

CONSTITUTIONAL REFORM PROCESS

‘If the process is not as important as the substance and results, then why go through the trouble of gathering the family just to receive lobola in bits and pieces when the whole sum can be transferred into father in laws bank account?’

Essentially the GPA which forms a temporary part of our current constitution provides for two things with regard to constitution making.

1. A process of constitutional reform led by a select Committee chosen by political parties from among their parliamentary representatives
2. The Kariba draft as the reference point of the entire process.

Both these positions are inherently contradictory to the much desired “people driven constitution” and therefore the objections by the CSO fraternity and all other right minded Zimbabweans to the government led process. Basically when the few leaders of the process are chosen by their individual political parties along partisan lines and a document crafted by an even smaller number of man is to be the basis of the will of the people, then the 4000 or 5000 people chosen for the process have their hands tied and cannot drive the process. As evidenced by the split in the nation today, the Art 6 position is as divisive as the June 27 sham election and its result. One group, presumably the wiser has condemned the process and refuses to partake in its flaws arguing that it is a decorative process by the politicians to unilaterally draft their desired constitution on the part of the MDC and to impose the Kariba draft on the part of ZANU PF. The second group is a more compromising one which deems it more necessary to participate in the process despite its doomed fate; they seek to get out of it the best they can for themselves as individuals and for their constituencies, effectively surrendering their collective true wills to governmental caprices. A few questions must be answered by

every Zimbabwean, objectively and truthfully without the common inclination to support anything which the popular leader of the day (Hon Tsvangirai) endorses.

Why Parliament

It has been argued that Parliament rightfully ought to lead the process. This proceeds from the premise that Parliament is composed of elected persons who are accountable to their constituencies, commonly referred to in this discourse as ‘the people’. Secondly that under the current constitution, Sec 32 vests parliament with the legislative authority i.e. the power to make law. Thirdly and more importantly, the political parties to the GPA seem to accept that the 29 March election results are not in dispute and reflect to will of ‘the people’.

As regards parliament’s representative role, it is not in dispute, but supposing that is what they had in mind on the 15th of September, their choice fails to address some pertinent issues. Our Parliament is not entirely composed of elected officials. *The system of uncontrolled appointments to the House allows some suspicious characters such as human rights violators a dark alley and a broken window entrance into the House.* Put differently, not only do unelected persons gain entry, those rejected by ‘the people’ at local elections sometimes sneak in too and purport to represent the people. Hon Chinamasa is one such example, not only is he unelected and rejected, he is generally disliked too, but when he speaks on numerous television broadcasts, one would be tempted to think he represents ‘the people of Zimbabwe’ when he clearly does not, simply because nobody in their sane mind would want him to represent the nation when his homeboys in Manicaland have failed to place their trust in him. The Governor of the Harare Metropolitan Province did not even attempt to get any sort of approval from ‘the people’ he claims to represent because he had a guaranteed seat in the House even before the process to choose

leaders got underway, despite the obvious rejection of what he stands for by the people of the province he now presides over albeit temporarily.

The point I am making is that if the basis of asking Parliament to lead was that it was elected then both unelected and rejected MPs have no business in the process save to the extent that they are Zimbabweans like you and I because they have no mandate and they are not accountable to 'the people' as they have no constituencies.

In addition this process is not as inclusive as they demand we think because Parliament is not the only representative body of 'the people', there are varied groups of representation to which consent is voluntarily given by 'the people' which were excluded in the negotiating process. Though having a greater legitimacy than MPs such bodies are required to be led by them as in the Art 6 proposal.

The second basis for allowing Parliament to lead is that it is the legislative authority anyway. As much as this is not contested there exist two fundamental objections to it which should not be ignored. The first is that *Parliament is a child of the Constitution not its mother*. If the Constitution is the supreme law which governs even Parliament, then it is risky to entrust its drafting to the control of Parliamentarians who are first and foremost politicians lest they confer themselves with unlimited powers. There is the story of how Kamuzu Banda wrote a constitution which said he would be the president of Malawi for his entire natural life. Experience has correctly taught Zimbabweans that even when you trust a particular politician, it must always be a cautious trust, the kind you withdraw when (s)he begins to adopt dictatorial tendencies. I remember attending a 21st February Movement occasion some 20 years ago singing "*Ishe komborerai President Mugabe ndivo musimboti wedu chivheneko chedu...*" And meaning it too at the time but today I would hate to hear my son sing the same words.

