveness and autonomy, a select group of (government affiliated) Members of Parliament came up with a revised version that, most importantly, did not reduce the Executive mandate. This led to the version presented to Kenyan citizens in the November 2005 referendum. With the government publicly campaigning in favour of the document and civil society organizations and opposition parties sensitizing against it, the campaign concentrated more on political personalities and approval (or disapproval) of the incumbent government than on the constitutional content issues.

Despite the positive lessons to be learned from the 'Bomas process', the absence of an agreed procedure on how the 'Bomas draft' would be enacted and submitted to a referendum left the door open for government to re-open debate in parliament and amend the draft which eventually resulted in a defeat at the referendum.

e.) The referendum

The new constitution was rejected in the referendum

During a referendum held on the 21st day of November 2005, the doctored draft constitution was rejected by 57% of the electorate bringing to nought Kenya's quest for a new constitution. Electoral promises made by the Kibaki regime to come up with a new constitution within hundred days, proved to be yet another constitutional illusion three years after he had been elected in office.

4. The constitutional reform process in relation to society at large

Citizens coalition

A large number of organizations (religious and secular), NGOs and political groups have been important driving forces for constitutional reform in Kenya. Many of these actors regrouped into the Citizens Coalition for Constitutional Change. They continuously expressed the need for a systematic review of the constitution. By 1990, such demands had been made to the Kenya African National Union (KANU) review committee established by the then President Daniel Moi.

Lawyers involvement

As demand for a comprehensive review gained momentum after the 1992 elections, a proposed new constitution, entitled *Proposal for a Model Constitution* was prepared by the Kenya Human Rights Commission, the Law Society of Kenya and the International Commission of Jurists Kenya Chapter. This proposed constitution formed the basis of extensive consultations and workshops from 1994 onwards, organized by civic, religious and political organizations.

Active civil society

Throughout the 2000-2005 review process, civil society representatives actively participated within the NCC proceedings and contributed in a significant manner to ongoing debates. In the run-up to the referendum, they were able to reach the vast amount of Kenyans, although a content-based campaign was replaced by political bickering.

5. The influence of the international community

Although it cannot be gainsaid that some of the Kenyan politicians, clergy, and civil society were the main drivers of the clamour for constitutional change, the covert and sometimes overt involvement of the international community played a critical role in the early 1990s in reminding the Moi regime that business would not be normal if a new and democratic order was not introduced. The European Union and, the United States of America were prominent in their demands. Quietly and subtly, a number of politically inclined Western NGOs also offered financial and other support to different civil society groups to sustain their struggle for a new Constitution.

Covert and overt
involvement of the
international community

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At the interstate level, the United States of America's embassy, on its part, affirmed its policy towards the Moi government with reduced funding to the country. The U.S. government stated its support for the constitutional reform process through its Ambassador who spoke repeatedly in support of a broad-based process of constitutional reform. It further reiterated that future development aid would be pegged on a government system that could only be attained through a new constitutional dispensation. The British Embassy and Western European countries supported the American position and stated categorically that nothing short of a comprehensive constitutional review would be acceptable as a condition precedent to resumption of normal development cooperation. It is these conjoined efforts that gave impetus to the review process at a time when the Moi administration was impervious to local demands for change.

More recently, through the funds and expertise provided at different stages of the 2000-2005 review, the international community continued to be an important actor when it came to the constitutional review process.

6. Lessons Learned

After the rejection of the Proposed New Constitution referendum on the 21st day of November, 2005, the following lessons can be drawn from this uncompleted exercise:

- The government should stand behind the constitution making process.
- Agreement between political and civil society elites can enhance the possibility of one fruitful process instead of two parallel paths. Parallel paths, showed the Kenyan case, do not work, as can also be seen in Zambia and Zimbabwe.
- The critical pillars against which a new constitution must be tested should be identified and agreed upon before the exercise begins, such as a clearly set end point.
- The way outreach to and inclusion of the population was arranged, from an early point in the process was exemplary.
- Deadlock breaking mechanisms, such as the erection of a consensus building group, within the review process has proven to be a good way to integrate views. This is advisable in other processes too.
- If it is agreed upon that a referendum as the final adoptive act will be issue-based, it needs to remain issue-based.

- If review is being undertaken in the context of an existing constitution, it ought to be entrenched in the existing constitution to immunize it from court cases.

It is noteworthy that following the disputed 2007 presidential elections, Kenya's politics have taken a dramatic turn leading to the creation of a grand coalition whose key features include the amendment of the constitution to create the offices of a Prime Minister and two Deputy Prime Ministers. In addition, the National Accord and Reconciliation Act, 2008, has been enacted and pegs the dissolution of the coalition to the enactment of a new constitution. Drawing from the lessons of the failed attempt at constitution making, in the month of April 2008, the coalition government introduced two bills in parliament to re-commence the review process. These are, The Constitution of Kenya Amendment Bill 2008, which seeks to anchor the review process in the current constitution and the constitution of Kenya Review Act, which seeks to create a committee of experts to conclude the review process by drawing from the previous experience. It opened the next stage in a rather problematic constitution-making process that began in 1990.

Kenyan Centre for Multiparty Democracy (CMD-K)

CMD-K was instituted in 2004 by Kenyan political parties and forms a unique interparty dialogue platform, funded by NIMD with additional financial support from UNIFEM, Heinrich Böhl and UNDP. In five years it has acquired a respected position in the Kenyan political arena as it has proved to be able to form a strategic nexus between political and civil society. CMD-K facilitates dialogue on the constitution process amongst others through the so called 'Inter Parties Forum for Constitutional Review', which has published a position paper entitled *Towards Completion of the Constitution Review Process*. This was forwarded to the parliamentary committee.



BOLIVIA

Capital

(constitutional, judicial)
(administrative)

Sucre, 19°2's 65°15'w
La Paz, 16°29's 68°8'w
Santa Cruz de la Sierra,
17°48's 63°10'w

Largest city

Official languages

Spanish and 36 native
languages

Government

- President
- Vice President

Republic

Evo Morales
Álvaro García

Independence from Spain

August 6, 1825

Political Parties (elections 2005)

Governing party

Movimiento al Socialismo (MAS) 72

Opposition parties

Poder Democrático y Social (PODEMOS) 43

Frente de Unidad Nacional 8

Movimiento Nacionalista Revolucionario 7

Total: 130

Total votes 3,102,417

Registered voters 3,671,152

Bolivia: frustration and lessons learned from the Constitutional Assembly

Carlos Böhrt Irahola

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Summary

Since 2005, the Republic Bolivia entered a new political phase. The indigenous and former leader of the *Cocaleros*, Evo Morales, won the elections in the first round. He is the first Bolivian president of indigenous ancestry. The period 2006-2008 has been one of political turbulence and social unrest, but also of hope for more justice and equality for the indigenous population of Bolivia. Evo Morales won the elections with an agenda for reform promising to rewrite the constitution with the objective of enabling previously excluded populations groups to fully participate in the political process. During 2007-2008, the National Constitutional Assembly was installed, but instead of uniting a much-divided society, it caused new political battles over regional autonomy, indigenous autonomy, the balance of power, the question of the capital of the country and distribution of national resources. Meanwhile, the new constitution has been approved by a popular referendum in January 2009 but the country remains politically divided. The divisions continue to paralyze the government from time to time while not much progress is made in the implementation of major government policies.

1. Bolivia's socio-political context

There could be no dispute over the results of the 2005 presidential elections in Bolivia. Evo Morales won the elections with 54% of the vote in the first round. For the first time in the Bolivian history, the need for a run-off vote was avoided. The movement, explicitly not a political party, backing Morales' candidacy, the MAS (*Movimiento al Socialismo*), won 70 of the 130 seats in the lower house. Evo Morales won the elections with a reform agenda promising to rewrite the constitution with the objective of enabling the previously excluded populations groups, mainly the country's indigenous population,⁴ to play a leading role in politics. He promised a more direct and participatory democracy, with an increased role for popular involvement. From the emergence of democracy in 1982 until 2005, electoral contests had resulted in compromising coalitions held together by the power of executive office. As a consequence, the political party system came to be seen as corrupt and exclusive in the eyes of the population.

In 2005, Morales' movement – not a political party – won the elections

Inclusion of indigenous people

The distribution of land was one of the main political issues of Evo Morales' reform agenda. In the past 50 years, two parallel and interrelated processes have taken place in Bolivia. In the poor highlands and valleys (La Paz, Cochabamba, Chuquisaca, Potosí and Oruro), cropland was distributed among the indigenous Aymara and Quechua farming families and resulted in scattered land ownership.

⁴ There is still a discussion on the categories of identity and the percentage marked as indigenous. According to the last national population census (2001) the majority of the indigenous population are the Quechuas (30%), Aymaras (25%), Chiquitanos (2.2%) and Guaranies (1.5%).

This created an extremely high amount of small-scale farms, forcing people who could not survive on such tiny plots to migrate to cities and the lowlands. At the same time, in the departments of Santa Cruz, Beni, Pando and Tarija, where only a minority of the indigenous population live, plenty of fertile land was available and this made it easy for a small number of western-cultured families to amass large agricultural properties and to develop Bolivia's incipient but still uncompetitive market oriented agriculture. Both processes resulted in an unequal distribution of land between the indigenous and western-cultured population.

Land division reform

Since 2002, Evo Morales and his agenda for political reform started to gain increasing support and caused a turbulent two years leading up to the 2005 elections. The elites of Santa Cruz and Beni, followed by those of Tarija and Pando, opposed Morales' constitutional reform plans. They shifted their focus on the reorganization of the country into autonomous regions, pushing for demands to decentralize the country administratively. So, while Evo Morales and the MAS party became popular in the highlands and valleys, the 'half-moon'⁵ departments also joined hands between 2002 and 2005.

The opposition unites

As in most countries in Latin America, Bolivia's government features an executive presidency. Therefore, the regime is personalized, and the President's will is the *factotum* of policy, influenced by the power group(s) surrounding him.⁶ The Executive's predominance is so strong that weakness or even subordination has been a constant feature of the Legislative and Judicial branches of government throughout Bolivian history. Although these branches are independent and a formal balance of power is written into every constitution Bolivia has had since 1826, the Executive dominates the other two branches.

The Executive has most power

This personalized regime was reinforced by the National Revolution, which had led to a single-party political system from 1952 to 1964. Following this era, Bolivia experienced a period of military authoritarianism, which in turn has been succeeded by democratic elections since 1982. In the period preceding 2005, Bolivia had a moderate pluralistic party system, with two groups of parties leading political and parliamentary pacts: on the one hand three political parties, which despite their different origins, ended up sharing the same liberal ideology and program and three others with a more grassroots and equalitarian orientation. These six political organizations supported different governments during this period through parliamentary compromise. This resulted in weak programmatic based parties and coalitions, often based on the division of civil servant positions in return for support. It created favorable conditions for corruption, which – as we have seen in the 2005 elections – led to the breakdown of the 'democracy by compromise' together with the collapse of the political party system.

Political parties had not been institutionalized, which lead to a break down of the system

2. Historical overview of the constitutional reform process

The existing constitution in Bolivia was approved in 1967 by a Congress elected with constitutional powers, even though the country was governed at the time by a military junta. Seeking legitimacy, the military called elections, which

The constitution to be reformed was established by the military junta

⁵ The name is because of the half-moon shape of these departments, from the northern end (Pando) to the south (Tarija), extending eastward as well.

⁶ At present, after the December 2005 elections, the political system still operates under these modalities.

empowered the legislative branch of government to amend the constitution. The fundamental structure and guidelines of this constitution are still in force today, despite major changes introduced in 1994 and 2004.

The military junta assumed *de facto* power in November 1964, followed by a period of authoritarian governments that lasted until the late 1970s. In 1979 and 1980, two round elections were held, without managing to elect the country's new officials with a clear majority. This led to unstable interim governments ending in a violent attempt by general Luís García-Meza to prevent an election victory of the Popular and Democratic Union (UDP),⁷ a coalition of center-left parties, which had won a simple majority in the 1980 elections. Nevertheless, the UDP managed to, democratically, take office in October 1982, which can be seen as the beginning of modern democracy in Bolivia. However, after a few months in government, the economy got out of control, spiraling into one of the steepest inflationary processes in world history. Undoubtedly, this economic meltdown was largely due to the boycott of government policies by the opposition parties in the National Congress. The debacle was finally resolved by shortening UDPs term of office and holding national elections again in July 1985.

This experience of UDP was a crucial lesson learned for political parties: to be a successful government, a parliamentary majority is necessary. Consequently, in the following elections, the Nationalist Democratic Action (ADN) and Revolutionary Nationalist Movement (MNR), a right wing coalition, signed a so-called 'Pact for Democracy'. This first political and parliamentary agreement enabled this coalition to complete the full term for the first time and it successfully implemented the 'new economic policy' oriented toward re-establishing macroeconomic balance and controlling inflation. The coalition approached the Bretton Woods multilateral financial institutions, which resulted in the implementation of the structural adjustment policies as advocated by the so-called 'Washington Consensus'.

From 1985 to 2003, five national elections were all won by the opposition candidates, chosen in the second (indirectly chosen by the congress members) round election through post-electoral parliamentary compromises. Therefore, this period has been called 'democracy by compromise'. However, these political arrangements had a negative side effect: the Legislative was overpowered by the Executive's will, seriously threatening checks and balances and consequently diminishing parliament's power to hold the Executive accountable. It was only a matter of time to bring the Judicial Branch under control as well, since its authorities were appointed by the National Congress. Under these conditions, political parties adopted a politics-as-business approach that caused high levels of corruption that invaded all levels of the government and severely eroded the credibility of any protagonist of representative democracy.

As a consequence, the indigenous peoples and a variety of societal sectors started to seriously challenge the political system's legitimacy, representativeness and fairness, since the early 1990s. In 1990, the first protest march of the lowlands indigenous peoples from the eastern and northern part of Bolivia was organized. It called for land rights, territorial autonomy, and respect for their identity. In the end, they succeeded in forcing political parties to partially amend

In 1982 Bolivia had an economic crisis

Necessity of a parliamentary majority

Too much compromise led to a decline in credibility

Marches of indigenous people led to changes in the constitution

⁷ The UDP combined the MNR-I (leftist MNR), the Movement of the Revolutionary Left (MIR), affiliated to international social-democrats, and the Communist Party of Bolivia (PCB), with diverse origins and orientations, although relatively united by a certain State-centered concept of economics.

the constitution. In 1994, the recognizing of the 'multi-ethnic and plural-cultural' nature of Bolivian society was incorporated in the constitution. Moreover, the Judicial and Legislative branches were transformed. A new mixed electoral system was accepted based on the German model⁸ which combines election of parliamentary seats on the basis of proportionality and a number on a 'first past the post' constituent basis. The new electoral system was applied for the 1997 elections, with 25 to 30 representatives elected as single constituent candidates, most of them indigenous Bolivians. However, this reform did not result in a better performance in the political party system in the eyes of the population.

By 2002, the party system had an unquestionably bad reputation. In protest against the system and its non-responsiveness to their basic needs, the indigenous peoples of the lowlands began another march in Santa Cruz, heading for La Paz, about 1000 km away. The protesters demanded 'popular sovereignty, territory and natural resources'. Echoing their protest, the 'National Council of Markas and Ayllus of Q'ollasuyo' (CONAMAQ), a highlands indigenous organization, began another march in Challapata (Oruro), 400 km from La Paz. Both protests joined in a place called Sica Sica, and totaled nearly 10,000 demonstrators by the time they reached the seat of government in La Paz. This impressive march resulted, among other things, in a demand for a Constitutional Assembly. Such an Assembly would need to redesign the governing structure of Bolivia. It forced the government and the political parties to include the function of a Constitutional Assembly in the existing constitution. It took until 2004 to partially honor this request.

In 2004 a Constitutional Assembly came into being

In August 2002, the second term of 'Goni' Sánchez de Lozada, the last government formed on the basis of 'parliamentary compromise', commenced. Less than fifteen months later, due to violent confrontations between protesters and the policy forces, especially in the city of El Alto, the President was forced to resign. However, the acceptance of the demands of the so-called 'October Agenda' of the demonstrators remained pending. They demanded a referendum on the sale of natural gas, a new Law on Hydrocarbons (including nationalization of gas fields) and a Constitutional Assembly to prepare a new constitution. The resignation of President Sanchez de Lozada proved that the grassroots movements gained increasing power in Bolivia and that their demand for a change in the political system and for a nationalization of the natural resources gained momentum. Vice President Carlos Mesa-Gisbert succeeded Sanchez de Lozada. However, he could not remain long in office either, although he did pursue the 'October Agenda' and organized the referendum on gas. He resigned in June 2005, ending the period of 'democracy by compromise'. It meant the final collapse of the political party system.

The President resigned

The outcome of the subsequent December 2005 elections were undoubtedly the expression of the popular will of the majority of the Bolivian population. The Movimiento Al Socialismo (MAS) and Evo Morales won the elections on the basis of the popular discontent with the traditional political parties while benefiting from the consolidated democratic institutions in Bolivia. The traditional parties who lost the elections accepted Evo Morales' victory and in January 2006, the historic inauguration took place. The disintegration of the traditional party system and the election of an indigenous, coca-leaf trade union leader as

The victory of Morales' MAS paved the way for constitutional change

⁸ The official body created the Constitutional Court and the Judicial Council, with all the implications thereof. The legislature elects over half of the deputies (70 out of 130) by simple majority, by single-person units, and the rest in two-person departmental units, by a proportional formula, so that each party or coalition ends up with a total number of seats corresponding to the number of votes they received. This model was described by Nohlen as a "personalized proportional system".

President initiated a new period in Bolivia's political history, paving the way for a Constitutional Assembly, as advocated in the MAS election campaign.

3. Modality chosen for the constitutional reform process

The existing constitution states that *total reform* of the constitution can only be done through a Constitutional Assembly, called by a 'special law' enacted by Congress by a two-thirds majority of those in attendance. On 4 March 2006, parliament enacted the law for *total reform*, required by the constitution and scheduled elections for the Constitutional Assembly 2nd of July. This Assembly, unlike several past editions, was organized meticulously following the constitutional rules for such reforms. Therefore, this reform process was considered to be the first time that a convention was summoned with constitution-making powers as recognized by the existing constitution since the great General Constitutional Congress of 1826.

