Constitution-Making and Human Dignity

Perspectives from Eastern and Southern Africa

The African Forum for Catholic Social Teaching

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Introduction

David Kaulemu
AFCAST Regional Co-ordinator for Eastern and Southern Africa

As the Church's social teaching (CST) is made more visible in Eastern and Southern Africa, it becomes less of a 'best kept secret'[1] in the church and society. Efforts are being made to popularize and discuss the values of CST. Church institutions vary in their levels of growth in the implementation of CST.

The publication of the Compendium of the Social Doctrine of the Church by the Pontifical Council for Justice and Peace in 2004 has been a wonderful blessing that has stimulated the faithful to respond positively. Official Catholic regional bodies like the Association of Member Episcopal Conferences of Eastern Africa (AMECEA) and the Inter-Regional Meeting of Bishops of Southern Africa (IMBISA) have published statements that demonstrate their commitment to the concrete implementation of CST in their respective regions. They have made efforts to contribute to the tackling of the social, political, economic and cultural challenges of their countries and in the world. They have, in the process, helped to deepen our understanding of CST.

In their response to the challenge of HIV and AIDS, the AMECEA Bishops wrote "Called to be a Good Samaritan" (Luke 10:30-37). In this document, they recognized that AIDS is not just a health issue but is fuelled by

> abject poverty, greed and corruption, ignorance and illiteracy, high levels of unemployment, war and the existence of refugees and internally displaced persons, inequality between men and women, immoral behaviour, disrespect of children's rights, and negative traditional practices.[2]

The IMBISA Bishops have made CST their framework for justice and peace programs and activities for development in the world. This commitment is replicated in various bishops' conferences and other local and international church institutions and organizations. As Pope John Paul II pointed out in Sollicitudo Rei Socialis, "The teaching and spreading of her social doctrine are part of the Church's evangeliz-

1 Henriot, Peter, Edward DeBerri and Michael Schultheis, Catholic Social Teaching - Our Best Kept Secret (Maryknoll, New York, Orbis Books and the Centre of Concern Washington D.C., 1992).

2 Kyara, Corbinian, "AMECEA Bishops: Now is the Time, Not to Blame Each Other, But to Act," Points of View Jesuits of Eastern Africa 32, September 2005, 48.

ing mission."[3]

The African Forum for Catholic Social Teachings (AFCAST) takes inspiration from Pope John Paul II's words a decade ago in his Post-Synodal Apostolic Exhortation, Ecclesia in Africa,

> The formation of clergy, religious and laity, imparted in the areas of their apostolate, should lay emphasis on the social teaching of the church. Each person, according to his state of life, should be specially trained to know his rights and duties, the meaning and service of the common good, honest management of public goods and the proper manner of participating in political life, in order to be able to act in a credible manner in the face of social injustices.[4]

In this spirit of making more visible the social teaching of the Church, AFCAST organised a workshop in Nairobi on "Constitutional Review and Human Dignity". The workshop, like the others held in various capitals of the regions of Eastern and Southern Africa, was a follow-up to Ecclesia in Africa where Pope John Paul II demonstrated that part of the mission of the Church as the family of God is to serve "in flesh" the suffering humanity of Christ in the African people.[5]

While this booklet is on constitution-making and review, it also illustrates how the Church has been struggling to become a place "where help is given and received, and at the same time, a place where people are also prepared to serve those who are in need of help."[6]

The following papers demonstrate the relevance of CST to constitution-making and constitutional review in Kenya, South Africa, Uganda, Zambia and Malawi. They raise the question, "How have constitutional reviews been informed by the need to enhance human dignity in Eastern and Southern Africa?" They give some insight into the successes that have been achieved and the challenges that lie ahead. The papers demonstrate how the Church in these countries has contributed to good governance with varying levels of success, and sometimes even failures.

Tom Kagwe describes the Kenyan constitution-making process. He

3 John Paul II, Encyclical Letter Sollicitudo Socialis AAS 80 (1988), 41.
4 John Paul II, Apostolic Exhortation Ecclesia in Africa (14 September 1995) 107.
5 Ibid, 110.
6 Second Vatican Ecumenical Council, Dogmatic Constitution Lumen Gentium AAS 57 (1965), 21.

demonstrates how politicians and the mass media can do a disservice to the process by politicising it and spreading confusion instead of helping people to appreciate what the issues are.

Mike Pothier reviews the ways the South African Constitution upholds and enhances human dignity. He also points out the places in which the constitution differs from CST in its understanding of human dignity, particularly in regards to homosexuality, abortion and euthanasia.

Gerard Chigona assesses the Malawian constitutional review process against the respect for human dignity. He concludes that only superficial gestures have been made since genuine social, political and economic participation of the majority of Malawians, especially the poor and marginalised, has not been achieved. The resources of the Church in the form of the social teachings have not been fully appreciated and utilised to help the review process and to enhance genuine human development in Malawi.

Sr. Specioza Kabahuma paints a more positive role of the Church in the constitutional review process of Uganda. She describes how the Catholic Bishops of Uganda have intervened at various stages of the development of the Ugandan Constitution. However, she still pleads for the continued process of popularising CST in order to encourage more political participation of the Ugandan people.

