Of Camels, Constitutions, and Elections.
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A wit once commented that a camel was a horse designed by a committee. Very rarely are designs of anything useful the result of compromises, and especially compromises where the parties involved in design have radically different ideas. This might be a fair characterization of the draft constitution. This was perhaps inevitable with the Global Political Agreement as it stood, for this was not a transitional arrangement, but a peace agreement to lead to a transition, which it patently has not done.

SADC subsequently (and repeatedly) has insisted on a very simple understanding of what should happen under the GPA: a new constitution and reforms in the many areas that would guarantee acceptable elections. Note the expected direction of events: constitution and reform, then elections, not constitution, then elections and thereafter reform. The latter is now what Zimbabwe will offer SADC.

In 2010, RAU pointed out that there were no good grounds for expecting that the GPA would lead to any significant reforms and the only probable way of resolving the inherent problems in the GPA would be an election, and an election that ZANU PF could not afford to lose. We were pessimistic about the chances of getting a new constitution, and even more pessimistic about the chances of reform. We were wrong about the constitution - we now have a draft ready for referendum – but we were wholly correct about the lack of reforms. RAU, SAPES, Solidarity Peace Trust, and the Zimbabwe Liberators Platform, have consistently argued that the political crisis cannot be resolved by constitutional change in the absence of major reforms – the restoration of national institutions as we have termed this1. As we pointed out in March 2012:

Whether we are talking about elections or “normal” civic life, it seems evident that much needs to be done before Zimbabwe could be seen once again to approximate a democracy. It is evident that much must be done to ensure that elections conform to just the minimum standards advocated by SADC, and considerably more if the range of possible rigging strategies is to be reduced. However, even if the necessary reforms to the electoral law and the implementing body take place, and even if a new constitution emerges out of the very conflictual constitutional reform process, little of this will matter if the institutions that must support the constitution and the electoral machinery are not brought under full civilian control, and serve the citizenry as a whole. Restoring our badly compromised national institutions is not an adjunct to electoral and constitutional reform, it will be fundamental to the success of these reforms, valid elections, and indispensable to civic life as a whole.

These views are just as relevant in February 2013, and have been echoed recently by both Dr Mandaza of SAPES and Wilfred Mhanda of the ZLP.

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RAU has also pointed out recently that it is possible to de-link the issues of constitution and elections. Certainly if the Government were to take seriously their commitments under the GPA (and to SADC), then it would acknowledge that the reform process has been still-born, and that the conditions for elections are not in place. Furthermore, they are not in place even for the holding of a constitutional election.

Against all of this, the referendum is clearly not unimportant, and there are some very difficult issues to confront around the referendum, not simply resolved by arguments over whether to vote YES or NO.

The Constitution

The first issue to confront about the referendum is the content of the constitution, but it is very difficult to separate this discussion from the processes leading up to the constitution. Now, although it is very clear that constitutions can guarantee very little in the absence of robust institutions, a constitution is nonetheless a very important document for a nation – it is the “autobiography of a country” as a respected South African jurist, Justice Mahomed, has pointed out.

The constitution therefore should strongly represent the desires of a nation, both in resolving the problems of the past and in framing the way of the future. This implies that it will reflect as strongly as possible the widest consensus of the citizens of a nation: a constitution that reflects the compromises between polarized groups is merely framing the problems and doubtfully resolving them.

It is evident to all that the process leading up to this draft has been highly conflictual and acrimonious, which has continued right up to the point when the Principals finally agreed on the current draft. This is very unsatisfactory. A good constitutional process would have had the Principals merely rubber stamp the draft; a good constitutional process should also not have required a referendum (as was the case in South Africa); a good constitutional process would have had wide discussion amongst citizens, with all opinions being reflected in the media; and a good constitutional process would have had total agreement about how the process would happen, and would have been as inclusive as possible.

Virtually none of this can be said to have happened in the Zimbabwean constitutional process from 2009 to date. It can be argued that this process could only produce a camel and not a stallion, and some argue, with considerable justification, that a flawed process can only produce a flawed result. Others argue that at least it is an improvement on the current constitution and all its myriad amendments, and there is some justification for this view. The Women’s Coalition, for example, argues that there are ten aspects of the draft are good for women, and that the draft meets 75% of women’s demands. This is very encouraging and suggests increasing awareness amongst legislators of the need to reflect the different status of women in society. However, it must also be pointed out that the gains for women can be undone if the more problematic aspects of the draft – Presidential powers, etc – are applied in a politically partisan fashion.