Ever since 2002, the traditional political parties, the societal sectors they represent and, above all, the elites of the 'half moon' departments were opposed to holding a Constitutional Assembly. They had argued that this reform mechanism was not recognized in the constitution. They also argued that the managerial difficulties for organizing a Convention of the size and nature demanded, combined with the feeble political party system, would pose a risk for the country's stability. The first argument was obviously overcome by the partial amendment in 2004, when the feature of a Constitutional Assembly was formally incorporated into the existing constitution. Fears about the collapse of the political system were overtaken by the unfolding of the grassroots actions such as the march of the indigenous peoples of 2002, the tragic, violent conflict of October 2003 (which resulted in the October Agenda) and above all, the election of Evo Morales with a convincing 54% of the votes cast in December 2005.

Elections of the Assembly and the request for autonomy

In the elections for the Constitutional Assembly, the MAS won 137 Assembly delegates (53.7% of the votes but not a two-thirds majority); PODEMOS won 60 representatives (23.5%) and 58 representatives were distributed amongst the 14 minority groups. The Constitutional Assembly started its work on August 6, 2006, in the city of Sucre, as described by law as the venue for this occasion. However, when the Constitutional Assembly law had been debated in Congress in March 2006, the 'half moon' opposition delegates had requested the simultaneous organization of a national referendum on departmental autonomy. This request was approved and enacted by the Congress at the same time of the enactment of the law on the referendum on the Constitutional Assembly. Hence, on July 2, 2006, the Bolivian voters had to cast two ballots: once to elect the delegates for the Constitutional Assembly and the second for the referendum on regional autonomy. The results of both votes could not have been more contradictory: the four departments of the 'half moon' voted 'Yes' for departmental autonomy, ignoring Evo Morales' public request to vote against autonomy, but at the same time backed MAS candidates for the Assembly, even in the department of Santa Cruz.

The organization of the Assembly was done meticulously

Opposition arguments failed to prevail

Elections for the delegates in the Assembly

Composition of the Assembly

The Constitutional Assembly's 255 representatives included 210 members elected as 70 three-person groups (two for the winning political organization and one for the second place group) and another 45 representing the nine departments, of which each five, awarding two seats to the majority and one to the second, third and fourth-place political organizations. The Assembly election was designed to strike a balance, albeit partial, in its composition between population, territorial-regional, cultural-ethnic and, of course, political-ideological representation. The 70 three-person groups were used to represent the population⁹ and, imperfectly, ethnic diversity, whereas, by giving each of the nine departments each five delegates, the regions would be represented as well. The 70 groups, however, represented ethnic diversity only imperfectly because the lowland minority indigenous peoples had no decision-making input since they were unable to be elected. Also, the use of the shared majority rule¹⁰ for determining the allocation of seats was a political decision to assure that no political organization would obtain a two-thirds majority of the Assembly votes.

Representative
composition

The Assembly's first task was to prepare its internal regulations. This proved difficult because the MAS and the delegates of the opposition could not reach an agreement about the number of votes required to approve the new constitutional text (simple majority vs. two-thirds). Thus, debates stretched on until mid-February 2007, when both sides were forced, by the society tired of their wrangling, to compromise. The overall new constitution would be approved by a simple majority in a referendum, whereas the article-by-article approval, and the approval of the final revised text of the new constitution in the Constitutional Assembly, would require a two-third majority.

Simple majority versus
two-thirds

The functioning of the Assembly

With the Assembly's general regulations in place, the Assembly immediately installed the following 21 commissions: 1. Nationwide representation, 2. Citizenship, nationality and nationalities, 3. Duties, rights and guarantees, 4. Organization and structure of the new State, 5. Legislative Branch, 6. Judicial Branch, 7. Executive Branch, 8. Other State Agencies, 9. Decentralization, territorial organization and autonomies, 10. Education and inter-cultural relations, 11. Integrated social development, 12. Hydrocarbons, 13. Mining and metallurgy, 14. Water and energy resources, 15. Rural, agricultural and industrial development, 16. Renewable natural resources, land, territory and environment, 17. Integrated Amazon development, 18. Coca, 19. Economic development and finance, 20. National borders, international affairs and integration, and 21. Security and national defense.

Division of the
commissions

Approval of the Assembly general regulations also consolidated the Assembly's leadership, appointed in the first few weeks following the inauguration. MAS and their allies occupied the chair, first vice-chair and four secretariat positions. Another three vice-chair positions were allotted to PODEMOS, MNR and UN, in that order, and the other two secretariat positions (fifth and sixth) to representatives from smaller political organizations. The MAS could thus control the Assembly, and their main representatives in the Assembly set the agenda and guided the decision-making on the distribution of commission leadership to MAS Assembly members.

MAS held the important
positions in the Assembly

⁹ Of these 70 groups, 38 are in La Paz, Cochabamba and Santa Cruz (= 54%).

¹⁰ We say "rule of shared majority" because in the 70 three-person groups, the foremost force gets two seats and the third one goes to the runner-up group. In departmental groups, in the same way, five seats were distributed among the four political organizations that received the most votes: two seats to the foremost, and one each to the other three. In both cases, the rule applied is the simple majority.

From March to early August 2007, the commissions received proposals and initiatives from civil society. They systematized the information and drafted the wording of future constitutional provisions. For this work, each commission was internally organized into sub-commissions, as many as necessary, to jointly draft the provisional texts for the new constitution and consequently make reports for plenary discussions. The general regulations called for two final reports, one to be signed by the majority and the other by the minority, which then needed to be submitted to the Assembly Chair for consideration and discussion in the Assembly plenary sessions (all 255 members). Unfortunately, conflicts paralyzed this process and these reports were never discussed in the Assembly with all members participating.

Public proposals were sent in, but not discussed in the end

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Contentious Issues

During the manifold activities described above, a major challenge arose when the Assembly delegates of the department Chuquisaca proposed to recognize the city of Sucre as the 'full capital' of Bolivia¹¹ in the new constitution. This was immediately rejected by La Paz and soon the issue became completely politicized. The MAS and the government publicly backed the delegates in favor of keeping La Paz the administrative seat of government whereas the PODEMOS delegates and the 'half moon' departments supported the Chuquisaca Assembly delegates. By August, the MAS made the mistake of pushing for the proposed resolution to be removed from all commission reports. This resulted in an outcry of the population of Sucre against the Assembly, which met in Sucre, preventing any activity until this polemic was resolved. Despite many efforts to overcome the deadlock, the Assembly was paralyzed until the end of November 2007.

Which city is the capital?

The political situation deteriorated with every passing day, since the deadline for the Assembly to complete its work was December 14, 2007.¹² The proceedings of the Assembly could not be moved to any other city without amending the Assembly law or its general regulations. Under the pressure of the timetable, the chair decided that, on November 23, the Assembly would reconvene in a military facility on the outskirts of Sucre. The night before, MAS Assembly members and some of their allies had already been transferred to the Military Lyceum, where the Assembly reconvened and continued its deliberations.

With time passing, tension rose and decisions were sometimes made in the absence of the opposition

Yet, most of the opposition delegates did not have enough time to reach this new location. Frustrated about this, the military facility was attacked by protestors, which led to 3 fatal casualties and about 200 people injured. By the end of the day, the Constitutional Assembly – without opposition participation, but with the necessary quorum – approved the overall text of the new draft constitution and amended the general regulations to authorize the chair to move the Assembly to another city, if necessary.

Finally, on December 10, 2007, protected by hundreds of MAS party members and supporters, who intimidated the few opposing members approaching the venue, the Assembly met in the city of Oruro to approve the details and review the text of the new constitution, in the absence of the main opposition forces. Thus, by resorting to procedures that were open to question, the Assembly finished its work within the given time limit. The next legal requirement was to put the draft constitution to the electorate through a referendum, but the referendum needed to be approved by the Congress first.

The final text was approved in the absence of the opposition

¹¹ Sucre is the capital of the department of Chuquisaca and was also, until 1898, capital of the Republic and official headquarters for all public agencies. In 1900, after a horrendous civil war, the Legislative and Executive were transferred to La Paz, and remain there to this day.

¹² The Special Summons Law, N° 3364, initially stated that the Assembly could not meet for longer than a calendar year, which would be 5 August 2007. However, the day before (4 August), Congress approved Law 3728 with a two-thirds majority, extending the deadline until 14 December.

When commission reports were published (by July and August 2008) it became clear that the MAS could not offer clarity about the way the Assembly commissions had operated. Beyond uncontested demands for justice, social inclusion and ethnic equity, the Assembly's main political grouping appeared not to have outlined clear constitutional goals. Since the draft text of the constitution was not the product of committee proceedings in the Assembly, questions were raised as to who had prepared the draft constitution that was approved in the Military Lyceum of Sucre and next in Oruro. Informal sources confirm that the text had been drafted in the period August to October 2007 by a small group of persons closely allied to the MAS rather than by the Assembly¹³ itself.

It is unclear how the final text came into being

In the episode that followed in the run up to the referendum (which was eventually held in January 2009; ed.) political tensions sharpened even further with the number of violent confrontations increasing. Observers even feared that the Bolivian nation would fall apart. In a reflection on the events, one can conclude that the Constitutional Assembly and the constitution-making process that was adopted, was not instrumental in overcoming the historical divisions within Bolivia and, in fact, resulted in a deepening of the political crises.

Increase of political tension

4. Guiding principles of the reform process

Neither the Law for the Constitutional Assembly, nor the general regulations it approved, ever explicitly established guiding principles for the Assembly's operation. However, the Law does make the Assembly subject to Articles 2 and 4 of the constitution to be amended, thereby implicitly introducing two principles: popular sovereignty and the scope of Assembly deliberations and decisions.

There were no explicit principles for the Assembly's operation

The internal regulations, in turn, elaborated on these two principles, incorporating the following foundations for the mandate of the Assembly: 1. The Assembly's power to formulate constitutional principles, 2. Its nature as an extraordinary event, explainable in the context of State crisis, 3. The principle of the Assembly overriding other authorities (because the Assembly originates norms), 4. The mandate to 'transform and construct a New Bolivian State' and 5. The final approval of the new constitution by the people, through a constitutional referendum (derived from the principle of popular sovereignty). In practice, however, these principles were unable to prevent the internal conflicts that paralyzed the Assembly, or lead to a consensus-based approval of a new constitution.

5. Relations between the Constitutional Assembly and civil society

The Constitutional Assembly interacted with civil society through three mechanisms: public hearings, local gatherings and by giving lectures and technical seminars on any subject considered necessary. According to the general regulations each commission had to organize at least one public hearing a week, in the city of Sucre, to receive proposals and initiatives of the electorate, the public and private entities. The local gatherings were also held throughout the country, in the capitals of each of the nine departments. According to the first

Civil society could send in proposals

¹³ Some versions, not fully confirmed, claim that the group had one or two Spanish advisers' assistance.

vice-chair, nearly 5000 documents were received in these hearings, gatherings and seminars, as well as a very large number of verbal initiatives, most of which could not be adequately processed.

6. International cooperation

To be sure that the Constitutional Assembly's sovereignty was preserved, the law on the Constitutional Assembly prohibited any kind of donation to the Assembly. Nevertheless, the international community found ways to support the constitutional reform process, backing the legal framework without influencing the Assembly's self-determination. In material terms, international cooperation played a significant role in supporting the operational conditions. Without its support the Assembly might not have survived to fulfill its legal duties.

The international community contributed – as far as is known – in four major areas:

1. The United Nations Development Programme (UNDP) provided the Assembly with the infrastructure, equipment and technical support for adequate operation.
2. The European Union also contributed to the Assembly. Many member countries of the EU organized a common fund for the Assembly, administered by the Bolivian office of German technical cooperation (GTZ).
3. The Dutch Government, through its Embassy in La Paz, supported by the Bolivian Foundation for Multiparty Democracy (fBDM), a partner of the Netherlands Institute of Multiparty Democracy (NIMD), funded an important 'Fund to Prepare Competitive Proposals for the Economic System and Rights' which enabled 19 entities and organizations to prepare proposals for the economic ground rules in the new constitution, which were delivered to the Assembly commissions, and
4. Multiple initiatives with varied ideological orientations and funding sources, which through NGOs, foundations, labor unions, business organizations, etc., influenced certain commissions of the Assembly.

7. Lessons learned from Bolivia's experience

Several lessons may be learned from Bolivia's constitutional reform process, including the following:

- A successful constitutional reform must have the consent of the population – if not of all, then of a substantial part of them. The population must know that they are well represented in the constitution-making process. That the proposals discussed and amendments introduced must reflect their concerns and interests. The more extensive (*total reform*) and profound (*structural*) the reform is, the greater the demand for inclusivity and representativeness of the change process.

This lesson is especially valid for countries with a population featuring high degrees of ethnic-cultural heterogeneity and socio-economic cleavages, such

The process was supported without influencing the content

It is necessary to be inclusive

as Bolivia. Otherwise, if the perception is formed that a constitution is imposed that embodies the vision and interests of only one or a few of the population's groups – even when they form the majority of the population – it will lead in the short or medium term to an aggravation of the problems intended to resolve. The other side of the coin is that vested economic interests and the traditional political parties should accept responsibility for historic injustices, for addressing the social and economic cleavages in the Bolivian society, and for investing in a more inclusive and participatory political process.

This lesson teaches us that no constitutional reform can succeed without continued and sustained consensus building and open dialogue, recognizing the other and respecting differences in point of view and interests. No reform can succeed without championing the principle that 'the rights of one group end where the rights of others begin'.

- Success largely depends on clear goals and coherent political forces or social groups leading the reform process. The larger the political force, the greater its responsibility. Conversely, if those leading the process have not developed clear and specific objectives for the reforms, they will be unable to direct the process and the intended contents of the reforms. Under such conditions, the process will inevitably lead to failure or mediocrity.

Clear objectives should be set at the start of a process

The political grouping leading the Constitutional Assembly in Bolivia did not have their clear concept for a new constitution prepared, nor an approach to guide them for at least 12 of the 14 months of that process. The more spontaneous supposedly bottom-up construction of requesting initiatives for the new constitution through public hearings, local gatherings and countless seminars proved not to be practical. These mechanisms were useful to build and improve relations with civil society, but so many initiatives, opinions and documents were sent that, rather than helping, they ended up disorienting the majority bloc. Once entangled in the intricate web woven by spontaneous actions, and cornered by the approaching deadlines, the Assembly's majority felt forced to sideline the opposition. The procedure followed resulted in the acceptance of a text of the constitution with was not properly discussed neither by the Assembly delegates nor by the different political groupings, including the MAS.

The idea of collecting public proposals was promising, but did not work practically

- Another major lesson learned from the constitutional reform process in Bolivia concerns the organization of the Constitutional Assembly. When reform is pursued through mechanisms such as an Assembly, the size of the event and number of delegates, the rules governing the proceedings, must be set very carefully and transparently. The number of participants should involve social heterogeneity and representativeness in the body responsible to prepare the reforms. A numerous convention (255 participants in Bolivia) is not necessarily more representative and is certainly harder to conduct business with. Although the Law on the Constitutional Assembly tried to arrange for a fair distribution of seats through its complex electoral system, it did not result in the intended inclusivity and representation. Therefore, as complex as it may be, in a divided society one should not err on inclusivity and representation in the composition of Constitutional Assemblies.

The Assembly delegates should be a fair representation of the nation

Similarly, the procedural rules (rules for the Assembly's operations, membership and distribution of internal positions of influence – leadership of commissions, the stages for approval of the texts for the new constitution, and the number of votes required at each step in the process) must be designed to prevent or at least limit political groups' attempts to dominate the Assembly proceedings and decision-making. There should be a fair balance between majority and minority interests presented in the Constitutional Assembly. Moreover, rules and regulations must be drafted in simple, clear terms, so their enforcement will not be subject to differing interpretations. Bolivia's Constitutional Assembly spent almost seven months of its time discussing its internal regulations.

The rules for the process should be clear and leave no room for interpretation

Update

After a period of prolonged instability and political violence, the Bolivian Congress approved President Morales's revised constitutional text by the necessary two-thirds majority. The agreement was reached on October 20th 2008. NIMDs partner in Bolivia, La Fundación Boliviana para Democracia Multipartidaria (fBDM) played a crucial role in the development of this agreement – essentially bringing together the moderates from both sides and facilitating a sustained dialogue over a number of months. Subsequently, the new constitution was finally approved in a referendum in which a majority of around 60% of the electorate voted in favor. Although this represents a sizeable majority, the country remains politically divided since the majority of the 'half moon' provinces voted 'no' to the new constitution. The dialogue and efforts to build consensus need to be continued to overcome the divisions in Bolivian society and to enhance the internal stability necessary for better social and economic development.

In Bolivia NIMD cooperates with the Fundación Boliviana para la Democracia Multipartidaria (Bolivian Foundation for Multiparty Democracy – fBDM), which represents all political parties and movements in Bolivia. During the polarization that hampered the Constituent Assembly (CA) in drafting the new constitution, fBDM has been very active in identifying moderate forces within the government and opposition parties to facilitate consensus. Their efforts resulted in the formation of a multiparty commission, headed by Vice President Álvaro Linera, which achieved agreement on the main political issues, including on autonomy. However, the new constitution was approved without taking these agreements into account.



ZAMBIA

Capital

(and largest city) Lusaka, 15°25's 28°17'E

Official languages

English

Recognised regional languages

Nyanja, Bemba, Lunda, Tonga, Nkoya, Lozi, Luvala, Kaonde, and about 65 other indigenous languages.