Simson Mwale gives account of the continuing search for an ideal constitution in Zambia. Analysing the country's four constitutional reviews, he identifies a number of shortcomings that need to be addressed. He also demonstrates the positive efforts made by church bodies to move towards an inclusive and legitimate constitution in Zambia.

The papers in this booklet provide good case studies for constitution-making and constitutional review processes in the regions of Eastern and Southern Africa. Using the values of CST, they draw out some lessons for the church and society. We hope that the booklet will contribute to the vision of the Africa Synod which felt that "the greatest challenge for bringing about justice and peace in Africa consists in a good administration of public affairs in the two interrelated areas of politics and the economy."[7]

7 John Paul II, Encyclical Letter, Ecclesia in Africa (14 September 1995) 110.

KEYNOTE ADDRESS

From Constitution-Making to Confusion-Making: Kenya's Review Process in Light of Catholic Social Teaching

By Tom Kagwe

INTRODUCTION

THIS PAPER ASSESSES THE CONSTITUTION-MAKING PROCESS IN KENYA, beginning with insights from Catholic Social Teaching and brief examples of constitution-making in Africa.

Generally, Kenyans are united in their demand for a new constitutional dispensation guaranteeing key principles such as accountability of state institutions; checks and balances; and an independent judiciary. However, the challenge is in the contents and the process for drafting such a constitution.

Critical to this process is the role played by politicians. In Kenya the political elite hijacked, and continue to hijack, the constitution-making process, even militating against its completion based on their own selfish, short-term interests. Before the 2005 referendum, they failed to resolve divisive issues because of myopic partisanship. They neither appreciated nor did they uphold the moral dimension of political representation as enshrined in Catholic Social Teaching. Thus, Kenya's constitution-making turned into confusion-making with legal, political and other contextual problems plaguing the review process.

CATHOLIC SOCIAL TEACHING

Catholic Social Teaching (CST) is a set of principles, anchored on universally accepted convictions, which are essential guides both to Christian values and social life. Placing the human person at its core, CST discerns the way to build an equitable and just society. The interest of the Church, as seen in various encyclicals that express CST, is to contribute towards the development of a social framework based on the desire for integral human development.[1] Its keen-

1 See Caritas, Catholic Secretariat of Nigeria,' Civic Education Manual for Communities and Schools.

ness to uphold human dignity[2] has given rise in many parts of the world – including Africa – to attempts to bring about socio-economic and political-juridical orders which protect basic human rights.[3]

The Church supports models of authority founded on the social nature of the human person. The political community, especially the state, must find its dimension in reference to people – not as a shapeless and inert multitude to be manipulated or exploited, but as a group of individuals each with a role to play. Thus, a citizen should be able to form an opinion on public matters and have the freedom to express his or her own political sentiments for the common good of society.[4] The Church values democracy inasmuch as it ensures participation of citizens in making political choices, electing, and holding the elected accountable through peaceful means.[5]

The CST principle of solidarity regards all people as created equally in God's image and sharing a common destiny.[6] This future must be constructed cooperatively to avoid catastrophe as Sollicitudo Rei Socialis ('Social Concern of the Church') warns.[7] As such, the state must seek to create an environment which allows citizens to exercise both their rights and duties. Thus, in pursuing the common good, the state must defend and promote human rights[8] with the rule of law and equity among citizens as its foundation.[9]

Political authority is an instrument for stewardship. It must be exercised within the domains of morality and on behalf of the common good which works according to a morally legitimate and juridical order. Therefore, political authority must be accountable to the people

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2 This commitment to human dignity was expressed by Pope Leo XIII in 1891 in Rerum Novarum ('New Things') which addressed the conditions of workers including their right to form or join trade unions. Also, in Pope Paul VI's Populorum Progressio ('Development of Peoples') of 1967 which traced the connection between development and peace. Pope John Paul II's Tertio Millennio Adventie ("The Third Millennium Approaches') of 1994 addressed the need for global interdependence in the face of worldwide problems such as uneven distribution of resources. Visit www.vatican.va for all Encyclicals and Documents on CST.

3 Second Vatican Ecumenical Council, Pastoral Constitution Gaudium et Spes, AAS 58 (1966)

4 Pontifical Council for Justice and Peace, Compendium on the Social Doctrine of the Church (Nairobi, Paulines Publications Africa, 2004) pp. 207-208.

5 Ibid, pp. 212-219.

6 Mofid, Kamran, Globalization for the Common Good (London, Shepheard-Walwyn, 2002).

7 John Paul II, Encyclical Letter Sollicitudo Rei Socialis, 17: AAS 80 (1988).

8 Mofid, Kamran, op cit, p. 210.

9 Second Vatican Ecumenical Council, Pastoral Constitution Gaudium et Spes, 85: AAS 58 (1966).

and respect electoral terms, the constitutive elements of democratic representation.[10]

To ensure respect for the rights and contributions of members of society, CST values governance with a separation and balance of powers. This protects the state from arbitrary decisions made by individuals.