In short I am saying, Parliament cannot dictate what the parameters of its powers are going to be by presiding over the process which produces the result. Can one of the actors regulated by a piece of legislation determine its fate by dictating its pace and content? Absolutely not! Zimbabweans must stand guard and prepare to reject dictatorship from any source, even the inclusive government because we have seen more than enough of it in our lifetime.

Our experience with Parliament points to its weakness. It was Parliament which created the monster called the executive presidency which is at the centre of our socio-economic and political problems. This centre of uncontrolled exercise of power was created by a weak Parliament which merely took instructions from the executive as to what it wanted to do, to rule with an iron fist after crushing ZAPU.

Both the 18th and 19th amendments to our current constitution were hardly debated in Parliament because the party leadership outside Parliament had taken a view which they wanted rubberstamped. The culture of weakness exposes the Speaker because all he must do is what he is told to do by persons outside Parliament. This process does not go down well with the separation of powers doctrine which says Parliament ought to have at least some autonomy. The independence of Parliament is compromised if all it can do is what it is ordered to do. It would be interesting to find out if there was any debate at all when Mudadirwa brought the executive presidency proposals to the House in that fateful year. My point is that given a culture of succumbing to party interests any assurances by the Select Committee that it will be independent are blatant lies especially when each party can chuck out any member and replace him/her without contest from other sides. A result of this tow- the- party- line attitude is manipulation of the law making process by those that venture to do so, a classic example is how after, the 19th amendment had sailed through the

House of Assembly, Hon Chinamasa sought and succeeded in amending it to the effect of excluding the non partisanship of chiefs as a constitutional provision presumably because someone somewhere was not comfortable with the neutrality of chiefs. The rest of the members did not contest this decision possibly because they had been instructed to go along with the process.

Additionally, this Parliament has no track record of being independent of the executive, even on how they have tackled repugnant existing legislation. Despite the decorative political will, Parliament has not yet taken a firm position or even devoted debate to POSA, AIPPA, Broadcasting laws and the barrage of Makamba, Mawere and Kuruneri type of regulations. Most disappointingly, despite the inclusivity of the current government in which decision making is by consensus, the unilateral Presidential Powers (Temporary Measures) Act remains intact to their full and original extent. On what basis can this parliament claim any loyalty or support from the nation. It would be a tall order to have the Select Committee to give us a CV of this parliament from which they are chosen regarding its law making role. What other progressive legislation has it passed to indicate they can be trusted with making a progressive supreme law? The only law they have passed has never been obeyed, the National Security Act was doomed from its conception, they have not met as required and have not discussed the continuing Human rights abuses by the state agents and the impartiality of the AG who has persisted in persecuting his appointer's political opponents in his attempt to destabilize the little peace the nations appears to enjoy. It is clear that there was never any intention to obey its provision since most of the ex officio members have vowed not to respect Tsvangirai. Parliament is powerless to make sure that its solitary law is obeyed yet they require our consent to make an even more important piece of law.

The last ground supporting the Parliament led process is obviously that the crafters of the GPA agreed that the 29th March elections

results are a true reflection of the will of 'the people'. Basically this ground is true but it must be noted that this is only true to the extent that the actual results were published. Biti had the results which he announced and went to jail for, ZANU and the now defunct ZEC had a suspicious variation thereof. As a basic point of departure, it is accepted that those results more closely relate to the will of the people than any other election result of last year and the three previous elections. If this is so, then, someone please tell me why Robert Mugabe is still the President of Zimbabwe contrary to that will of the people of 29 March. It is obvious that the drafters of the GPA were not concerned by this will of the people and thus Art 6 is intended for some other purpose than to conceive a people driven process of constitutional reform. Could it be that they had and still have some other interests they are not willing or able to share with 'the people' because as it is, the provisions of Art 6 and any talk of people driven constitution are mutually repulsive.