Illustrating this last point, Zimbabwe Lawyers for Human Rights (ZLHR) have given the draft a very qualified report: there are good things and bad things about the constitution; many ways in which it is better than the current constitution; and many ways in which the draft does not resolve the problems of the past. For example, the changes to Presidential Powers are minimal and still leave too much unaccountable executive power in the hands of one person. Their
analysis, summarized by Idasa and RAU\(^2\), suggests that very little in the draft meets the democratic ideal, most is short of the ideal, and some is still downright undemocratic. Clearly, citizens need time to understand the draft, to see how their views have been reflected or not in the draft, and to investigate the areas that they might not understand. Three weeks seems inordinately short for us to do this, and thus voting YES or NO without the time for adequate reflection and discussion will continue a very flawed process. Perhaps there should be third question for the referendum: TOO SOON TO VOTE!

**The Reforms**

However, notwithstanding all the above, there still remains the second aspect of the SADC prescription that needs to be addressed before any election takes place, and this is the matter of reforms. This is not a simple matter. How much reform is necessary before a satisfactory election can take place?

For the political parties this is the real crunch, and much more difficult to resolve than the constitution. ZANU PF’s position all along has been that there is no need for reform, and they are entirely confident that the institutions of the state can deliver a valid election: they say so because they deny utterly that there has been anything wrong with any of the previous elections. ZANU PF sees little wrong in senior army officers stating a partisan preference, or the head of the police force doing the same and suggesting that is it the duty of the police force to support and vote for ZANU PF: that Commissioner-General Chihuri is wholly in breach of the Police Act when he acts in this manner and is encouraging the entire police force to act in breach of the Police Act raises no concerns for ZANU PF. We can go on about many other state institutions that have similarly been “captured” by ZANU PF, but this has been described on many occasions previously\(^3\).

So ZANU PF is strongly motivated to deny any problems at all and to keep the status quo – this was recently stated baldly by the Minister of Justice – for to admit a problem in any one area could snowball into wholesale change, and the system of coercion requires all state institutions to act in concert. For example, if the police were to do their duty, as the Police Act requires, and take active steps to deal with political violence and intimidation, traditional leaders and local government officials would rapidly have to change their behavior and adhere strictly to the terms of their enabling legislation. Like a pack of cards the whole system would fall down, and so it has to be maintained as a whole. Therefore, there is no need for reform. The improbability of ZANU PF winning a “good” election requires no reform, for, as RAU pointed out last year, it is exactly because the state institutions belong wholly to ZANU PF that Robert Mugabe’s re-election would violate the trend seen in virtually other African countries in recent decades\(^4\).

The MDCs, and particularly MDC-T, argues for massive reform as the minimum condition for the holding of elections. Sarcastically, RAU termed these maximum conditions\(^5\), and pointed out that MDC-T was, in effect, arguing for the establishment of fully functioning democracy before elections could take place. This is patently an unreasonable expectation in the current political

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climate, given ZANU PF’s position. For example, the demands for repeal of repressive legislation – not only demanded by MDC-T, but also by all civics – are quite evidently a long-term objective: parliament must prepare new legislation, or amendments to the existing act, hold discussions with citizens about the changes through the portfolio processes, debate the proposed changes, repeal the offending act or make the proposed amendments, pass the new legislation or the amendments, and then have the President endorse the bill into law. This will clearly take a much more energetic Parliament than one we have currently.

Furthermore, the MDC-T itself is highly deficient in using its legislative power: when the Zimbabwe Electoral Commission submitted its highly misleading report on the 2008 elections months later than the legally required, it did this without penalty, and, even more disturbing, submitted a report that has never been debated. Had MDC-T used its legislative power, the Commissioners and the Commission might have been strongly criticized, and this might have led to both the election of completely new Commissioners and substantial reforms within the Commission.