Government

- President
- Vice President

Republic

Rupiah Banda
George Kunda

Independence from the United Kingdom

October 24, 1964

Political Parties (election results 2006)

Governing party

The Movement for Multiparty Democracy (MMD) 73

Opposition parties

Patriotic Front (PF) 43 seats

United Democratic Alliance (UDA)* 26

United Liberal Party (ULP) 2

National Democratic Forum (NDF) 1

* UDA is a parliamentary coalition between:

Forum for Democracy and Development (FDD) 1

United Party for National Development (UPND) 23

United National Independence Party (UNIP) 2

2 seats were allocated in subsequent by-elections, 3 seats were won by independent candidates, 8 seats are reserved for presidential appointees

The politics of constitutional reform processes in Zambia

Martin van Vliet

Summary

Zambia already initiated its fifth constitutional review process in 2003 ever since it obtained independence in 1964. Previous reform processes were strictly controlled by the ruling elite and used to advance particularistic political interests instead of consolidating Zambia's overall democracy. While recognising that constitutional reform is an important tool for strengthening 'horizontal accountability' within a political system, in Zambia it has primarily entrenched a 'hybrid' form of democracy or what others refer to as 'Presidentialism'. All reform processes have also been characterised by a serious lack of involvement by ordinary citizens. The elite driven processes have so far failed to strengthen 'vertical accountability' and haven't succeeded in convincing Zambian citizens to buy into the importance of constitution based governance.

The fifth (and currently ongoing) reform process does not entirely fit the traditional pattern of Executive dominance and elitism and represents a new and more participatory approach. Instead of the President and parliamentarian caucuses deciding which constitutional amendments to adopt or not, a popular body – the National Constitutional Conference (NCC) – has been set up within which different stakeholders are represented. Yet, its mandate, composition and autonomy continue to be contested while a number of civil society organisations have boycotted the processes so far. It is, therefore, still questionable whether the current reform process will deliver a constitution that is legitimate in the eyes of the vast majority of Zambians.

Zambia's constitution has so far failed to become a popularly accepted 'autobiography' of the country's emerging nation.

1. Zambia's socio-political context

Zambia, a landlocked country neighbouring not less than eight countries in Southern Africa, covers an area of more than 750.000 km² and hosts approximately eleven-and-a-half million inhabitants. Located in a turbulent region, Zambia has been a remarkable example of stability ever since independence compared to neighbouring countries as Angola, the Democratic Republic Congo and Mozambique. Zambian political leaders have been carefully preserving national stability ever since its first President Kenneth Kaunda became known for his *One Zambia, One Nation* slogan.

This 'One Zambia' comprises 73 officially registered ethnic groups with Bemba, Tonga, Nyanjah, Lozi, Lunda, Kaonde and Luvale being the only officially registered national languages. The Bembas are the largest group consisting of almost 20% of the national population, followed by the Tonga and Nyanja speakers (both 15%). Despite patterns of internal migration and considerable urbanisation (close to 40%), some regions are clearly dominated by a particular socio-linguistic group. Various political parties have (had) a clear regional support basis. As not one single group outnumbers others, collaboration between different regions and ethnic groups is an important incentive for Zambian political parties. If a politician is to be successful at the national level, constructive cooperation with and obtaining support from different groups and regions is crucial.

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Cross ethnic support is necessary for success in Zambian politics

Amongst the religions adhered to in Zambia, Catholicism is the most dominant with a following of about 25-30% of the national population next to Protestantism, Islam, Hindu and Pentecostalism. Influential religious mother bodies are the Zambian Episcopal Conference (Catholic Church), the Council of Churches in Zambia (Protestantism) and Evangelical Fellowship of Zambia (Evangelicals, Pentecostals, Baptist and others). Its leadership, certainly that of the Catholic Church, plays a significant political role in society as will be demonstrated in this chapter.

The church is very influential

The President has a lot of power

Although often referred to as an adaptation of the Westminster model, Zambia's political system is best described as a presidential one. The president is both head of state and government and makes almost all crucial appointments. Cabinet ministers are members of parliament and have an advisory mandate to the President, but are themselves not accountable to parliament. Zambia's party system is characterised by the combination of a dominant party and a relatively high level of fragmentation. Looking at the last four elections, it is remarkable that not one single opposition party managed to maintain a strong representation over the years. An institutionalised party system has not materialised so far and many parties are highly dependent on their leaders. 150 elected members of the (unicameral) National Assembly are chosen on the basis of the 'first past the post' electoral system, which leads to a 'winner takes all' practice. Frequent by-elections, as a consequence of floor crossing or members of parliament passing away, enhance continued electoral competition between political actors in the period between general elections.

Political parties are not institutionalized

The early 1990s saw a comeback for multiparty democracy

Zambia's post-independence political history shares many characteristics with other countries on the continent. One party rule by the independence party was fairly quickly installed after initial years of multiparty democracy. Following a decade of hope and socio-economic progress, popular discontent grew significantly. Protests against first President Kaunda's authoritarian leadership, the collapse of the state lead economy and the global pro-democratic wave fuelled the come-back of multiparty democracy in Zambia and neighbouring countries in the early 1990s. A wide coalition of trade unions, businessmen, farmers, unemployed, intellectuals and former one-party representatives formed the Movement for Multi-Party Democracy (MMD) which secured an absolute majority in parliament in the 1991 elections. MMD was voted into power based on an economic reform agenda and a pledge for political change (*democracy*)

based on a multiparty system with effective checks and balances according to its manifesto).

Once in office, the MMD leadership however first and foremost used constitutional reform processes to advance their own particular interests. When President Chiluba later pushed for a constitutional amendment to allow for a third term in office this was successfully blocked by a broad-based civil society platform and various Members of Parliament. His handpicked successor, Levy Mwanawasa, won the 2001 elections by a very small margin. Subsequent to these disappointing legislative elections, MMD did manage to regain a majority in parliament by co-opting opposition members of parliament. In the 2006 elections, Patriotic Front secured a strong urban-based support but MMD nevertheless preserved its majority in parliament.

Constitutional reform was used for particular interests

Between independence in 1964 and 2001, not less than four constitutional review processes were completed in Zambia. President Mwanawasa initiated a fifth review process in 2003. The legacies of the four previous reviews will be highlighted before the current process is analysed.

2. Historical overview of constitutional making and reform processes

Independence constitution

The last constitution of Northern Rhodesia had been in place for only a year when Zambia's independence constitution was drafted in 1964 following negotiations between Zambian political representatives and the colonial power. Whereas the former constitution was based on a Westminster parliamentary system with a British Governor as ultimate authority, representatives of Zambia's United National Independence Party (UNIP) pushed for a strong presidential system and diminished legislative powers within the independence constitution.¹⁴ There was no popular involvement in the drafting nor popular approval of the final document. The constitution remained an alien document to the vast majority of Zambians.

At first there was a desire for a strong presidency

Oneparty rule

Despite his dominance over the party system, first President Kaunda could not prevent opposition parties from increasingly challenging the position of the independence party UNIP during the First Republic (1964-1972). Kaunda subsequently opted for a transition to oneparty rule, which he legitimized as a way of maintaining national unity and preventing ethnic rivalries. In 1968, a referendum was organised to eliminate the constitutional obligation to hold referenda in case of constitutional amendments. This opened the door for one party rule and four years later Kaunda installed a Constitutional Review Commission (CRC) that entered this door and paved the way for oneparty rule. Kaunda made use of the so-called Inquiries Act. This Act had not been drafted for the purpose of constitutional reform but it enabled Kaunda to control the review process. It provides the Executive with a mandate to determine the terms of reference of any review commission, appoint its commissioners and decide which of the recommendations made are accepted or ignored. Kaunda selected those recommendations that suited his political interests while neglecting others

All power was vested in the presidency

¹⁴ 'Political policy: President and parliament in Zambia', *Journal of Management History* (1999, vol.5 n.4)

(i.e. reduction of presidential powers) when he introduced one-party rule. The reform process was thus used to advance specific interests of the Executive by means of the Inquiries Act.

Back to multiparty democracy

Following popular demand for political pluralism and calls for a new constitution, Kaunda nominated the Mvunga Constitutional Review Commission in 1990. Yet again, he single-handedly determined the process and tried to rush a 'transition constitution' that his government had defined through parliament. He also emphasised the constitutional requirement of holding a national referendum to find out whether Zambians really wanted a return to multiparty politics. Different interest groups, aligned within the Movement for Multi-Party Democracy (MMD), however, mobilised opposition against the 'transition constitution' as proposed by Kaunda and stressed the need to draft a transition document that was based on inter-party consultations. A combination of international pressure, broad-based popular dissent and tactful mediation by the Churches finally led to a transition constitution under which both UNIP and MMD agreed to go ahead with multiparty elections, without organising a referendum first. Within this constitution, the requirement for future Presidents to organise a national referendum if they wanted to reform the constitution was included. All actors stressed the importance of the clause in order to prevent future constitutional changes to be pushed through by the Executive without popular consent. Different groups in society had contributed to the final text of the transition constitution and the reform process itself. Zambia's transformation to multiparty democracy became an example for others on the continent. The content of the constitution had not changed comprehensively, but that was to be done subsequent to the multiparty elections in 1991.

Civil society and international pressure led to multiparty elections and a possible new constitution

Political reform stalled under President Chiluba

During the electoral campaigns in 1991, MMD emphasized it would embark on a substantial political reform process in order to consolidate fully multiparty democracy if the party would be elected in office. However, only two years after his landslide victory, President Chiluba installed the Mwanakatwe Constitutional Review Commission. Just as first President Kaunda had done, he made use of the Inquiries Act allowing him to control the entire reform process. After going around the country in search of popular input, the Commission presented its report in 1995. Three controversies then arose:

Promises aside, the President still held the power

- *The mode of adoption:* Civil society organisations and opposition leaders called for a popular body (a Constituent Assembly) to be set-up with representatives from various segments of society mandated to draft the new constitution, based on the Mwanakatwe report. Only a Constituent Assembly could ensure a truly 'people driven' constitution and prevent the Executive from manipulating the process. The President however decided that (the MMD dominated) parliament would be mandated to decide which recommendations within the Mwanakatwe report would be enacted. He defended his choice by pointing out that parliamentarians were elected by Zambian citizens. Whatever parliament decided would therefore reflect the will of the people.

Representation of the will of the people

- *Ignoring most of the recommendations made:* Within its official reaction to the Mwanakatwe report, the government rejected not less than two-thirds of all recommendations made by the CRC. Although these recommendations were based on popular input from all provinces, MMD blocked a comprehensive review of Zambia's political system and clearly failed to deliver on their electoral promises made during the 1991 campaigns. Just as Kaunda refused to reduce his presidential powers in 1972, Chiluba had no intention of adjusting his powers once he had entered office.
- *Controversial amendments:* Many Zambians had informed the CRC that they wanted presidential candidates to be 'real' Zambians. Within the Mwanakatwe report, this became defined as having parents from Zambian descent. This 'parentage clause' was taken-up by the MMD to block Kaunda, who wanted to return to active politics and run for president in 1996, but whose parents were of Malawian descent. Another proposed amendment was used to block Kaunda's running mate from participating in the elections. MMD proclaimed it was accepting the will of the people (in contrast to the two-thirds of the recommendations it ignored) but the political motives behind the decision to accept the 'parentage clause' were obvious when MMD Members of Parliament chanted '*we have defeated Kaunda*' in Parliament once the Act on the amended constitution was adopted.¹⁵

Presidential power was not reduced

Ambiguous motives for blocking certain amendments

Yet again a constitutional reform process was used by the ruling elite to entrench its own position and frustrate political adversaries. Instead of consolidating democracy, the process diminished political accountability and devaluated checks-and-balances within the system. This obviously created a lot of mistrust between the MMD government, various civil society leaders, church representatives and trade unions, which had previously worked together towards a return of multiparty democracy. This breach of confidence between MMD and civil society organisations would have an enormous impact on future reform processes.

Mistrust between government and opposition grows

One significant element should however not be overlooked. The MMD overwhelmingly won the 1996 elections. After its leader, Kaunda, and his running mate had been blocked by MMD to run for office, UNIP decided to boycott the elections in 1996 and called upon their followers not to vote. The results demonstrate that there was no substantial following to this call except within UNIP's traditional stronghold Eastern Province. However, even there, votes for Chiluba increased as compared to the 1991 elections.¹⁶ The UNIP leadership today qualifies the call for a boycott as a serious strategic mistake. The elections resulted in a landslide victory for MMD obtaining more than 60% of the vote and 131 Members of Parliament. Whereas western donors expressed serious doubts over the quality of the elections (stressing the main opposition candidate had been blocked from running), only 16% of Zambian citizens thought the elections were flawed because of the measures taken against Kaunda. Surveys also indicated that 43.2% of the citizens described MMD's performance as good, 35.1% as fair and only 21.7% as poor.¹⁷ The 1996 constitutional reform process and the manner in which it was abused by the MMD had apparently not lead to a negative appreciation of the party by Zambian voters. This is a first indicator of the 'democratic gap' between citizens and their leaders with which the issue of constitutional reform in Zambia has been and still is confronted.

The people are not dissatisfied with the ruling party; a democratic gap?

¹⁵ M. Bratton/D.N. Posner (1999): 'A first look at second elections in Africa', *State, Conflict and Democracy*, PP 377-407

¹⁶ Van Donge (1998): 'Reflections on donors, opposition and popular will in the 1996 Zambian general elections', *The Journal of Modern African Studies*, Vol. 36 (1) PP: 71-99

¹⁷ M. Bratton/D.N. Posner (1999): 'A first look at second elections in Africa', *State, Conflict and Democracy*, PP 377-407

A third presidential term was not granted

In the run-up to the 2001 elections, President Chiluba pushed for a constitutional review to enable a third term in office. This time around, a combination of severe pressure from civil society organisations, law associations, women movements, churches, members of parliament, street protests and international pressure was able to block the linking of constitutional reforms with the President's personal ambitions. Just as in 1990, a broad-based movement was able to stand up and defend Zambian democracy. Chiluba then handpicked Levy Mwanawasa as his successor who narrowly won the 2001 elections and who indicated that, the issue of constitutional reform would be part of his political agenda.

Legacy of four consecutive reform processes

Zambia has thus implemented four constitutional reform processes in less than four decades. Before addressing the current (fifth) reform process, the legacy of the previous reforms can be summarised.

Popular bodies

- *'Process protects content'*: The Zambian experience demonstrates that the process of the constitutional reform significantly determines the outcome. Most constitutional reform processes were legally guided by the Inquiries Act which enabled different Presidents to control the reform process and therefore also the result. In the absence of an enlightened President striving for genuine democratic consolidation, only a process that carries support from political and civil society stakeholders beyond the ruling party can succeed. Following the disappointing experiences, civil society organisations started to stress the need for popular bodies (such as Constituent Assemblies) to guide future reform processes instead of reform processes guided by the Inquiries Act.

Referendum

- *'Referendum as safeguard'*: Kaunda's suppression of the need for a popular referendum to adopt / reject substantial constitutional changes enabled a fairly easy transfer to oneparty rule in the 1970s. During the transition to a multiparty democracy, an article (art. 79) that stipulates the need for a referendum to formally adopt a new constitution was therefore stressed by many. This article will have a serious impact on future reform processes, certainly considering the fact that many Zambians have not been involved in previous reforms and are yet to be convinced of its importance.

No popular support for constitutional reform

- *'Democratic Deficit'*: Despite popular contributions made to various Constitutional Review Commissions by thousands of citizens, the 1996 and 2001 elections have clearly demonstrated that a strong constituency pushing for constitutional reform has not surfaced. The issue has been dominated by a Lusaka-based elite, either from political parties, civil society organisations or international donors. If Zambian democracy is to be consolidated and politicians to be held accountable for promises in the area of constitutional reform, enhanced and continuous investments in popularising core issues in constitutional reviews is a necessity.

Reduction of the Executive power

- *'Mistrust politicians'*: Chiluba's broken promises of introducing substantial political reform as well as his third term bid created mistrust and animosity between political leaders and civil society organisations. The content issue that contributed to that mistrust mostly concerns the power vested within the Executive. It is a common feature in many democracies that political parties
-

favour a reduction of executive powers while in opposition but change their mind once in power.

- 'CSOs as *main drivers*': Although members of parliament and international donors played an important role in blocking Chiluba's third term bid, the constitutional reform process provided a rallying point for various civil society organisations and churches. They regrouped under an umbrella organisation called OASIS Forum. This organisation became the single most important driver for constitutional reform at the turn of the century following the disappointments in the 1990s. Feeling betrayed by the MMD government, some representatives informally even indicated that they wanted MMD out of office. Some civil society organisations in Zambia thus became highly politicised.

Coalition of Civil Society Organisations

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3. The modality chosen for the current constitutional reform process (2003-now)

Another reform process initiated

Referring to the previous disappointing experiences, President Mwanawasa indicated that 'Zambians had every right to be cynical about the constitutional reform' as 'the deceit, greed and appetite with power had polarised attempts on constitutional reform.'¹⁸ Nevertheless, he also decided to make use of the Inquiries Act as a basis for yet another reform process. OASIS Forum feared the initiative would, once again, lack the required legitimacy and initially boycotted the Constitutional Review Commission (CRC) that was setup by the President. However, when the CRC appeared to be taking up issues they had long been pushing for (setting-up a popular body as the mode of adoption, presidential elections based on a 50+1% majority instead of a simple majority, including socio-economic rights within the Bill of Rights), they decided to contribute to the commission after all. When the Mung'omba CRC draft report and proposed constitution was presented on 30th June 2005, OASIS Forum even became its strongest defender.

The President revived the constitutional reform process

However, once the report had been presented, controversies arose over the mode of adoption of a new constitution. Just like a decade ago, tensions between government and civil society organisations quickly mounted and they became strong opponents.

Whereas OASIS Forum demanded a Constituent Assembly to be urgently set up to enable the 2006 elections to take place under a new constitution, the government emphasized the lack of time to fulfil all legal requirements involved in setting up such popular body. Frustrated, OASIS Forum and opposition parties organised a number of demonstrations that attracted some thousands of urban supporters and made firm statements as *the fight for a new constitution [is] now between the MMD and the people*¹⁹ and emphasised the need to discuss the establishment of a Constituent Assembly before the election as a *way of averting a potential civil war*.²⁰

Constitutional reform before or after the elections?

¹⁸ The Post, 03-11-2005

¹⁹ The Post, 25-11-2005 (by Rev. Ndhlovu, chairperson Oasis Forum)

²⁰ As Oasis Forum indicated to opposition Member of Parliament Given Lubinda (The Post, 25-11-2005)

When the election date approached, OASIS Forum changed tactics. They (temporarily) dropped their usual call for a comprehensive constitutional reform executed by a Constituent Assembly and started to push for partial amendments of the constitution on issues related to the elections (such as a 50+1% majority vote for the presidential elections instead of the existing simple majority system). Politicians within the ruling party and some political analysts stressed the political nature of this shift. They claimed that civil society had dropped the need for a comprehensive reform because their priority was to remove MMD from office.