Assuming that the elected members truly represent the people, it cannot be said that such mandate extends to all matters and such representation surely is only valid to the extent that the one represented consents to its exercise therefore when people cry out for a chance to write their own constitution which is not led by MPs then, the MPs cannot deprive such people that right on the basis that the same people have elected them. In all logic the MP ought to recognize that their faith and trust in him falls short of asking him to write a new constitution on their behalf. Any right to represent another is limited by the will of the represented otherwise it becomes a dictatorship as we have witnessed for many years, were, once voted into power, the elected official continues to purport to have the legitimacy conferred by election yet despising and suppressing the voters to avoid a similar election.

In any case the constitution outlives both the MP and Parliament and thus it is not entirely about representation by certain individuals but it is about the creation of a system of government

acceptable to 'the people' beyond trusted or untrustworthy individual politicians. My choice for Hon Fidelis Mhashu last year merely meant that of the available candidates at the time he is the one I generally trusted with the decision making regarding the good welfare of those with whom I share a neighbourhood. It by no means points to my surrender of all my decision making processes and powers to him or him being a replacement of me on all matters I have a right to participate in, he cannot dominate me in constitution making for that reason alone. Constitution making is no general matter by any standards and secondly *an INHERENT ELEMENT OF PEOPLE DRIVEN IS THAT ALL VOICES ARE EQUAL IN BOTH THE PROCESS AND SUBSTANCE* which is clearly not the case when the MPs alone design the process and decide who shall participate and who shall not and after all is said and done they will deliberate on the result alone in their respective Chambers and possibly amend the draft. Already the will of the people is undermined by merely having Mutambara, Chinamasa, Misihairambwi, Ncube and Sibanda in places of deliberating their fate; it is ridiculous to suppose that they will be interested in a constitution which does not guarantee their unelected role at Parliament. If the people's will was important to them, Simba Makoni would have been given some post seeing as he got more votes than any other MP apart from Hon Tsvangirai.

Kariba Draft

The document was published in the Herald of the 24th June for perusal by the nation and I will not venture to discuss its contents lest I publicly declare my disapproval of it. I will merely say it is the back door version of the Constitution you and I rejected in 2000 an attempt to resurrect it without its proper faces, those of

Chidyausiku, Jonathan Moyo and Patrick Chinamasa but the skeleton bears an undeniable resemblance.

Personally I do not believe most of what Chinamasa says especially at face value and in the absence of his opponents to defend themselves or accuse him of this or that but I am unfortunate to say I believed his speech in the House of Assembly when they were passing the 19th amendment to the effect that both the GPA and the Kariba draft were the fruits of long term negotiations between ZANU and MDC. I remember the other side disputing vehemently that there was any on going negotiations between them at all. The Kariba draft and its mention in the GPA are clear evidence that the nation was being lied to.

While they were agreeing as to the content of a draft constitution indoors they were busy directing their supporters to butcher the other side outdoors. I dare say that the content was influenced by the environment outside. It is perfectly within ones rights to think that maybe, just maybe, the butcher of Morgan and his friends the other time was meant to get him to agree to some term in the draft to which he was opposed or that the shameless attack of Chamisa at the International airport was leverage for behind the doors constitution drafting. It should be obvious that such persistent and systematic attacks yielded some concessions on the part of one side in which case both the process and its content were inspired by duress fear and ZANU's characteristic violence.

Basically the environment in which it was drafted was not ideal or even right for constitution drafting. One of the lines of the preamble of Art 6 refers to the Lancaster House Constitution being only a vehicle of transfer of power, pointing to the fact that the recipients of power accepted it nevertheless because it brought with it power, riches and fame for them despite their other objection therefore they have amended it 19 times in 29yrs. The nation needs to guarantee that this is not a mere vehicle of transfer

of power because there is another vehicle which carries that burden called elections, we must be careful that when Tsvangirai comes (because he is coming) he will not require to amend it 19 times or will he be able to dictate to the country from his Harvest House Office by ordering his MPs in the fashion Mugabe did in the 'one party state' era of the 80s.

The Kariba draft is an attempted resurrection of an already rejected document and largely borrows from the current one as amended. ***I am tempted to point out one of its most glaring omissions on setting the roof age limit on presidential candidates. The current one states the floor age at 40 but does not preclude very old persons from running for presidency. My logic here is simple, that if a person can be too young to be a president, and a person can be too old to remain in the workplace, it follows that a person can be too old to be a president.*** The current process will not realize that or it will but it will be ignored because it will not come from Robert or Richard.