So, in the situation where one party wants improbable reforms and the other none at all, it is parsimonious to focus on the minimum effective reforms that could guarantee genuine elections. As RAU has pointed out previously, this is very possible to do and the foci are easily derived from all the masses of evidence about political violence and elections since 2000. The key changes needed are not difficult:

Firstly, the security sector needs oversight, what some have termed Security Sector Governance as opposed to Security Sector Reform. The latter is a decade-long process, while the former merely requires strong civilian oversight of the uniformed services and the intelligence agencies. This achieved in two ways: appointments of the senior officials through full consensus by all political parties, and a wholly civilian oversight body – in Zimbabwe’s case, agreement between the President and the Prime Minister of the appointments to the army, the police, the prisons, and the intelligence service, the disbanding of JOC, and a wholly civilian National Security Council.

Secondly, ensure that all state institutions adhere completely to their enabling legislation. The police are not allowed to be members of political parties or participate in political activities, and shall carry out their duties in a wholly non-partisan manner. Traditional leaders – chiefs, headmen, and village heads – are not allowed to be politically partisan, and must report all crimes in their areas of jurisdiction, without exception, to the police.

Thirdly, the Office of the Attorney-General (and the Attorney-General) must be completely non-partisan. The Attorney-General should be appointed with the agreement of both the President and the Prime Minister.

Fourthly, the state media – television, radio, and the press – shall be regulated by an independent body for instances of bias and the propagation of hate speech. Reform of the state media will a lengthy process, and, thus, in the short term all that is feasible is that there is an effective stop to all political bias and hate speech.

Of course, this is a very small list of reforms, and unlikely to satisfy the reformers, but these minimum reforms will strike at the heart of the repression and violence. Without these minimum reforms it is doubtful that Zimbabwe can hold a decent referendum or election. These

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institutions at present inhibit ordinary democratic activity, never mind issues around civic education on constitutions and elections, or the holding of referenda and elections.

The way forward

So, it should be clear that RAU is arguing for a more complex and nuanced position than merely positioning itself in one of the two camps on the constitution, and, as pointed out above, arguing it is TOO SOON TO VOTE. This may seem very unhelpful in the current situation, and we can anticipate the arguments from those who argue that we have to get the referendum over before elections because the current Parliament’s life will end on 29th June. This argument is predicated on several misunderstandings, endlessly expressed.

The first misunderstanding is that the GPA will end in June. As RAU has pointed out, the GPA is an “agreement” only, and continues as long as the agreement lasts: it effectively has no end. The second misunderstanding is the elections must be held before June: the current Parliament ends on 29th June, and elections must be held no later than 29th October 2013. So, the GPA can continue but Parliament cannot.

The third misunderstanding is that this impasse between the GPA and the current constitution cannot be resolved without an election. Linked to this misunderstanding is another misunderstanding: that the GPA requires a new constitution to be in place before elections take place. Although it is obvious that neither the GPA nor the Inclusive Government would continue after an election, this is not clearly stated in the GPA. However, it seems evident that whichever party won an election, it would be disinclined to continue with the GPA, and, in any event, the GPA would cease if any of the parties to the agreement withdrew from the agreement, as most certainly would be the case for a clear winner in parliamentary and presidential elections.

But, even if these are all misunderstandings, all the political parties are preparing themselves for elections, but it may argued is this because elections are the fall back position for political parties that cannot see another way out of the mess in which they find themselves? And are elections the only manner in which the political parties can deal with the increasing internal conflicts in which all find themselves?

As RAU pointed out recently, there are several ways in which an election may be postponed, and not all of them desirable. The most desirable would be for the political parties to agree upon a new interim constitution, and new transitional arrangements such as a body similar to the Transitional Executive Council created to guide South Africa through to democratic elections in 1994. And then, since we may well have a new constitution, to ensure that the reform process takes place ahead of elections. This will be unsatisfactory to all those who believe that the GPA should go and that elections will finally resolve the political impasse that has existed since 2008. However, this is only acceptable if we have “good” elections, and we can all accept that the winners are actually the winners: anything short of this may simply perpetuate the current impasse and might even make it worse.

So, there remains time enough to challenge the lock-step prescription of constitution, then elections, and then reforms (possibly). It means thinking creatively (by all political parties) about what would be good for the nation as a whole; it means thinking about reform as necessary for

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the holding of “good” elections; and it means thinking that constitutions are not the panacea for all ills.