Considering the narrow win in 2001, it wouldn't be easy for an MMD President to secure victory under a 50+1 majority system. Civil society organisations, however, indicated that their shift was motivated by their belief that Zambian democracy would be significantly strengthened if a President were elected under a majority system. This controversy is yet another indication of the amount of mistrust between political parties and civil society organisations and the highly political nature of reform processes. President Mwanawasa refused the demand for partial amendments prior to the elections but, innovatively, announced his commitment to set-up a Constituent Assembly (CA) after the elections.

Promise to set up a Constituent Assembly after the elections

The elections in 2006 were won by the incumbent President Mwanawasa and MMD obtained a majority of seats in parliament. Just as in 1996 and 2001, the constitutional reform process didn't play a significant role during the electoral campaigns. Opposition party Patriotic Front (PF) performed well on the basis of a socio-economic agenda that had been advanced (and supported) by the Catholic Church, securing a strong urban support base and 43 seats in parliament.

Constitutional reform and the politics of roadmaps

After the elections, President Mwanawasa first indicated that he was not in a hurry over the Constituent Assembly as it would be an expensive undertaking. In December 2006, his government presented a lengthy 14-step roadmap for constitutional change leading to a new constitution in a time span of more than 5 years (285 weeks). Government defended this lengthy roadmap on legal grounds. As the existing Zambian constitution considers parliament to be the only legislative body, setting up another popular body with legislative powers, such as a Constituent Assembly, requires the existing constitution to be amended. To do so, a national referendum was considered necessary to allow Zambians to decide to mandate another institution, aside from parliament, with legislative powers to enact a new constitution. It is noteworthy that the need for such a referendum was agreed upon during the transition to multiparty democracy in order to prevent presidents from misusing the constitutional reform. An additional impediment is the fact that a referendum can only be organised on the basis of a census first that determines the number of eligible voters. Therefore, a long trajectory would be needed before the CA could even be setup when respecting existing laws. Government also indicated that once this voting registration process was finalised, elections for CA members would have to be organised.

The President proposes a time consuming road map

OASIS Forum and other civil society organisations were highly disappointed with this time-consuming and expensive proposal. Relations further soured

when President Mwanawasa stated he would personally not vote in favour of the establishment of a Constituent Assembly when he would be asked in a referendum. In April 2007, OASIS Forum released an alternative and much shorter roadmap comprising a total of 71 weeks. In contrast to the government (and the agreement made in 1991), they stated that there was no need to abide by the existing rules and regulations for amending the constitution, as the subject was not to amend the existing constitution. An entirely new constitution was to be drafted, so existing legalities rules would not apply. This would save a lot of time as no referendum or census would be required prior to the CA. They also indicated interest groups could nominate participants and there was no need for electing them. Once the CA had adopted a new constitution, the people could vote over it in a national referendum so that the new constitution would obtain popular legitimacy.

The cso coalition countered with a shorter road map

For months both camps attacked each other either stressing 'Government's lack of political will' and 'OASIS Forum's lack of respect for the legal requirements spelled out in the constitution'. Civil society organisations referred to 1991 when the constitutional requirement of organising a national referendum was abandoned following broad-based political will for a rapid transition to multiparty democracy. But, comparing the broad based alliance fighting for the end of one-party rule in the 1990s with the legalistic approach of democratically elected president Mwanawasa is not convincing. In addition, the need to create legal obstacles for amending a constitution was widely shared in 1991. It was seen as a mechanism to avoid an overflow of constitutional reforms in the sole interest of the incumbent president. Nevertheless, the two conflicting roadmaps had clearly created a deadlock within Zambia's fifth reform process.

Political parties jointly define a (contested) compromise roadmap

Political parties, working together at Secretary-General level within the Zambian Centre for Inter-Party Dialogue (ZCID²¹) took the responsibility to address this deadlock. They compared the two roadmaps, discussed both of them with their provincial representatives and came up with what they called a compromise roadmap that avoided being too long and costly (government) or legally questionable (civil society). This roadmap emphasised the need to establish a popular body mandated to adopt a new constitution or amend the existing one but did not provide that body with legislative powers in order to prevent the legal difficulties involved. A popular body could come up with a draft constitution that would be enacted by parliament and then be (partly) presented to Zambian citizens in a referendum. The members of the proposed popular body, which was to be called the National Constitutional Conference (NCC), were to be nominated by the various interest groups instead of being elected. Subsequently, the ZCID convened a meeting of principals of all the political parties (ruling and opposition) which included the Republican President on the 23rd of June 2007. This became known as the Summit of Presidents. The summit resulted endorsed the compromise agreement prepared by the Secretary Generals. A month later, a first draft of the National Constitutional Conference Bill was presented by the Minister of Justice to key stakeholders for input. Within two months, the NCC Bill was enacted by a vast majority in parliament. So, it was decided that a National Constitutional Conference was to draft a new Zambian constitution.

ZCID brought parties together which led to a compromise roadmap

²¹ See box at the back of the chapter for background information on ZCID

Constructive inter-party dialogue

An important lesson that can be drawn is that constructive inter-party dialogue offers the opportunity to bridge the gap between government and civil society on key governance issues. The long-term impasse on constitutional reform between government and civil society was resolved with a political compromise that was (initially) endorsed by all political parties.

Once the NCC was put in place, confrontations between government and civil society did not disappear. On the contrary, the set-up of the conference became the central bone of contention and a reason for some member organisations, though not all, of OASIS Forum to boycott the conference. They stated the conference would not lead to a 'people driven' constitution that could stand the test of time. As the National Constitutional Conference is still underway at the time of writing, the exact impact of its mandate, composition and functioning cannot be fully assessed. Nevertheless, an overview will be given on the various components of the conference and the positions taken by both participants and those who decided to boycott.

The National Constitutional Conference

NCC mandate

- The National Constitutional Conference has no legislative powers
- It has a mandate to discuss and adopt a new draft constitution or part thereof
- The final enactment procedure was not determined within the NCC Act and left to the conference members to decide

They have the option to:

- Ask parliament to enact NCC amendments to the existing constitution (apart from the Bill of Rights which constitutionally requires a referendum)
- To ask parliament to enact most NCC amendments to the existing constitution but to present major contentious issues and the Bill of Rights separately to a national referendum
- To present the entire draft constitution as agreed upon by the NCC to a national referendum

This mandate was, however, contested for two reasons.

- OASIS Forum expressed fear that (MMD dominated) parliament would not simply rubber stamp the NCC agreement and would reopen debate in parliament in order to defend partisan interests. The legacy of the 1996 reform process and the mistrust that was generated are very much reflected within this viewpoint. OASIS Forum continued to stress the need for a popular body with legislative powers despite the legal impediments related to setting it up.
- The same non-governmental institutions that pushed for piece-meal amendments of the constitution prior to the 2006 elections, now fiercely opposed the fact that the conference had been given this option and had not been forced by law to come up with an entirely new constitution that would have to be presented to Zambian citizens in a national referendum. The Catholic Church has been demanding for socio-economic rights to be included within Zambia's Bill of Rights for a long time and was not satisfied that the conference had now been given the *option* instead of the *obligation* to address the matter.

Contentious issues

Members of the conference however trust parliamentarians to simply enact agreements reached within the NCC. In addition, the constitutional requirement for a referendum to become legally binding (at least 50% of eligible – not simply registered – voters need to participate) is not easy to achieve. The percentage of eligible voters that participated in previous elections was relatively low. Therefore, they argue that it is wise for the conference at least to consider different enactment procedures. Parliament could, for example, be asked to enact those issues which the conference agreed upon by consensus in order to prevent the entire process from failing when the 50% threshold is not realised during a referendum. However, entering a constitutional reform process without a clear end goal and enactment procedure agreed upon does create risks.

Although the current reform process is still ongoing at the time of this writing, a lesson can be drawn in this respect. Defining the exact ending of a constitutional reform process before initiating one creates clarity and a more solid reform process. Besides, if the end goals are agreed upon by all key stakeholders, it also increases trust in the entire constitutional reform process.

It is important to have a clear end goal, when the process starts

NCC composition

The NCC Act specified the interest groups that could select (not necessarily elect) their representatives. On the 19th of December 2007, members of parliament, representatives of political parties, local councillors, NGOs, professional bodies, traditional leaders, special individuals, the judiciary, state institutions and the civil service were sworn in as members of the National Constitutional Conference. Based on the composition, some civil society organisations claimed the draft constitution would be a 'politician driven' in stead of 'people driven' document because the 73 local councillors, 158 members of parliament and 48 party representatives would dominate the 502-member conference compared to the mere 79 representatives for civil society. The struggle for influence over the reform process between civil society and political parties continued to be at the heart of this controversy.

More political than civilian representation in the NCC

Participants of the conference state that both councillors and members of parliament have been elected by the Zambian people and, therefore, very much question civil society's claim to be the true representatives of 'the people'. They acknowledge NGOs have been leading calls for the reform process ever since 2001 but stated that political parties, as crucial pillars of democracy, also have an important role to play. Politicians admit they have put themselves in the driver's seat within the NCC as they consider civil society organisations to be important stakeholders but not the legitimate drivers. In addition, the politicians emphasised that it was wrong to think all party representatives are similar and act as a single block. Nevertheless, the configuration of the National Constitutional Conference made some civil society representatives fear that the issues they are fighting for (reduced powers of the executive and improved accountability, socio-economic rights included within the Bill of Rights, presidential elections organised on the basis of a 50+1% majority) would not stand a chance of being adopted by the NCC. The feeling of not being awarded sufficient influence within the NCC greatly contributed to the decision by some member organisations of the OASIS Forum to boycott the conference.

The ncc became politicized

The reform process clearly shows it is not merely technical but highly politicised: political parties, civil society organisations and government all try to maximise their influence over the process. Undeniably, one of the main requisites for any successful constitutional reform process is an active participation of all sections of society within the process. A popular body including all major stakeholders is more likely to deliver an acceptable new contract between the government and its people than an exclusive body. The boycott by various civil society organisations, especially the Catholic Church, therefore, poses a serious challenge to the current Zambian reform process and will be dealt with in more detail in the next section where the relation between the NCC and society at large is assessed.

These experiences provide a number of lessons learned on constitutional reform processes. Firstly, it is of importance that political and civil society reach a mutual understanding on their joint and distinct responsibilities. Secondly, a popular body that includes all major stakeholders is more likely to deliver an acceptable new contract between the government and its people. Thirdly, a constitutional reform process continuously faces the challenge to find ways to accommodate groups outside the process in order to anchor its legitimacy in society.

National Constitutional conference – autonomy

Those who refer to the NCC as a truly independent body mainly point out to its self-regulatory character. Once the conference members had elected the chairperson and three vice-chairpersons (comprising members of opposition parties and trade union), they defined the rules and regulations of the conference on their own and installed a disciplinary committee. The conference however, depends on the Minister of Finance for funding on an annual basis, the Minister of Justice for approving NCC requests for external experts to make presentations during the conference and on the Secretary to the Cabinet to endorse major disciplinary sanctions against conference members. During the first months of its sitting, government had always rapidly and positively responded to requests made by the NCC secretariat for additional staff and expertise. Another contentious issue concerned the mandate that was given to the President to dissolve the conference. According to civil society, this enabled him to dissolve the conference whenever he did not agree with resolutions that were being adopted. To address this concern, the act establishing the NCC includes specified conditions that need to be met if the President were to use this right.

NCC functioning

Once the internal rules and regulations were agreed upon, a subcommittee structure was set up. The draft constitution as defined by the latest Constitutional Review Commission (Mung'omba 2005) was divided in 11 separate parts that would be dealt with by separate subcommittees. The draft constitution thus became the major guiding document for the conference, although it was entitled to add or remove any clause it agreed upon. The committees were:

1. General Constitutional Principles, 2. Citizenship, 3. Human Rights,
4. Democratic Governance, 5. Executive, 6. Legislative, 7. Judicial, 8. Local Government, 9. Public Service, 10. Public Finance, 11. Land and Environment.

In principle, each committee is given three weeks to go through their respective articles in the draft constitution. The results of the subcommittee meetings are then presented to the plenary session that starts after all committees have sat.

The way government and civil society relate throughout the process is crucial for its outcome

Rules were defined at the NCC

Division of the Commissions

The committee members aim for consensus on every issue but when this seems impossible, discussions are often deferred to the plenary. Requests for advice from external resource persons is possible. The decision making process within the plenary meeting is firstly aimed at reaching consensus (defined as not more than 100 of the 502 people disagreeing). If this is obtained, the conference members will vote on the basis of a two-thirds majority threshold. Issues that are not accepted by a two-thirds majority are possibly referred to a referendum. This consequently means that one-third of the conference is able to block agreements on specific issues or at least defer them to a referendum. The Zambian case suggests that the decision making process within a constitutional reform process should be aimed at generating a consensus as substantial as possible.

Delegates aim to reach consensus on each issue

The conference should come up with a final document within 12 months. The President has the option of granting the conference more time. At the time of writing, a number of important articles had been agreed upon in the committee stage (noteworthy is the article on the absolute majority votes of 50+1% for presidential elections). The fact that this issue, which not many people believed could ever be accepted by the conference, was agreed upon greatly enlarged confidence in the process. Still, at the plenary stage agreements reached within committee stage can still be reversed. Early 2009, a number of these agreements reached at the committee stage were indeed reopened for debate. These include the 50+1% threshold, the mandate of the executive, the number of Members of Parliament, and the fact that Ministers can also be appointed from outside parliament. This turn of events negatively affected the perception of the NCC.

A time frame is set

Contentious issues

Perhaps the most contentious issue on the agenda of the NCC is the Bill of Rights. NGOs and the churches want social, economic and cultural rights to be legally enshrined within the Bill of Rights of the constitution. They perceive it as a safeguard for any government to seriously address concerns of ordinary Zambians in areas as education, health care and housing. Government officials however have often expressed fears of the country becoming ungovernable when such rights become legally binding. Would people believe they could take government to court for failing to provide housing? Finding a compromise on this issue is of great importance to the conference. It is possible that those organisations that boycotted the conference become convinced of its success if compromises on these issues can be found. Constitutions of other countries, notably the South African constitution, include a Bill of Rights without triggering the legal battles the Zambian government fears.

Should social, economic and cultural rights be in the Constitution?

Next to the 50+1% requirement, the issue of allowances became highly controversial. The announcement NCC members would receive a sum of around 300 USD per day immediately lead to public outcries. Although it is based on existing parliamentary schemes, some people interpreted it as a strategy to co-opt people within the conference. Knowing a Lusaka based family is able to live on such amount for an entire month, it makes one wonder why defenders of the conference provided its contesters with such easy ammunition. The Zambian experience shows that for the legitimacy of a constitutional reform process, a remuneration scheme needs to be put in place that does not compromise the integrity of the process in the eyes of the population.

NCC members receive 300 USD per day

Boycotting

Member organisations of OASIS Forum such as the Catholic Church, Protestant Church and NGOCC decided to boycott the NCC doubting its mandate, composition and autonomy. One of the co-founders of the OASIS Forum, The Law Association of Zambia in the end did decide to participate. All political parties had originally agreed to participate, but once the Catholic Church pulled out, various senior representatives of the main opposition party – Patriotic Front – also contemplated a boycott. The Catholic Church constitutes an important political constituency to them. Whereas the leadership of Patriotic Front decided to pull out of the process, a group of 26 members of parliament disagreed with the official party line, stated that they had not been consulted over the matter when a party line was drawn and decided to join the conference. With a number of influential NGOs and part of the main opposition party boycotting the NCC, Zambia's fifth reform process has indeed become contested.

Some cso's as well as the Catholic Church pulled out of the ncc

Ever since its start in 2003, political leaders and civil society representatives have faced numerous clashes with respect to the constitutional reform process. The examples that have been briefly mentioned are:

- The initial boycott of the Constitutional Review Committee by OASIS Forum in protest against the use of the Inquiries Act
- Disagreements over the possibility of organizing a Constituent Assembly prior to the 2006 elections
- The conflicting roadmaps presented after the 2006 elections
- The quest for influence within the NCC by both political parties and civil society
- The decision by some civil society organisations and church mother bodies to boycott the NCC

Contrasting claims with respect to 'the will of the people' were the single most important issue that fuelled these debates. Civil society organisations and the church mother bodies, in particular, argue in defence of the citizens' interests. Only a strong presence of civil society organisations (as embodied by OASIS Forum) included in the reform process would guarantee a 'people driven constitution'. Politicians have put more emphasis on their role as elected representatives of the people. In their opinion, the current boycott of the NCC by some NGOs does not signify a loss of its legitimacy. In the light of this discussion on Zambia's popular will, it seems logical to place the conference in a larger societal context. Once again, the Zambian case illustrates the need for political and civil society to reach an understanding on their roles and responsibilities. Whereas elected political representatives have a legitimate role to play, civil society organisations are crucial when it comes to obtaining popular support for a new constitution. The latter could reflect on their use of the nuclear option of reverting to boycotting constitutional reform processes beforehand rather than engaging critically within them.

Both political and civil society claim to represent the people

4. The constitutional reform process in relation to society at large

Any claim made, by whatever institution, being a true representative of the will of the Zambian people with respect to the constitutional reform process, is problematic. The 1996 elections already demonstrated that despite MMDs rejection of two-thirds of the CRC recommendations, almost 80% of Zambians still perceived their performance in power as either good or fair. Throughout three consecutive election polls in the run-up to the 2006 elections issues such as agriculture, education and unemployment were identified by Zambians as important priorities.

“The constitution and election-related issues, however, remained insignificant issues for most Zambians as less than 1% (0.9%) were concerned with them.” The same report goes on to conclude “[...] despite so much national debate on the importance of having a new constitution and electoral law before the 2006 elections, this was not the concern of the electorate”.²²

A case study conducted in 2004 affirms that electoral and constitutional reform was a low priority to ordinary Zambians.²³ Although thousands of people actively contributed to the different constitutional review commissions (personally or on behalf of institutions), a strong constituency pushing for constitutional reform has not emerged yet. Issues of bread and butter are obviously much more evident to citizens in poor countries compared to the – often indirect – advantages generated by constitutional reform. Furthermore, the empirical data presented above nuance the claims made by institutions involved in Zambia’s reform process, ‘representing the will of the people.’