The draft is desperate as a reflection of the will of the people. Two clear grounds emerge, the first pertains to the architects themselves and the second is manner in which it was concluded. If the composition of the negotiating teams is anything to go by [Biti & Mangoma] MDC T, [Chinamasa & Goche] ZANU PF [Ncube & Misihairembwi] MDC M and their accompanying drafters – it is clear that only Biti and Mangoma are irrefutably elected while Goche is somewhat elected and enjoys some appearance of legitimacy. The rest of the crew is in the same boat, unelected and rejected. They were representing only themselves in those meetings no wonder they created and got cabinet posts. How then can a team of 25 generally elected MPs and the nation be given any directions by a small group of some of the most disliked politicians and argue as the Select Committee does now that such dictatorship has any legitimacy at all.

The Kariba negotiations were done clandestinely and possibly at the nicodemus hours of our days when the nation was fast asleep. The teams deliberately met in the lavish hotels or lodges of the resort town far removed from the sewerage smells of my home town Chitungwiza, Mbare, Gokwe, Nkulumane, Mkoba, Chiwaridzo, Cherutombo, Vhengere or Chikanga. One should ask why the secrecy, to the extent of publicly denying they were meeting. I stand guided but I venture to suggest that none of the man in silk suits and swiss watches and Mercedes Benz meeting on boats were really worried much or aware of what it means to have a people driven constitution, the UZ student who wants education as a fundamental right or the worker who desires a right to strike enshrined in the law less so the victim of violence who requires an enforceable right to protection of the law. This draft should not prevail over any other mere contribution in the process if it deserves any consideration at all now that the nation knows its true source. The nation clearly does not believe Hon Mwonzora when he and the President engage in their public show of power over its status, the provincial meetings were told that the rest of the proposed drafts would be published which we still await.

ZANU PF on the other hand, having lost all legitimacy after their murderous enterprise of last year and the last thirty is not concerned with accountability to anyone. The very idea of any people centered processes makes them shake in their boots, the very idea of 'the people' does even worse, that was the point in disappearing a few, chasing millions to other countries and killing the rest, directly by guns sticks and stones and others indirectly through starvation and disease. It is stupidity for anyone to even imagine ZANU PF supporting anything people driven remember they engineered the release (or lack of) of election results of 2008 which reflected 'the will of the people'. The people's will and any expression of it is more a threat to them than is Morgan, that is why they now sit, eat and plan with him in cabinet how to brutally handle any demonstration by WOZA. UZ Students and other civic

groups. ZANU is aware that Morgan is a mere result of our collective national will and is not the driver. They fear us more than they fear MDC because it is the people's will that forced them into a marriage they did not want in the first place with MDC which Mai Mugabe had vowed would never lead/rule this country and it is the people's will which will bring them to ruin if allowed to breath.

This process is doomed to fail as it was in 2000. It puzzles one that politicians brag outside the country about how educated and smart Zimbabweans are yet they treat us here with the utmost contempt. MDC is interested in anything that will see Mugabe and ZANU out of office and they taking over the powers that he has had since 1987. Some in the party want to retain the present strangle hold on power as they believe they are next in line they look at Mnangagwa or Solomon Mujuru and see themselves in their future. Zanu PF is more honest with us they just want to remain on the farms they have taken, they do not want to pay back the RBZ loans, to loot still anything deposited therein and want to mine in Chiadzwa above all they want to retain control of the agents of persecution for the next round of elections. Both camps seem to ignore what Zimbabweans actually need and want and are capable of doing for themselves under a tree, in a classroom, at church in their homes and in their hearts, that is, to know what they want without politicians helping them – to say what kind of a constitution making process makes their desired result without the dictatorship that Parliament handed over to Robert Gabriel Mugabe on that fateful day of 1987 when Zvobgo warned of the dangers of what he had created.

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WHY MADUKU IS RIGHT ABOUT THIS CONSTITUTION MAKING: A SHAM OF A PEOPLE DRIVEN PROCESS!

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