Are the people truly interested in constitutional reform?

Looking at the way the current National Constitution Conference relates to society at large, two issues are of particular interest. The first concerns the relationship between participants of the NCC and the institutions they represent. How did the stakeholders determine whether or not they were going to participate within the NCC and how were representatives then selected? Secondly, how does the conference as a whole relate to society?

Institutions took different positions on the question of whether or not to join the NCC. It is interesting to examine how these decisions have been made and how ordinary Zambians were involved precisely because of the strong representation claims.

A few civil society organisations (such as the Media Institute for Southern Africa, the Law Association of Zambia and trade unions) organised relatively broad-based public consultative meetings with their members whether to join the NCC. However, such broad-based member consultations proved to be exceptions! The Catholic Church for example had organised broad based civic education programmes on constitutional reform, but the decision to boycott the NCC was taken by its leadership without substantive internal consultation. Within the Evangelical Fellowship of Zambia, more consultation took place and the majority of its members favoured a boycott although one of its constituencies did decide to join. The chairperson of yet another member of the OASIS Forum clarified that their initial decision to boycott the NCC was taken during a meeting with its Lusaka based leadership only. The chairperson indicated ‘the members of our

Whether or not to pull out of the NCC was often a top-down decision

²² Pangolin Consulting (2006)

²³ Erdmann and Basedau (2005)

member organisations are now anxious why we are not in the NCC and we have to explain to them why we are not in there. [...] It is not easy because there is still a lot of ignorance.' This refers to a rather top-down approach of a leadership deciding and subsequently explaining instead of broad-based consulting and then deciding on the basis of popular input. Positions taken by civil society organisations are therefore not necessarily based on grassroots concerns and consultations. An upward decision-making process within civil society organisations would enhance the legitimacy of the positions taken.

Political parties organised internal consultations in May 2007 so as to discuss the different roadmaps, possible compromises and some contentious content issues with their rank-and-file in the different provinces but they did not hold broad-based consultative meetings to decide whether or not to participate within the NCC either. In April 2008, the parties jointly organised regional consultative platforms to discuss content issues and in quite some cases regional representatives, interestingly, clearly contradicted positions taken by the leadership at the national level. The lesson to be drawn from these experiences is that party positions taken over constitutional issues sometimes merely reflect leadership positions that were drawn without a democratic internal decision making process.

Besides the informative role of individual participants towards their constituency, the conference secretariat also defined an ambitious programme to increase popular awareness. Live transmissions, weekly wrap-ups and phone-in discussions on national radio and television are some of the ways in which they wanted to include the Zambian people. A final opportunity for engaging Zambian citizens arises when the draft NCC report is presented and the general public has 60 days to provide input to the conference. Establishing mechanisms to reach out to other stakeholders and the population in general increases the legitimacy of a constitutional review process.

Citizens are involved
through the media

Some of the organisations that decided to boycott the conference later indicated they would participate 'from the outside' by monitoring NCC debates and sensitizing Zambian citizens. Some were also invited by the conference to make presentations in order to incorporate their positions within the NCC discussions. If the draft NCC report reflects their main interests, they might become strong defenders of it as happened to the draft CRC report in 2005. But the OASIS Forum leadership stated in July 2008 that it would call for public demonstrations against the NCC, claiming it had shown itself to be 'a waste of time.' A PF member of parliament who boycotted the NCC stated the party was campaigning against the NCC in urban areas by focussing on the allowances allocated to its members although he also indicated that the entire reform process was hardly an issue in many rural areas. This is another obvious indicator of the fact that constitutional reform should not be seen as a mere technical matter but as a highly political process.

The leaders of institutions that decided to boycott the NCC as well as those that have joined it, face a similar challenge of communicating their position to the majority of Zambians. Until now, opinion polls have indicated that only a small percentage of Zambians is convinced of the importance of the reform process in relation to their daily needs.

The unforeseen

Then the news broke that President Levy Mwanawasa had suffered a brain haemorrhage during an African Union meeting in Sharm-el-Sheik, Egypt. Zambian democracy was seriously tested when a presidential by-election had to be organised in 2008 while the constitutional review process was in full swing. Although the opposition party, the Patriotic Front (PF), challenged the results in court (after losing the elections with only 35,000 votes), national and international observers pronounced the elections were free and fair. A parallel voting tabulation exercise undertaken by a local and American institute confirmed the results. At the time of writing, the court case dealing on the issue was still pending.

The President suddenly died, which led to general re-elections

Subsequently, some contradictory statements made by the office of newly elected President Banda with respect to the NCC raised some questions about his commitment to the process. The fact that agreements reached at committee stage were reopened within the NCC in early 2009, did affect civil societies' confidence in his commitment to the process. Yet, at the time of writing the exact impact can not be fully overseen.

5. The influence of the international community

The international community has played an important role in assisting local actors defending Zambia's democratic rights on two major occasions. In 1990, a lot of international pressure was put on the first President Kaunda to allow for a return to multiparty elections under a constitution acceptable to other stakeholders. In 2001, pressure was also seriously put on the government to prevent the Third Term bid by presidential Chiluba. Linking governance criteria to donor support has obviously created influence for specific donor demands. However, donors are afraid of being dragged into local political conflicts and therefore are walking a thin line.

International pressure contributed to Zambia's return to multiparty democracy

Various representatives of OASIS Forum, having collaborated successfully with many western donors ever since the 2001 elections, often turn to donors with requests to raise pressure on the government over particular governance issues. Prior to the 2006 elections, they requested donors to push for a Constituent Assembly to be set-up so that the elections could be held under a new constitution. This time around, no such strong pressure was generated as basic democratic principles were not violated by the government in any way. Once the President had publicly committed himself to a Constituent Assembly (to be setup after the elections), international donors did include the need to define a roadmap as an important governance indicator during negotiations with the government on budget support to Zambia.

International donors pointed to the need for a road-map

Various representatives within the international community also indicated that they had been contacted by civil society organisations to fund sensitization programmes advocating against the NCC. Although a number of western NGOs provided some funding, the major bilateral donors have been hesitant as they recognise the political sensitivity involved in funding public campaigns against an Act that has been adopted by a large majority in parliament. They requested

major political and non-governmental actors to regroup themselves and develop a joint civic education programme aimed at informing citizens in a more impartial and neutral manner.

The international community plays an important role in Zambia's constitutional reform processes. Civil society organisations and government actively try to mobilise international support supporting their own agenda, which makes funding decisions (who, when, how much) extremely political. The donor community tries not to become too directly involved in national political struggles and will only put weight behind governance issues if basic democratic principles are at stake. This interplay between government, donors and civil society organisations is another important characteristic of Zambia's constitutional reform process which, combined with the current absence of a strong local constituency, raises further questions about Zambia's 'home grown' democratisation process at large.

An important lesson to be drawn from the Zambian experiences is that international donors need to be mindful not to be exploited in the controversy between civil and political society and to be aware that their assistance does impact either deepening or ameliorating divisions.

6. Lessons learned

The exact impact of the institutional set-up that was mandated to lead Zambia's fifth constitutional reform process cannot be assessed yet. The first committees were still sitting at the time of this writing. The plenary assembly had not started at all and the consequences of the President's death were not clear. Nevertheless, the Zambian case does provide some interesting lessons for other constitutional reform processes.

- **Popular Involvement:** Zambia's constitutional reform processes have been elite driven with international donors and leaders from both political and civil society as its main actors. The latter failed to popularise the issue and sensitize a majority of citizens. Investing a lot of energy in securing a stronger local constituency behind the constitutional reform agenda is crucial. Once the issue is considered to be of greater importance by a larger segment of the population, voters will hold their representatives accountable for the results achieved. As long as such popular involvement and interest has not been generated, claims made with respect to 'popular will' or a 'people driven' constitution have to be treated with caution.
- **Recognising the reform process as a political arena:** Political parties, civil society organisations, churches, the business community and trade unions often have different views and interests when it comes to redefining the political system in society. A successful constitutional reform process is able to include all major stakeholders in order to build consensus on the 'autobiography of the nation.' The Zambian case demonstrates that political parties jointly managed to overcome the long-lasting impasse on constitutional reform and subsequently drove the process that led to the NCC.

csos try to mobilize support for their agenda, while international donors try not to become too involved in local politics

Popular involvement

Recognising the reform process as a political arena

More consultation and dialogue with other stakeholders (certainly civil society organisations) over the number of seats allocated to the various stakeholders could have possibly prevented a number of stakeholders staying outside the process calling for boycotts.

- Ensuring the autonomy of the reform process: Despite its self-regulatory functioning, the National Constitutional Conference does depend upon the President, the Minister of Finance, the Minister of Justice and the Secretary to the Cabinet in various areas. Although this 'dependence' did not have a negative impact during the first months of its sitting (the NCC Secretariat was mostly given what it requested from government), it does create risks for the process once disagreements arise between the sitting government and the NCC.
- Agreeing on the exact end goal and status of the end product: Entering an extraordinarily contentious reform process without prior agreement on its exact ending and the status of its end product might just delay controversies over the issue. Reaching an agreement on the enactment process prior to the reform process is of great importance in order to ensure that all stakeholders are aware of and agree with the reform process. Room for political interference at a later stage might then be minimized. That agreement is easier to reach at the start of a process than once locked into controversies at the end of process. Failure to have the finish line agreed upon before the race starts, often results in not meeting the finish line at all, adding to frustrations and fuelling mistrust.
- Increasing awareness of legal aspects of constitutional reform: On various occasions, Zambian civil society organisations have proposed roadmaps for constitutional reform or specific demands that were legally questionable. Portraying the government as unwilling whereas it abides by existing laws suggests the need for legal sensitisation programmes in order to prevent citizens from becoming misinformed.
- Respecting the mandate of political parties: Zambian NGOs dominated the constitutional reform agenda (with support from western donors) for years. When a deadlock between government and civil society organisations arose, political parties jointly decided to define a compromise by suggesting the set-up of a National Constitutional Conference following internal consultation with their regional branches. This proposal was accepted by a large majority in parliament. Whereas civil society organisations have been seen as the natural drivers of governance issues and have become highly political institutions in many African countries, the Zambian case suggests that constructive inter-party dialogue offers significant opportunities for consolidating democracy. However, as has been pointed out, consultation between political parties and other stakeholders prior to the drafting of the NCC compromise could have broadened the legitimacy and support basis of the agreement reached.

Ensuring the autonomy of the reform process

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Agreeing on the exact end goal and status of the end product

Increasing awareness of legal aspects of constitutional reform

Respecting the mandate of political parties

The Zambian case shows that constructive interparty dialogue offers significant opportunities for the consolidation of democracy

Zambian Centre for Inter-Party Dialogue (ZCID)

NIMDs partner in Zambia has been set up by the Secretary-Generals of all Zambian parliamentary parties. After initial years of informal interparty dialogue, the centre was formally established in July 2007. ZCID's board consists of the Secretary Generals of the parliamentary parties. The institute aims to strengthen the legal framework of Zambian democracy, the functioning of political parties and improve cooperation between political and civil society. ZCID facilitated a political agreement between all party presidents on the constitutional review process in 2007. ZCID tries to actively engage civil society within its activities as it recognises its important role in fostering democracy in Zambia.



ECUADOR

Capital	Quito, 00°9's 78°21'w
Largest city	Guayaquil, 2°11's 79°53'w
Official languages	Spanish
Government	Presidential republic
- President	Rafael Correa
- Vice President	Lenín Moreno
Independence	
- from Spain (<i>Failed</i>)	August 10, 1809
- from Spain	May 24, 1822
- from Gran Colombia	May 13, 1830

Political Parties (election results 2009)

Governing party

Movimiento Alianza País (MPAIS) 61

Opposition parties

Partido Social Patriótica (PSP) 23

Movimiento Popular Democrático (MPD) 7

Partido Social Christiano (PSC) 6

Partido Renovador Institucional Acción Nacional (PRIAN) 4

Movimiento Municipalista 4

Other parties – rest

Total: 124

Ecuador's constitutional reform process: lessons learned for political parties

Luis Narváez-Ricuarte

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Summary

Ecuador has suffered increasing political and economic instability in the past twelve years. As a result, several presidential terms have been interrupted. Such crises have not only affected several state institutions, causing the severest injury to the political party system, but also a growing general mistrust towards politics by society. The presidential elections in 2006 dramatically changed the balance of power in Ecuadorean politics. With an agenda of political reform and a new constitution, Rafael Correa and his political movement 'Alianza País', gained an exceptional electoral mandate. After the approval of the new constitution, through a popular referendum, on September 28th 2008, the whole political system is being rebuilt.

1. Social-political context in which the reform process started in 2007 took place

Ecuador's first constitution as a republic was established in 1830, following the country's independence. Over the years, new constitutions have been written at an average rate of one every 8.5 years, usually during or after, periods of social, political, and economic unrest. Only in 1979 did Ecuador pass from military to civilian rule. Since then, infringements of democratic norms have been frequent.

In 1979 Ecuador transitioned to civilian governance

The 1979 constitution marked the new relations between the political system and society in general, but it did not mean that the political system developed itself according to a logical path of formation and promotion of a political culture. Rather, political activity in Ecuador was characterized by a high degree of non-ideological, interest-based confrontation. Many of the political parties were transformed into political enterprises with a leadership culture based on caciquism. In Latin America, this means the rule of leaders; as a class, they often played a key role in their countries' political structure. In the Ecuadorian case, it signifies the relation between the distributor of favours and the local population.²⁴ In other words, the post-1979 political order was dominated by corrupt and exclusionary political parties and consequently society was largely marked by inequality and exclusion, especially of the indigenous inhabitants. Moreover, no interaction between the Ecuadorian population and political power groups took place. Their relation was articulated solely in formal terms; during democratic periods, the population was required to legitimize the position of the dominant classes through elections.

There is large inequality in the country

²⁴ Tribunal Supremo Electoral – http://www.tse.gov.ec/index.php?option=com_content&view=category&layout=blog&id=9&Itemid=16 (Friday, 30 May 2008, 12h30)

Manipulation in the system prevails

The electoral system was manipulated during all of the democratic stages since 1979. The attitude of political parties towards their political adversaries, who were in government, was such that it led to irrational confrontation, not permitting a consensus over the implementation of an agenda for national development. Moreover, often the political party of the President did not have a majority in congress, leading to ineffective governing. Since the beginning of the 1990s, the rightist oriented liberal market policies resulted in downsizing of the state under the influence of the 'Washington consensus'. Meanwhile, after the fall of the Berlin Wall in 1989, the leftist oriented political forces attempted to resurrect the equalitarian political ideas of the 1950s, without replicating the old militant strategies. In practice, Ecuador became a nation without a clear political direction and predominantly organized by political relationships.

Political relations form the base

The situation changed significantly at the beginning of the 1990s, under the government headed by a left democratic party. Several indigenous movements, which were founded earlier, started to request not only political participation, but also an apology for the abuses that society had condoned towards the lower classes. For the first time, the government recognized the Confederation of Indigenous Nationalities of Ecuador (CONAIE) as an official and representative institution. This indigenous movement was included in the political arena with the support of several social movements, who, on moral grounds, questioned the social exclusion of the indigenous peoples. Through its political branch named PACHAKUTIC, CONAIE was able to enter politics and managed to gain a presence in parliament within a relatively short period of time. Subsequently PACHAKUTIC participated in the coalition government of President Gutierrez in 2002.

In the early 1990s the indigenous movement was included in politics

The mistrust of politics by the population, the weak institutionalisation of political parties and the fragile political system finally paved the way for the birth of new leaders in the late 1990s. Leaders that did not originate from the traditional party structures, but from civil society. These new actors, recognizing that the prevailing constitutional norms of 1998 had been exhausted, proposed an array of changes. The most significant proposal was elaborated by the movement Alianza País of the later and current President Correa. It proposed to modify the constitution as a first step towards a 'citizen's revolution', a model for a participatory democracy.

The lesson to be drawn is that mistrust in a political system leads to pro-active participation of otherwise excluded actors from the population.

In the end it came down to only two sides: either with 'Correa' or against

The interesting characteristic of the proposed model was that Alianza País called upon input from both internal actors as well as outsiders. This approach was characterized as 'inclusive' by enlarging the group of people collaborating in the formulation of the new constitution. Other leaders who enjoyed less popularity saw themselves forced to connect their political ambitions to this phenomenon called 'Correa'. By capitalizing on these developments, Correa finally managed to reduce the fragmented national political stage to a two-headed race. On the one side, he and his proposal for a revolutionary change presented as 'Socialism for the 21st century' and on the other side, the political right wing, failing to articulate an adequate message and divided amongst themselves.

This political environment enabled social groups to empower themselves and exert pressure in the political arena. They participated directly by means of alliances whose mechanics of association did not run along the lines of ideology, but rather followed unorthodox and more practical interests. The minimal common denominator was 'change'. The most articulate elements in the constitutional reform process are those proposals coming from groups with an ethnic denominator requiring solutions for the amelioration of their daily lives: the right to the usage of water, land distribution, recognition of certain levels of autonomy and self-governance, or even administrative self-determination, the control over natural resources, etc.

After successful elections for the movement of Rafael Correa, the Constitutional Assembly started in 2007, working on the 20th version of the constitution since 1830. The Assembly first convened on November 29, 2007 in Montecristi, and was given six months to write a new constitution, with a possible two-month extension. In late July, 2008, the Assembly approved a draft constitution comprising 494 articles, which was set to be voted upon by the registered voters of Ecuador in September 2008.

Most of the social pressure groups had practical demands

2. Historical view of the constitutional reform process 2006-2008

Ecuador embarked on an uncertain path of political reform on the 6th of February 1997. The government of President Bucaram, installed only six months earlier, was forced to resign due to the pressure caused by a civic strike. The strike was called for by various social and political forces expressing their discontent with the regime for its style of government, the corruption and immorality, bad economic policies and general uncertainty. One of the main requests of the opposing groups was the revision of the constitution. The demand for constitutional reform originated both from social movements as well as from some of the political actors of Ecuador. In the case of the social movements, it was the result of a process towards a more substantial participation and intervention in the political life of the nation. From the political point of view, it was an attempt to regain space after it had been undermined in a 25 year long process in which it appeared impossible to find institutional answers to national concerns. The reigning constitution, which had entered in force on the 10th of August 1979, was the result of a process aimed at the legalistic restructuring of the state. This process was initiated in 1976 and promoted by the military dictatorship that held power at the time. It named two commissions of jurists and assigned the task of elaborating a constitutional project to each commission. Both results were then submitted to the electorate by means of a popular referendum (held on the 15th of January 1978).

The constitution to be altered was established by the military junta

In 1997, almost 20 years later, Ecuadorian political life fell back into chaos, marking a new period of political and economic instability. It began, as mentioned above, with the political and illegal dismissal of President Bucaram, followed by the right-wing President Jamil Mahuad. Subsequently President Gutierrez, who was elected in 2002 with a popular support of 54%, was dismissed as well. This happened in spite of the fact that he was a populist leader who had managed to find sufficient support among segments of the military, the indigenous movements and certain social movements.

A rapid sequence of Presidencies over the last decade has led to instability within Ecuador

After the fall of Gutierrez in 2005, his successor and former vice-President, Alfredo Palacio, the seventh President in nine years, called for a popular consultation on the installation of a National Constituent Assembly to amend the 1998 Constitution. This constitution was adopted under President Jamil Mahuad despite a great confrontation with Congress. President Palacio's request for a popular consultation was submitted to the Supreme Electoral Tribunal (TSE), but failed to find approval because of fear for a repetition of what had happened with Palacio's predecessor Gutierrez and not because of the call for an inclusive process of dialogue in Ecuador.

Within this political context, a professor in economics, Rafael Correa, appeared on the political scene. Correa served as Minister of Economics and Finance in the Government of Alfredo Palacio, but soon distanced himself from the economic policy promoted by the President and the right-wing oriented political parties. The dispute over the direction of economic policy finally increased to the point where Correa resigned from his post as minister. Subsequently, he formed, together with other academics, a movement called *Alianza País*. This movement raised the necessity to reform the 1998 constitution and develop the Ecuadorian democracy into a more direct form of democracy.

Then Correa appears on stage

The most important representatives of the political establishment, including Álvaro Noboa, who was Correa's opposing candidate during the elections in 2006, were against the installation of the Constituent Assembly. These leaders formed an allied front; the only idea which appeared to unite them was their opposition against political reforms. This oppositional front, however, lacked the capacity to formulate alternatives responding to the nationwide demand for change. Consequently, after more than a decade of continued instability, significant swings in the electoral support for the traditional political parties, the rise and decline of short-lived neo-populist outsiders and constant interruptions of presidential terms, Rafael Correa became President by winning 56,57% of the votes in 2006.

Correa and his movement want to change the system through constitutional change

Correa's election dramatically changed the balance of power in Ecuadorian politics. In the elections, he refused to present his own candidates for parliament. With this move, Correa explicitly showed his dislike for the existing political party system and for parliament and demonstrating his intentions to change that system and to install a more participatory democracy. This led to a severe struggle for power between him and parliament. After two years in office, President Correa won that struggle. He subsequently enjoyed overwhelming popular support, as was demonstrated in April 2007 when he won 80% of the vote for his proposal to call for a Constituent Assembly. Also, in September 2007 in the elections for the candidates for the Assembly, in which his political movement obtained 70% of the electorate and, lastly, in September 2008, when the new constitution was approved by the population with a majority of about 63%. Correa's victory was obtained with support throughout the whole country, crossing the traditional regional division between the coast and the sierra. It firmly established his position as a national leader with a mandate for change. The four traditional parties, and the most recent political parties that were formed as alternative for the traditional ones, have almost disappeared from the political scene.

Consequently, the Constituent Assembly was being dominated by representatives of Movimiento País (MPAIS), the coalition of Alianza País and other small social movements. Therefore, MPAIS was able to present a new constitution, without the support of the opposition. The challenges were thus: dialogue with the opposition and the more oppositional parts of civil society, amongst them the media, and reaching consensus in the Assembly. One of the Assembly's first actions was to temporarily suspend Congress – whose majority consists of opposition parties – until the results of the referendum on the new constitution would be known in 2008. Congress' duties were taken over by the Assembly's commission *Legislación y Fiscalización*. This step has been severely criticized by the opposition as being unconstitutional and illegal. Indeed, from a legalistic point of view, the decision taken by the Assembly appears to be questionable. From a political point of view, the overwhelming popular support for this process, as evidenced in the last three elections, legitimize what is seen as a political path to re-establish the rule of law and confidence in governance.

The Assembly was dominated by MPAIS

The Assembly took over duties from Congress

Although transferring duties from Congress to the Assembly might have helped in the constitutional reform process, it was a questionable act, democratically.

Take democratic principles into account

3. Modality chosen for the constitutional reform process

The mandate for constitutional reform in all its dimensions was provided through the question submitted to the popular consultation. The population was asked whether it accepted "that a Constituent Assembly with full legal powers would be convoked and installed, in conformity with the Electoral Statute that will be adopted, in order to transform the institutional framework of the State and to elaborate a new Constitution."²⁵ Considering constitutional doctrine, the reform process adhered to constitutional principles. There was citizen participation, as well as elected representativeness in the Assembly following free and fair elections. The mandate was based on the expression of a popular will to transform the institutional framework of the state and to elaborate a new constitution. Also, the population knew in advance that it would cast another vote again in September 2008 to approbate the new constitution.

The population was well informed

The elections for the Constituent Assembly took place on the 30th of September 2007. Candidates of nine different political parties and fifteen political movements participated in the event. The 130 newly elected delegates followed the guidelines set out by the 'Statute of Election, Installation and Functioning of the Constituent Assembly'. The Assembly delegates, acting on their popular mandate while under pressure by the strong opposition of the incumbent Congress, adopted 'Constituent Mandate No. 1' on the 29th of December 2008. This document laid down and recognized the following principles that would guide the process:

- The Assembly assumes and exercises the constituent power with plenary powers (Art. 1).
- The constituent mandate, laws, agreements, resolutions and decisions, stand superior in hierarchy to any other norm, legal order and is of obligatory compliance (Art. 2).

²⁵ Asamblea Constituyente – MANDATO CONSTITUYENTE N° 1 (Registro Oficial N°223, 30 Noviembre del 2007) Montecristi, Ecuador, 29 Noviembre 2007.

Mandate

- The Assembly will replace, without the imposition of criminal, administrative or civil sanctions to the authorities, all officers and public servants who fail to comply, by action or omission, with the decisions of the Assembly (Art. 3).
- The Assembly ratifies and guarantees the existence and application of the rule of law and democracy.

As mentioned earlier, before installation of the Assembly, it suspended the representation and functions of the delegates in Congress. The delegates of Congress were elected in the 2006 elections. The Congress was dominated by the opposition since Correa did not present his own candidates for these elections. The acceptance of the Constituent mandate No. 1, implied that Until the proclamation of the official results of the approbation referendum has taken place, that the legislators in Congress would remain in recess. In the meantime, the Constitutional Assembly assumed the attributes and duties of the Legislative Function (Art. 6).

One lesson learned from the 1998 constitution-making process was, that a simultaneous functioning of the Congress and a Constitutional Assembly formed a serious obstacle for the reform process. With this experience in mind, Constituent Mandate No. 1 was approved by an absolute majority of the Assembly delegates. The opposition declined to vote in favour of the recess of Congress, supporting the alternative option of subordinating the competences of 'the Constituent power with plenary powers' (Art. 1 and 2) 'until the official proclamation of the results of the approbation referendum would have taken place' (Art. 7). In other words, let Congress remain in function and only grant plenary powers to the Constituent Assembly when it is ready to implement the newly written constitution.

From a constitutional doctrine point of view, the powers of a Constituent Assembly are not understood to include or assume control over the Legislative, Executive or Judiciary. Formally, the supervisory role of congress in recess – during the process – finds itself in a status quo. Concerning the risk posed by a Constituent Assembly dominated by a large majority, the corresponding limits are certain constitutional principles, such as the fundamental rights of each individual, guaranteed by international agreements in force. Furthermore, they are implied in the reaction of public opinion through various channels.

The Assembly approved the proceedings related to its own functioning on the 11th of December 2007. The norms and rules that regulate the proceedings of the Assembly have been published in a statute. The statute includes principles such as the equity among delegates, the application of the non-discrimination principle, the liberty of expression, the competences of the delegates, the Assembly composition and the mandates of the Assembly committees. Furthermore, the general procedures for debates and decision-making are laid down, both the functional and organic ones.

Through acceptance of the Mandate, Congress could be sent to recess

Besides executive power, the Assembly also assumed control over the legislative and judiciary power

A statute was set up for the proceedings in the Assembly

4. Accepted principles for the constitutional reform process.

Elections of the Constituent Assembly

The electoral register confirmed the official registration of 9.371.238 voters for the election of the delegates for the Assembly. A total of 6.857.466 voters cast their ballot; nine parties and seventeen political movements participated in the election. For this purpose, the electoral process was organized by means of a mixed system for distributing the seats. A combination of proportional representation was applied, complimented with the distribution of seats based on the T.H. Hare method. In this way, popular expression in the Assembly was guaranteed by the allocation of both majority and seats in the composition of the Constituent Assembly.

A large majority of the population voted for the allocation of Assembly seats

In September 2007, free and fair elections resulted in a majority of seats won by the candidates of the political grouping led by the President of the Republic, the Movimiento País (MPAIS). In numbers, MPAIS obtained 82 seats of the 130 in total. The second largest grouping followed with 18 seats and the rest of the seats were distributed among candidates of the former traditional, but now small oppositional political parties. The majority of the MPAIS was large enough to allow the MPAIS representatives to take decisions in the Assembly.

MPAIS WON

Organization of the Constituent Assembly

Ten Constituent Commissions were created; each assigned a specific theme as part of the constitutional debate:

1. Fundamental rights and Constitutional Guarantees, 2. Organization of social and citizen participation and system of representation, 3. Structure and Institutions of the State, 4. Territorial Order and Assignment of Competences, 5. Natural Resources and Biodiversity, 6. Labour, Production and Social Inclusion, 7. Development Regime, 8. Justice and Fight against Corruption, 9. Sovereignty, International Relations and Latin American Integration and 10. Legislation and Control.

Division of the Commissions

Principles of the Constituent Assembly

Each of the Constituent Commissions was formed by 13 delegates distributed according to proportional representation. These groups received the initiatives and proposals from the Assembly's delegates and from social movements, syndicates, indigenous inhabitants, ethnic groups, civilians, unions, civil society, institutions and organs of the State, and finally any natural or legal person (Art. 23). After the studies and discussions had taken place, the corresponding commission submitted its report, through the President of the Assembly, to the Plenary Assembly. The Plenary took notice of the majority and minority reports, after which a debate and finally the approbation of the proposed texts followed. After adoption, the proposals became Constituent mandates, laws and regulations, all with immediate binding and obligatory force. The approbation of the contents of the report took place by absolute majority vote (66 votes from 130 delegates). The compilation and harmonization of the different approved reports was carried out by a special edit commission. Once the text of the new constitution was approved in the Assembly, the Supreme Electoral Tribunal called for a referendum within a period of 45 days. By means of the referendum, the Ecuadorian people could approve or reject the proposed constitution by a simple majority of 51% of votes cast (Art. 69).

Proposals were discussed, submitted into reports, debated by the Plenary Assembly, and then compiled for the people to vote on in a referendum

The idea of the proposal for a Constituent Assembly polarized the political discourse ever since it was proposed in 2006 until the actual call and its implementation, starting in November 2007. However, the political discourse did not result into a polarization within Ecuadorian society. A substantial majority of the people was inclined to favour the Assembly. Opposition arguments did not carry favour with the population. With the Executive and the Congress in recess, the opposition parties and groups were unable to produce alternative proposals that received popular support. Given this reality, the President of the Assembly, who is a member of the governing party, articulated an inclusive strategy that aimed at input of opinions of the general population. An example of this is the organisation of a reception by the Assembly for hundreds of groups, trade union syndicates and representatives of civil society to provide these groups with the opportunity to articulate and advocate their points of view. Although this made the process more inclusive indeed, the participatory manner proved very time-consuming. Effectively, the 60-day period for finishing the text for the proposals had to be extended.

Society was involved

5. The relation between the reform process and the realm of Society

Officially, each delegate had the right to put forward and defend his position on issues of varying importance. These issues were subsequently subject to discussions and approval in the committees through strict democratic process. However, President Correa, who was officially not elected to the Assembly, did indirectly influence the process. Delegates of the governing party in the Assembly were given instructions on the preferred position on certain proposals. This was done in order to maintain cohesion and support for the proposals amongst the MP AIS delegates belonging to MP AIS, regardless of their personal views. There even was an official coordinator appointed to coordinate between the positions of President Correa and the Assembly delegates.

President Correa indirectly influenced the Assembly

Obviously, the preparation of the delegates was determined by diverse strategies and methodologies. For the first time in Ecuadorean history, a high number of civil society organisations participated in the Assembly by means of workshops, presentations, receptions, etc. All this was made possible by use of private financial resources, private contributions, and the technical and financial cooperation of international NGOs. In addition, MP AIS organized a policy platform that resulted in an alliance with indigenous movements and other ethnic groups. It organized education and training courses and workshops, which were taught in indigenous languages, recognizing the multi-ethnic character of the Ecuadorian population.

Civil society organizations participated through workshops and training courses

On the other side, the oppositional discourse focused on mobilizing support for a 'no' to the draft constitution that was submitted to the referendum. Their discourse, disseminated in different forms through the media, claimed that the Assembly was an illegal institution that could not produce the text of a new constitution.

The opposition used the media

6. The influence and the role of the international community

The political events and successive crises with the vast turnover of presidents that have shaken Ecuador since 1996, received wide attention of the international community. In some cases, this attention was merely a political science interest in assessing the level of stability of the political system and to identify the political risks of the course of events. In the process, Ecuador gained the reputation of a fragile state. In other cases, the international interest went beyond mere observation and was aimed to intervene in the complex and dynamic Ecuadorian reality in efforts aimed at contributing towards greater stability.

The international community observed and/or intervened in Ecuador

For this purpose, it is important to identify the actors of the international community which have had a presence and influence in the process. In the first place, there was a special interest of partner countries, especially those located in the Andean region. Special attention should be paid to the United States for its geopolitical influence. Secondly, international organizations like the Organization of American States (OAS), the European Union (UE) and the United Nations (ONU), are important actors as well, in particular because of the manner in which they have expressed themselves about the process. Thirdly, some NGOs also made a significant contribution to the Assembly, as well as the academic centres, such as the Latin American Faculty for Social Sciences (FLACSO) and the Andean University Simón Bolívar (UASB).

Bilaterally, through international organisations or NGO's

For understanding the role of the international community, the second electoral round in 2006 can be illustrative. Through the democratic process of free and fair elections, the economist Rafael Correa became President of the Republic. He delivered on his promise to convene and install a National Constitutional Assembly. Internationally, the affinity or disagreements with the Ecuadorian political process expressed itself according to ideological proximity or remoteness with the political platform of Correa. Explicit support for the election of Correa was expressed by Venezuela and Bolivia, whereas a more formal acceptance, more by means of diplomatic courtesy, was expressed by Peru and Colombia.

Political support

Possibly due to the highly sensitive nature of the United States' relations with Latin American countries, US participation does not appear explicitly in the Ecuadorian process. Nonetheless, it is clear that the issue of democratic affirmation – free and fair elections, popular referendum – an important element of US foreign politics, has the support of the United States. The US backing is channelled through the conduit of non-governmental organizations as well as through declarations and actions which express the acceptance of the process.

Process support

A deeper involvement in the process can be attributed to the United Nations. UNDP assisted with a programme, which prepared the methodology to be used by the Constitutional Assembly. The programme had the objective to establish a set of principles and procedures which allowed for an adequate registration and processing of the information provided by the social and political organizations and movements which were directly or indirectly participating at the different stages of the constitution-making process.

UNDP

Organization of American States

The OAS had established its presence through an observer of the process, under the guidelines of the 2001 Lima Declaration of the OAS. Its mission was to guarantee that transparency was the guiding principle both in the debates and with regards to the inclusion of initiatives originating from the different Ecuadorian social actors. Furthermore, OAS also provided the observers who oversaw the electoral process before the installation of the Assembly.

European Support

Although the European Union did not contribute directly, it nevertheless provided support through a number of NGOs with whom it maintains relations.²⁶

The influence of these NGOs has been substantial, both on issues debated in the commissions and in the plenary sessions of the Assembly. The countless number of NGOs that exist in Ecuador make it very difficult however to determine the precise level of involvement and the influence of specific organizations.

Involvement of Academia

Finally, it is important to highlight the participation of the academic sector, especially of FLACSO in the UASB contributions. These regional academic institutes not only have provided critical analysis of and reflection on the process, but also provided valuable input for the construction of a new state model and in the editing of the text of the new Constitution. Various professors of the above-mentioned educational institutes were represented in the Assembly as elected delegates.

7. Most important lessons learned

The type of reform discussed in this case study can be regarded as constitutional reform through a Constitutional Assembly, called for and mandated by a popular referendum. Through a popular vote, the Assembly was empowered to carry out a partial or a total rewrite of the existing constitution. In addition, the mandate included legislative powers during the period in which the Assembly functioned. This power was exercised during the latest reform process when the Congress was sent 'with recess' and taking over the legislative functions.

The process should be legitimate

To be successful and legitimate, it is an absolute condition that the constitutional reform process is firmly rooted in the application of the principles of democracy. Citizenship participation has been the guiding principle and driving force. It resulted in the legitimately elected delegates to the Assembly, in the formulation and popular acceptance of the mandate of the Assembly, and in the acceptance of the new constitution through a national referendum. In this way, the democratic legitimacy has unequivocally been established. Through the followed process, democracy has been affirmed and, it is hoped, deepened.

There should be a clear framework and set regulations for the Assembly and its Committees

It is indispensable to record the described process in a regulatory normative framework for future use. Such a framework should contain the mechanisms, tools and procedures used in the process. Furthermore, it should include a chronological timeframe for the completion of the different steps in the process from start till finish. The norms guiding the process should be agreed to explicitly and be the core of the framework. They include equity and non-discrimination in participation, freedom of speech for the delegates, as well as procedures and regulations for the composition and mandates of the committees of

²⁶ Participación Ciudadana – DEMOCRACIA DIRECTA: PRINCIPIOS BÁSICOS Y SU APLICACIÓN EN EL ECUADOR (Editado por Corporación Participación Ciudadana) Quito, 2008 "Esta publicación ha sido posible gracias al apoyo del programa conjunto de Idea Internacional y el Instituto Holandés para la Democracia Multipartidaria NIMD: Agora Democrática"

the Assembly, the guidelines for debates and decision-making, and, finally, procedural and organizational questions, both functional and organic.

Proposals for discussions should preferably originate through dialogue from the contributions from social and political actors engaged in the constitution-making process. The inclusion of the widest possible section of society is required to consolidate the ambition of popular and civic participation in governance. It will contribute to the ultimately aim of assuring a just, dignified and free future for every citizen.

Civic participation is important

An inclusive approach allows social and political organizations to become motivated and truly committed to the process of constitutional reform and to exert direct pressure on the political decision-making process. Simultaneously, it is important in a fragmented society to canalize demands and to construct alliances around issues of common interest and common policy platforms or ideologies.

An inclusive approach will commit a larger part of the population

For democracy to perform well and for constitutional reform processes to succeed, a strong democratic political culture is required. An inclusion approach is the characteristic feature of such a culture. In the formation of political culture, the institutionalization and strengthening of political parties should be one of the priorities. It ought to be the primary challenge and focus in the cooperation to improve the performance of democracy and the fulfilment of our objective of a just and peaceful society.

NIMDs partner in Ecuador is Ágora Democrática, a joint venture between NIMD and International IDEA. Since its start in 2006, the office's main priority was support to the Constituent Assembly. It provided several commissions of the Assembly with technical support on gender inclusion, social participation, political system reform and media policy. Moreover, in 2008, in cooperation with a platform of other important stakeholders, it developed a draft text for the Electoral Law and the Law on Political Parties.



ZIMBABWE

Capital (and largest city) Harare, 17°50'S 31°3'E

Official languages English

Recognised regional languages Shona, isiNdebele

Government

Semi presidential, parliamentary republic

- President Robert Mugabe
- Prime Minister Morgan Tsvangirai
- Vice Presidents Joseph Msika and Joice Mujuru
- Deputy Prime Ministers Thokozani Khuphe and Arthur Mutambara

Independence from the United Kingdom

- Proclaimed November 11, 1965
- Recognized April 18, 1980

Political parties in tri-partite government after the Global Political Agreement (2008)

Zimbabwe African National Union-Patriotic Front (ZANU-PF) 97
 Movement for Democratic Change – Tsvangirai (MDC-T) 99
 Movement for Democratic Change – Mutumbara (MDC-M) 10

Rest divided by the President

Total: 210

The Zimbabwean constitutional reform process

The history of Zimbabwe's constitution-making process 1888 to 2008

Reginald Austin

Summary

Zimbabwe has been governed under numerous, frequently reformed constitutions, typically produced exclusively by elected Legislatures rather than through inclusive participatory processes. They were 'handed to' rather than 'made by' the people. The in January 2009 unanimously accepted Amendment 19 of the constitution of Zimbabwe now includes a roadmap towards a new democratic constitution in 18 months that opens up for a participatory process under the aegis of a Parliamentary Select Committee.

Zimbabwe's colonial and 20th century Cold War-dominated history to independence has meant that international actors have and still influence this process. Actors involved in the country's reform processes include the commercial colonizer, the British South Africa Company (BSAC), British imperial and Southern Rhodesian settler governments, political parties, civil society (especially churches), soldiers, black nationalist activists, political parties, liberation movement leaders long incumbent in power and new political parties demanding free elections and accountable governance.

Colonial and liberation wars, violence and militarization were recurring driving forces in the process. They shaped successive governing and opposition elites' approaches, conceptions, ideologies and attitudes to forms of government, on who and how to make and reform constitutions and the meaning of constitutionalism. These violent contexts have given Zimbabwean constitution making and reform processes a particular quality: violence became the repeated 'body language' in the design and practice of the reform processes and thus, together with the substantive documents, part of the country's 'autobiography'.

1. Zimbabwe's socio-political context

In 1890, the indigenous population was 600,000 compared to a mere 1500 white colonists. By 1975, whites totaled 296,000 of a 6.5 million population. The current population is an estimated 12.5 million, predominantly rural but increasingly urbanized, of which approximately 40,000 are whites and a small minority of Asian and mixed race. Over 3.5 million Zimbabweans have meanwhile become economic or political emigrants.

The main black language groups are Shona (80%) and Ndebele (15%). The latter, established a military hegemony over the local Shona speakers in the 1830s. White minority rule persisted until April 1980.

White minority rule maintained its rule until 1980

Agriculture was the mainstay of the economy followed by mining and secondary industry. Commercial farming was predominantly white on privately owned land, while indigenous agriculture was primarily on communal land. Agricultural production fell dramatically after the 2000 expropriation of farms, paralleled by a steadily degrading economy as inflation rose to world record levels.

Rhodesian politics were notionally multiparty but dominated by whichever single political party best represented its close-knit consensus. Socio-economic relations reflected colonial politics. Blacks' status was inferior to whites' in health, education, employment, civil and political rights. British responsibility to protect indigenous peoples' rights was never exercised until, under UN pressure, it insisted on No Independence Without Majority Rule (NIBMAR). This triggered the unilateral declaration of independence and UN sanctions. Black dissent and opposition, necessarily extra-Parliamentary, was persistently met by repressive legislation. Their leaders therefore concluded that constitutional reform was only achievable by force and launched a war of national liberation.

During the war, the nationalist movement, divided into the Zimbabwe African Peoples Union (ZAPU) and the Zimbabwean African National Union (ZANU) shared the common objectives of establishing majority rule as well as the restoration of expropriated land. Their further political orientation reflected their leaders' more or less radical vision of Zimbabwe's future form of governance. After independence and ZANU's clear electoral victory in 1980, the PF-ZAPU opposition's main policy difference was with the government's desire to replace political pluralism with a one party state, which it achieved by the forced absorption of the opposition in 1987 in the 'unified' ZANU-PF.

Two nationalist movements
joined into one: ZANU-PF

After independence, Zimbabwean political parties based their legitimacy on their liberation struggle credentials. ZANU-PF increasingly emphasized the 'liberation of the land' as the hallmark of the need for its continued government. However, as an urbanizing society focused on social and economic issues and good governance, a new coalition of interests within civil society emerged. They regarded a freely elected political party committed to those objectives as equally legitimate. On this basis a new party, the Movement for Democratic Change (MDC), was launched (1999) by prominent trade union and civil society leaders. Ever since, Zimbabwean politics have been dominated by fierce competition between these two parties and their very different visions.

MDC was launched in 1999

2. Historical overview of constitutional making and reform processes

The seed of modern government was King Lobengula's 1888 concession to the British South Africa Company (BSAC), to explore for and exploit minerals in his kingdom. The company forcefully 'reformed' it in 1893 by war, overthrowing his kingdom and installing colonial occupation. In 1896, the company, with imperial support, crushed the indigenous people's rebellion against the occupation. Thus began British colonial involvement and its neglected constitutional powers to protect indigenous rights from erosion by company or settler laws. This pattern of empty constitutional protection did nothing to create respect for or faith in constitutionalism, then or in the future.

The British neglected
constitutionalism

Another important constitutional issue arose at the beginning of colonial rule: property rights, especially rights over land. In 1919, the BSAC surrendered its colonial role and title to land to the British Crown. Claims made by the indigenous population to keep their communal land were rejected on the ground that: "The Africans of Southern Rhodesia were on a lower end of the scale of social organization such that their conceptions of right could not be reconciled with the institutions of civilized society". Such racist reasoning has cast a long shadow on Zimbabwe and its people. Claims on land made by the company and settlers in the transition of mandate to the British Crown were also rejected. The settlers, however, remedied their loss by purchasing the land back from the British.

The indigenous population was not allowed to have land

Attempts to use the Courts to protect constitutional rights have had mixed results. Formally, courts offer an indirect means by which citizens, otherwise excluded from the reform process, can influence and even drive it. However, the Legislatures' legal power and superior attitude causes difficulties. Successful court challenges to legal reforms were ignored or overturned by the Legislature in both Rhodesia and Zimbabwe. This reveals a deeper problem: the dominant, elected parliamentary party's persistent disrespect for constitutionalism and the rule of law.

Protection through courts was ignored, showing disrespect for the rule of law

The pattern of constitutional reform is to exclude (major) stakeholders and for government to maintain exclusive control. This pattern hardened during the intense period between 1953 and 1961. Two liberalizing constitutional reforms, amongst which was the 1965 Rhodesian independence constitution, resulted in failure. This document was exclusively designed by the settler regime to enable them to wage a war against decolonization. The resulting 15-year war of national liberation ended with a 'stalemate peace'. Britain used the opportunity to convene the Lancaster House conference attended by the stakeholders under duress with a forced agenda. A constitution without an honest consensus or shared ownership, frozen violence, frustration and future problems was the result. Its defects were ignored in the euphoria of peace and independence, the process hailed as a miracle, but an unhealthy precedent was provided for Zimbabwe's elites.

Following 15 years of war, the compromise Lancaster House Constitution was reached

Post-Independence Reform Processes

In theory, the 1980 Constitution ended undemocratic, authoritarian government. It promised liberal democracy through political pluralism, an entrenched Bill of Rights, an independent judiciary and the Rule of Law. However, significantly, it preserved two pillars of the colonial era: the temporary preservation of unequal white representation and the extreme, and potentially permanent, protection from reform of the grossly unequal white ownership of agricultural land.

The Constitution had promise, although some colonial aspects remained

Subsequently, the elected ZANU government challenged and overturned almost every one of those features by legislative amendments or the use of force. A campaign to crush and absorb its former ally and official opposition, PF-ZAPU, took some years and cost thousands of lives but achieved *de facto* reform: a one party state.

One party state

Even though civil society became more assertive, ZANU-PF continued to accumulate electoral victories

During the 1990s, economic hardships caused by the government's *Economic Structural Adjustment Programme (ESAP)* and dissatisfaction with corruption and authoritarianism resulted in a revival of the trade unions and an assertive civil society. They launched the national constitutional Assembly (NCA) focused upon demanding an inclusive reform process to create a national constitution. But given parliament's reform monopoly, under strong and unchanging leadership, ZANU-PF concentrated on ensuring overwhelming electoral victories as the means to stifle attempted revivals of political party pluralism.

In 1990, with South African freedom imminent, ZANU-PF's election manifesto raised the possibility of farmland expropriation without compensation. Its 1992 Land Acquisition Act envisaged implementation. This launched a standoff between government and the courts on the constitutional ground for such a reform. Expropriation also confronted the then internationally dominant neo-liberal dispensation, entrenched in the 1980 constitution. Thus, Britain, the EU, the USA, and the UN became involved in the process. In 1998, the collapse of a compromise set the scene for a new round of reform and new modalities to drive the process and change.

Since 1999 African States have become involved

Since 1999 attempted reform has seen continued international involvement, especially from the African States. Official resort to legal repression and violent pressure persisted, paralleled by an active but excluded civil society and the emergence of a strong, but factional, political party opposition.

Repression persists

What is clear is that the legacy of exclusiveness, of force, and complexity arising from external involvement, continues to shape the Zimbabwean constitutional reform process. Equally, positive lessons from this history have either not been learned or deliberately or negligently ignored, while negative precedents are followed.

3. The modalities chosen for the various constitutional reform processes

Agreed Principles for Review

Until the Global Political Agreement (GPA) of September 2008, there has never been a *broadly shared and solid* agreement on guiding principles for making or reforming the Zimbabwean constitution. There have been commonly stated general objectives, such as independence, majority rule, elections or – as recently after the 2008 electoral impasse – 'Shared power in a Government of National Unity'. But the idea of agreeing on a particular mechanism, much less an inclusive mechanism, for settling the agenda, procedures or committees by which a consensus on problems and their solutions might be reached, was never attempted.

Achieving consensus on inclusive constitutional reform mechanism is difficult

Equally, the values to be reflected in a constitution have never been stated and agreed upon. This is surprising given the success of the 1990s CODESA model used in South Africa's search for a constitutional solution to the difficult transition from *Apartheid*. In Zimbabwe, the 1999 attempt to agree on reforming the constitution failed. There was no consensus on either the Commission of Inquiry, the mode of review or the kind of state envisioned. More recently, the 2008/9 SADC mediated negotiating process has been essentially formed by

Agreement on the values reflected in the constitution is not easy either

the external facilitator and implementation of decisions has revealed persistent misunderstandings or blunt rejection of what was supposedly 'agreed'.

However, the protracted negotiations between ZANU-PF and the two MDC parties under the guidance of SADC resulted, at last, in the Global Political Agreement which was signed by the ZANU-PF and the two MDC parties in Harare on September 15th 2008. A roadmap for a new Zimbabwean constitution based on an elaborate set of principles was subsequently enacted in Amendment 19 passed unanimously by the Zimbabwean parliament in early 2009 that cleared the way for the installation of the 'inclusive' three-party government in February 2009. Under the amended constitution, the agreed upon roadmap should result into a fully new Zimbabwean constitution within a period of 18 months.

Following negotiations, a Global Political Agreement was set in which a new constitution is promised within 18 months after signing

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Unhappily, the recurring pattern of constitution making so far has been a context of violence, repression and phantom negotiation. This holds for 1965, the Lancaster House agreement, the *de facto* oneparty reform, the post-2005 response to opposition constitutional demands and the SADC mediated negotiations during 2007 and 2008. The implementation of the GPA under the current inclusive government promises to open a new avenue.

Violence remains

The ultimate failure of the outcome of the past imperious processes is, at least partly, due to the lack of widely shared principles and the historical tendency to see violence and domination as the most appropriate 'principle' to surround a constitution making or reforming process.

Shared principles and non violence are both essential

It is too soon to assess whether the recent agreement – negotiated exclusively between the three parties – to prepare a new constitution based on the principles of democracy, will succeed and obtain support beyond the political elites, which agreed to the process and principles. Given the problematic, historical legacy, it appears that an important break with the past approaches, at least on paper.

Constitutional Modalities

Parliamentary Legislation

From the time of the BSAC, the Legislature has been the favoured institution for constitutional reform. This was in line with the British constitution that was based on parliamentary supremacy. Until 1961, constitutional making and reform was a matter of simple majority vote in either the British or the Rhodesian parliament. Consultations, or broadened participation, was rare and entirely controlled by the Executive. Although the 1961 constitution introduced procedural limits and judicial oversight of constitutional amendments, the Rhodesian parliament dealt with these judicial obstacles to its will by overthrowing the constitution and removing the interfering judges.

In the 1980 Lancaster House constitution, special majorities, procedures and judicial oversight were included. However, once the parliamentary opposition was 'absorbed', ZANU-PFs overwhelming electoral majorities enabled it to make any amendment it wished, except for the proposed land reform in 1990. Thereafter the only limit on parliament was judicial. The result was again a

confrontation between Executive and Judiciary ending in the judges' forced removal and replacement. Opponents of the reforms, including the MDC, used the courts whenever possible but ultimately without effect apart from their confrontational side effects.

Imposed conferences

The Lancaster House conference of 1979 was an exception to the purely Parliamentary reform process, although the 1980 constitution ultimately was an Act of British Parliament. The international forces involved in it were impressively inclusive but the participation of its national stakeholders was poor in terms of their representation, their input and their attendance under duress. It is arguable that the conferences' primary purpose was not to make a constitution providing a basis for Zimbabwean national reconstruction and reconciliation but to end the regionally destructive war, achieve independence with at least credible majority rule and relieving Britain of its long standing and internationally embarrassing Rhodesian responsibility.

This is well reflected in the British Chairman's readiness to use his position as a 'Dominant Third Party Mediator' to force the conference pace. He overcame the liberation movement's deep objection and threatened boycott on the issue of the protection of colonial agricultural land rights by deploying all the pressure, promises and persuasion at his disposal. This included vague promises of 'future funding for agricultural development' from the USA. In addition, friendly African Front Line States advised the Zimbabwean national liberation movement to accept the proposed document, to win the election and rely on their future sovereign power to deal with the land issue. The Patriotic Front's leaders then accepted the unacceptable. Thus, a dominating, rather than a consensus mode of reform became a model for future constitutional reform processes.

Commission of Inquiry

By 1999, as a result of civil society demands, severe industrial unrest, ZANU-PF's desire for land reform and belief in its popular support, the Executive decided to consider a modified reform mode. The National Constitutional Assembly (NCA) and the newly formed Movement for Democratic Change (MDC) had called for wide consultations, informed debate and a sufficiently empowered National Constitutional Conference to produce a consensus-based national constitution. Instead, the government opted for a more restrictive process executed by a Commission of Inquiry. This Commission would consult the people, and draft constitutional proposals to be discussed at a Constitutional Conference, but its outcome would be referred to the President for finalization.

This Executive controlled process was not acceptable to the NCA or the new MDC, which boycotted the official process. They instead used the political space and engaged in an active program paralleling the Inquiry's official media and consultation exercise. These parallel programs produced a stimulated and well-informed Zimbabwean public actively engaged with the constitutional issues at stake. In this lively political atmosphere, ZANU-PF remained sufficiently confident of its popularity to put the draft to a reasonably conducted referendum. It was the first initiative of its kind and government lost the referendum. This shocked ZANU-PF but generated public excitement and revived political pluralism.

In 1999 the NCA and the MDC asked for a conference on the constitution.

Instead, a Commission of Inquiry was installed by the President

The NCA and the MDC paralleled this process

The newly formed MDC proceeded within months to contest the 2000 parliamentary election. Again for the first time, ZANU-PF almost lost its parliamentary majority in an election criticized by observers as marred by violence and official mismanagement. The government immediately made the rejected reforms law. Convinced that intervention by Britain, western donors and white farmers' opposed to land reform accounted for the MDC success, it placed land reform at the top of its agenda. This was to be driven by a fresh form of de facto reform: officially tolerating occupation of white farmland by ex-combatants. Government justified this as necessary to eradicate a colonial injustice perpetuated by the 1980 constitution.

ZANU-PF lost the referendum

Zimbabwe has thus experienced various reform mechanisms. How effective were these modalities? The Commission of Inquiry and the referendum experiment were dangerously uncertain, proved confrontational, alienated civil society and party opposition. Yet, it did significantly raise popular involvement with governance issues and contributed to the rise of political pluralism.

Popular political involvement grew

The 1980 constitution reform mechanism is still retained as the legislature, after eighteen constitutional amendments and is still the primary institution mandated for constitutional reform. Ever since 2000, internationally facilitated negotiations between the ZANU-PF and the MDC have become an important forum for constitutional reform. ZANU-PF demonstrates an official willingness to discuss reform with the MDC while subjecting it, its supporters and the active civil society to violence and legal repression.

The regional organization SADC has become, with the South African President, the long-term facilitator of the process. Effectively, it is creating the environment in which meaningful negotiations for the reform process are expected to take place. Western donors support the position of the MDC and have pressurized ZANU-PF with targeted sanctions. The region's (SADC and AU) involvement shows real concern with the situation but their position on the process of land reforms is ambiguous. As former European colonies, they sympathise with ZANU-PF's defense of its farm expropriations as its sovereign right and a just correction of colonial injustice. The result of this reform mode has been intensified confrontation, a frozen reform process and no sign of consensual, realistically inclusive constitutional change until the recent Global Political Agreement and subsequent enactment of Amendment 19 to the constitution and the new 'inclusive' government.

Thanks to the negotiations led by the Southern African Development Community and the subsequent GPA a reform can take place soon

4. The constitutional reform processes in relation to society at large

The Colonial Period

There was no structured relationship between the reform process and society at large. White Rhodesian society was homogeneous in social, economic and political attitudes and its elected legislators accurately expressed the dominant consensus, especially on racial supremacy. The British neglect of its protection of indigenous rights was likewise an accurate reflection of British society's attitudes to indigenous rights.

Since Independence

The first eighteen years of independence was a period of extreme contradictions in the relationship between the ZANU-controlled parliament and its subjects. As long as land reform was not on the agenda, reforms, including the early abolition of whites' special representation, were acceptable to that community. Despite early and serious disagreements between ZANU and PF-ZAPU, important reforms such as the creation of an Executive Presidency were agreed upon between the leaders. With the exception of minor civil society concerns, society at large accepted reforms through their only means of participation, namely, voting in the 1985, 1990 and 1995 elections.

Subsequent to the collapse of the Government of National Unity soon after independence, violent actions against PF-ZAPU dissidents and supporters and the absorption of numerous PF-ZAPU representatives, ZANU achieved its desired one-party state in 1987. The relationship between the ruling party and former PF-ZAPU citizens was antagonistic, best reflected in the fact that in 2000, they overwhelmingly elected MDC candidates, rejecting their 'absorbed' former PF-ZAPU leaders.

After the 1999 Referendum and the 2000 elections, a similar antagonism grew between the ZANU-PF and the urban population, evidenced by the defeat of most ZANU-PF urban candidates in 2005. Subsequently, a massive government campaign was initiated to destruct and dislocate citizens in urban areas, seen by urban society as punishment for their 'disloyalty'.

The almost total absence of structured participatory reform institutions in Zimbabwe means that there is no model of how the relationship between such a platform and society would be managed. The minor exception was the 1999 Constitutional Commission of Inquiry process. The fact that, for the first time, voters – albeit in a low turnout – did not support the official position suggests that Zimbabwean society, when given the opportunity, is responsive to a participatory process and willing to appropriate the process. The energy and public interest it generated, and the MDCs place in it clearly contributed to the rapid and successful rise of pluralism. Had it been undertaken with good will on all sides, it might have created a more constructive national political atmosphere. The reality however, is that elections are, as they have been since 1980, society's sole means of expressing its views and participating.

5. The influence of the international community

An extraordinary range of states and organizations has been involved in and continue to influence the ongoing history of Zimbabwe's constitutional process. Considering that ninety-two of its one hundred and twenty-one years of its governance was British colonial, and the Communist bloc supported its war of national liberation, this is no surprise. The international influences have been varied and contradictory. Actors involved have been Britain, the United Nations, the Communist Bloc, the EU, African States (including Apartheid and 'new' South Africa) and, more recently, the Southern African Development Community (SADC). The intimacy of their involvement in Zimbabwe's constitution-making process has been equally extraordinary and contentious.

This complexity may explain Zimbabwe's almost schizophrenic political environment where the language and attitudes of liberal democracy vie with the dogmatic slogans of anti-imperialism, national sovereignty and militaristic discipline.

The 1980 constitution still reflects the conflict between the values of the western international forces which shaped it and the anti-colonial nationalist liberation government which controlled and managed the reform processes until it was forced to compromise with the MDC parties to form the new 'inclusive' government. The ultimate effect of this international influence is unknown, but its effect, both positive and negative, is clearly important to the reform process. The West ensures the survival of the social democratic voice of the opposition but it touches post-colonial sensitivities and is exploited to condemn opposition as disloyalty. It must also be realized that reform tensions emphasize the gap between perceptions of external influence as constructive criticism and as coercion or 'regime change'.

Although the exact impact of international support is unknown, it is important to the reform process

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Contemporary Zimbabwe illustrates the breadth and the limits of the international community's influence, especially divided as it is between the West and Africa, when confronted by determined rulers of a sovereign African state. Constitutional reform should be primarily a national responsibility, even in a globalised world. International involvement should ideally encourage achieving the trust between incumbent and opposition needed to promote consensus and inclusiveness, which alone produces a lasting, nationally 'owned' constitution. In the intensely confrontational conditions of Zimbabwe, this is as difficult a task as it has been throughout the country's turbulent and frequently 'internationalized' constitutional history.

International involvement should remain focused on promoting consensus and inclusiveness

6. Lessons learned

Engagement and Boycott

The Zimbabwean case is in many respects unrewarding and unproductive, lacking in positive lessons from the place in reform processes of agreed principle, different or productive relationships between reformers and society. The consistent dominance of the legislature, the rare resort to inclusive or consensual conference modes and the habitual use of varying scales of violence provide little positive lessons. But it reflects a reality not uncommon in developing democracies: the problem of a new party with new ideas seeking to enter into the reform process in a polity dominated by an establishment claiming unique legitimacy. One important lesson is that, given any opening of political space, the opportunity should be taken. The survival and growth of a vulnerable opposition party in such an inhospitable environment has provided an important message.

New parties should use the space available and take the opportunities that arise

International influence

Important as this has been and remains, Zimbabwe shows that the dominance of such influence is not uniformly positive nor productive of good processes or constructive nationally owned constitutions. This is especially so where the dominance of external actors tempts them to put their national priorities before those they are influencing. Caution is also advised where the international

Be cautious with international influence

community involved is divided on the process or the objective of the reform and on the unconsidered use of reform process models offered by such assistance. It is most important for political parties to be aware of the realities of the reform context and the need for caution in identifying too closely with a particular foreign source of advice.

Timing and Delayed Reform

Zimbabwe is a classic example of the critical place of timing in frustrating the exploration of the possible process to be adopted for constitution making and the principles to guide an inclusive reform process. The belief that the process can indefinitely be delayed by a party in power, should be challenged. The importance of taking the time necessary is exemplary in the failure of the Lancaster House Constitution. Take time to identify and deal with important issues and resolve real differences and do not force the pace of the process is a key lesson. The positive example is the South African CODESA reform process. Political parties engaged in constitutional processes should insist on taking enough time for something as fundamental as a nation's constitution.

The importance of clear, issue-based principles to guide participants in an inclusive reform process is well illustrated in Zimbabwe's reform experiences from 1980 onwards. It is essential to ensure the bona fide acceptance of 'inclusion' by all parties. All of Zimbabwe's 18 amendments to date were exclusively parliamentary, in most cases decided by the dominant incumbent ZANU-PF. The latest 19th amendment is the first based on an elite-pact of three political parties under the aegis of SADC.

NIMDs partner for Zimbabwe is the Zimbabwe Institute. The institute is a policy research think tank dedicated to influencing policy development in Zimbabwe. The ZI is an autonomous organization, which has worked with the two MDC formations in the fight for democracy in Zimbabwe, as well as with ZANU-PF by facilitating the SADC dialogue process that led to the Global Political Agreement of September 2008. ZI continues to facilitate in the implementation of this agreement, which includes guiding principles for making or reforming the Zimbabwean constitution.

Conclusion

Reginald Austin

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Bolivia, Ecuador, Kenya, Zambia and Zimbabwe; five states each in the throes of complex, conflict-driven attempts to establish a stable constitutional framework enabling the country and its people to move ahead with sufficient legitimacy and harmony to deal with unfinished tasks of national cohesion, development, democracy and social justice. The Latin American cases reveal that the attempts to create constitutions which confront and seek to resolve deep cultural divisions reflecting severe social inequalities, follow centuries of frozen, post-colonial domination of indigenous populations sanctified by constitutions made exclusively by and for successive ruling elites. The African cases have a shorter history, both colonial and post-colonial, revealing similar patterns of constitutional reform characterised by political incumbents, new or old, insisting upon exclusive elite control of the process to perpetuate their hold on power.

In all cases, an emerging combination of political, civil society and international attitudes are now seeking, with mixed results, more inclusive, people-driven constitution-making processes and people-serving constitutions. The reasons for this new approach is to prepare a new contract between the citizen and the state that will result in greater government legitimacy and more stable conditions for socio-economic development. Despite their distinct histories, cultures, economies and societies, comparing their contemporary approaches to reform reveals instructive lessons for actors considering the appropriate process for democratic constitutional reform.

In Kenya, Zambia and Zimbabwe, within a short period from the end of decades of undemocratic colonial rule, the post-independence governments succeeding their peaceful or forceful liberation,

uniformly and rapidly replaced multiparty politics with formal or effective one party rule. New pressures for constitutional reform and inclusive politics in the late 20th and early 21st century were driven by a combination of civil society, international donors and would-be political parties espousing democratic politics and inclusive reform. In practice, to a greater or lesser extent, the process has been a reversion, by both established and new incumbents, to maximize exclusive control of government and reform processes. A feature in Africa has been a continental wide tendency, contrary to African Union's democratising policies, to 'understand', not criticise this pattern, possibly explained by lingering resistance to perceived donor driven, neo-colonial influence.

The impact of the history of constitutional reform has varied. In Latin America, past exclusiveness lead to demands for popular participation and justice. The preferred reform mode was a Constitutional Assembly, subject to a Referendum. Similar demands are seen in the African cases. Nevertheless, the practice and reality differed. Not least because even when apparently radical reform has been confronted and agreed upon, history has left deep fears and hidden disagreements that mortgage the review processes. It means that reforms are undertaken with insufficient good will, and the obfuscation rather than transparency of their true objectives, and thus a lack of real consensus. An extreme example is Bolivia where not even the dominant stakeholder's own objective was clear. This allowed 'delegate spontaneity' to confuse the negotiations. Thus, what might have been a model, inclusive and 'total reform' process and machinery, became a tortuous, highly contentious Constitutional Assembly, a constitution 'approved' under siege conditions and dependent for legitimacy, on

its approval by referendum. In Zimbabwe, the incumbent viewed an electorally-supported challenger to its entrenched One Party power and its own radical land reforms, as treason rather than reform. Only the neighbouring states' concerns over a collapsed economy and consequent migration flows, meant continued (especially regional) efforts to press for reform.

All cases prove that in complex and developing societies, the constitutional reform process is intensely political. It is frequently made more difficult by confusing reform issues with the personalisation of the process around leaders. Ecuador, Kenya and Zambia demonstrate this, but may also show how the intense identification of reform with leadership may be variously mediated.

Reform modalities are manifold, but the cases reveal that major players, both incumbent and challenging political parties, prefer processes which are restrictive and controllable, rather than those representing society at large and potentially unpredictable. The preference for reform within the exclusive control of the Legislature is only partly explained in the African cases, which inherited Westminster political systems, and parliamentary supremacy. However, in Latin America and in Africa, well after 'Westminster' ideals disappeared (as by one of Kenya's 39 amendments creating a one party State), incumbents' resistance to granting reform authority to elected Assemblies is persistent.

Even more restrictive has been the pattern, in the African cases, of preserving exclusive control by such devices as: appointed Constitutional Experts Commissions or a constitutional review process by the imminently controllable Commission of Inquiry. This deliberately illusory 'inclusive' method

resulted in civil society boycotts of otherwise consultative processes in Zambia and Zimbabwe, most provocatively when used in Zambia by a newly incumbent government elected on the promise of inclusive, popular driven reform. The 'control syndrome' is not exclusive to incumbent Legislators. In Ecuador, the legal arrangement for the elected, and opposition dominated Congress to continue in parallel session with the newly elected Constituent Assembly, was questionably overturned by the Assembly ordering its recession until the reforms were approved by referendum.

Even where a genuinely inclusive Constituent Assembly is established, substantive inclusion can be reduced by means such as a limited time-line for the process or resources needed for meaningful consultation, education and popular participation. In this regard, support from national civil society and the international community is vital.

It is clear that when popular pressure or dissatisfaction with the established political dispensation reaches a certain intensity, forces outside the political structures, in civil society, will act. This situation is unpredictable, as the differences between Bolivia and Ecuador: over a century of stultified post-colonial racial dominance, and the decades it took for this in the African cases. But, whatever the moribund nature of political parties or the repressive government, the point came when churches, trade unions and non-governmental bodies saw the need for constitutional reform and pressed until reform (successful or not) was attempted. Importantly, the cases show even though civil society is often responsible for initiating reform, political players tend to exclude it as an active participant in the process.

In a democratising era, the involvement of the international community has been important, both positively and negatively. For post-colonial Africa, most obviously Zimbabwe, the historical imperial act of imposing a constitution, which frustrated its liberation war's primary aim: abolishing colonial land ownership left the post-independent incumbent sovereignty sensitive and suspicious of any reform supported externally. More importantly, it created among ex-colonial African States an 'understanding' of this suspicion as justification for repression of internal reform demands. This illustrates the delicacy and potential impact of external involvement. South Africa's virtual responsibility for design and management of Zimbabwe's current reform demonstrates the critical need for it in some circumstances. The fact is that non-incumbents and incumbents alike will, if selectively, continue to rely on global or regional support for such processes. In both continents, common values will lead reformers, political parties and civil society to work with like-minded organisations' help. Thus, the wave of reform in Bolivia and Ecuador's indigenous focussed reform owes much to the continental wider world's mood.

What general conclusions can be drawn, particularly by political parties as actors in the reform process? In such typically complex, heterodox societies, developing democratic institutions, constitutional reform is a highly political business demanding serious thought, preparation and planning. To build a process aiming for a legitimate constitution, the party must ensure its own democracy, internal tolerance and ability to develop consensus. The party must have its own clear objectives and values, understood by its leaders and supporters. It can then approach the reform process in good faith, and be aware that the good faith of all concerned is essential. It must

know where it can compromise or stand firm. On the design and management of the process, it should seek inclusion of all significant stakeholders, and ensure a time frame allowing for the collection and dissemination of critical information, opinions, and proper provision for debate and digestion. In all these matters, it should make use of civil society, and relevant international sources of information, assistance and opinion, but remember that models, especially constitutions, must suit their own national realities.

Beyond and before any period of active involvement in reform activities, a political party must understand that the constitution is the essential framework within which political contests ought to take place in a democracy. It must have a programme to maintain this awareness among its supporters and the public at large. The constitutional reform mechanism chosen should be the product of negotiation and real agreement. It should have the autonomy to ensure a smooth and effective process, including sound service management and a deadlock breaking mechanism. The temptation to personalise the reform must be recognised as a danger to be avoided if the substantive issues are to be properly addressed and resolved.

Some general lessons learned

1. Set time-frames and date to complete the process in advance in order to avoid processes getting derailed with the finish-line in sight. Remember that a failed constitutional process often has dire political implications!
2. Have clear objectives agreed upon from the start of the reform process.
3. Regulations for the Constituent Assembly and committees defined in advance can enhance their functionality.
4. An independent consensus body, to which contentious issues can be referred too, has proven to be beneficial.
5. Inclusion of civil society and the population at large enhances the acceptance of the constitutional draft when proposed in a referendum.
6. An Assembly or Conference should fairly represent society at large. Allow for enhanced inclusiveness and representation during the process if so required.
7. The outcome of the referendum needs to be fully accepted and subsequently enacted by government.

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Cover, Bolivia image, AP Photo / Dado Galdieri, 2008 – A supporter of the constitutional reform in a march towards La Paz holding up Bolivia's newly proposed constitution.
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This publication is made to examine, through case studies in Bolivia, Ecuador, Kenya, Zambia and Zimbabwe whether and if so how, the covenant's injunction for participation in the reform process, as an important part of public affairs, has been met.

In particular, consistent with the mandate of the Netherlands Institute for Multiparty Democracy (NIMD), the study is focused on the role of political parties in this process and what the lessons are in the cases provided.

In the introduction, Albie Sachs writes, that constitutions cannot simply be cobbled together. There is not such a thing as a standard, one-size-fits-all, fungible constitution, whether democratic or otherwise, for all countries. By their very nature, constitutions emerge at moments of profound importance in the life of the nations to which they apply.

In the words of Ishmael Mahomed, then Chief Justice of Namibia, and later Chief Justice of South Africa: "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 reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside..."

The Netherlands Institute for Multiparty Democracy (NIMD) is a democracy assistance organisation of political parties in The Netherlands for political parties in young democracies. Founded in 2000 by seven parties (CDA, PvdA, VVD, Groenlinks, D66, Christen Unie en SGP), NIMD currently works with more than 150 political parties from 17 countries in Africa, Latin America, Asia and Eastern Europe.

NIMD supports joint initiatives of parties to improve the democratic system in their country. NIMD also supports the institutional development of political parties, helps develop party programmes and assists in efforts to enhance relations with civil society organizations and the media.