Democracy calls for political parties to be avenues for nurturing widespread participation, interpreting the aspirations of the people and orienting society towards the common good. Parties should be internally democratic and capable of synthesising and planning from various political perspectives. Representation is cardinal but equally important is participation by citizens through the referendum, which gives them direct access to political decision-making.[11]

To be informed before such a decision is pivotal. Thus, information is among the principal instruments of democracy. Participation without an understanding of the situation of the political community, relevant political facts and proposed solutions to the societal problems undermines democracy.[12] The media plays a critical role in information sharing. Equally, politicians must speak truthfully about their solutions to people's problems.

Finally, the importance of subsidiarity cannot be underestimated. Following this CST principle, the state should provide an adequate legal framework for citizens to exercise their different activities freely, only intervening in the interest of the freedom of its citizens. Democratic life must begin 'within the fabric of the society'.[13]

In Search of a New Order?

The African Quest

Today, civil society and political leadership in Africa view constitution-making as part of the solution to the socio-economic problems plaguing the continent rather than simply as a 'power map'.[14] States are encouraging people to participate in the constitution-making process, recognising that it is the most legitimate way to dismantle the colonial and neo-colonial legacy.

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10 Pontifical Council for Justice and Peace, Compendium, p. 220.
11 Ibid p. 220.
12 Ibid p. 223.
13 Ibid pp. 222-226.
14 Ihonvbere, Julius, "Towards A New Constitutionalism in Africa," 4th Occasional Paper Series for the Centre for Democracy & Development, London, 2000.

Indeed, the pressure for constitutional reforms has increased following many years of mismanagement and socio-economic difficulties in the 'first republics' across the continent.[15] Constitutions hurriedly drafted prior to independence to symbolise the end of colonialism have largely failed to dismantle those legacies, notwithstanding their numerous amendments.

In the East African region, Kenya amended the Independence Constitution (1963) 16 times in the first 15 years of independence. Tanzania ammeded its Independence Consitution (1961) 13 times by 2000. Uganda replaced its Independence Constitution (1962) with the infamous 1966 'pigeon hole' Constitution[16] and, one year later, with the Republican Constitution. Every new leader made his amendments until the introduction of the 1995 Constitution of Uganda. The latest amendment of 2005 removed the two, five-year terms limit, enabling Museveni to run for a third term. This amendment clearly contradicts CST, which warns against the disregard for electoral terms.

Similarly, Obasanjo of Nigeria sought a third term. A motion passed by the lower house but was defeated by the senate. Even his vice-president unequivocally opposed the idea. Nigeria's Independence Constitution (1960) has been replaced or suspended altogether, depending on whether the president is civilian or military. In 1979, an attempt began to redraft the Independence Constitution. The process was thwarted in 1983 with the suspension of the constitution following the coup d 'etat of General Muhammad Buhari. A rekindling of the constitutional review came following the promulagation by decree of the 1999 Constitution, based on the 1979 version.[17] This constitution has been rejected across class, gender, ethnic and regional lines as incapable of ensuring good governance.[18]

In Southern Africa, the situation is hardly different. Zimbabwe inherited a constitution based on the Westminster model of a titular

15 Ali-Aroni, Abida, "The Constitution Making Process in Kenya: Challenges, Lessons and Prospects," presented at the symposium on East African Constitutionalism in the 21st Century: Reflections and Prospects organised by the Kituo Cha Katiba, 10 to 11 September 2004.

16 On 15 April 1966, a new constitution was imposed on the people of Uganda by the then Prime Minister Milton Obote. Members of parliament were simply told to find the document in their pigeon holes after the debate of its introduction as the country's constitution. See Kituo Cha Katiba, "Report of the Fact Finding Mission of the Kituo cha Katiba on the Progress of the Constitutional Review Exercise in Kenya," 19 to 22 September 2001 and 26 to 29 February 2002.

17 Ihonvbere, Julius, op cit.

18 Ibid.

president and an executive prime minister. Soon after independence, President Mugabe, then the prime minister, abolished the titular presidency, sacking President Banana and occupying the throne as executive president. An attempt to write a homegrown constitution ended when the people voted 'no' to the referendum in 2000.[19] Primarily, the review process was not adequate. Out of the 400-member commission, 175 were members of Mugabe's ruling party. This, coupled with selective interpretation of people's contributions, made a mockery of people's participation, especially that of the opposition parties.

Models of constitution-making processes abound across Africa, differing from country to country. While Francophone Africa has preferred the national conference model, Anglophone Africa has adopted the commission-constituent assembly model. Still, all have resulted in national referendum.[20] South Africa[21] and Ghana[22] may be the shining examples of progressive constitutions and constitutionalism. Eritrea and Uganda have strong constitutions but no constitutionalism.[23] Zimbabwe and Nigeria failed to ensure meaningful participation by the majority of their people. The same is true in Kenya's constitution-making process.

Kenya's Search

The quest for a new constitutional dispensation in Kenya is as old as the country's constitutional history. Its roots can be traced to the Lancaster House Conference of 1962 which culminated in the Independence Constitution. That constitution was typically foreign[24] and did not deal appropriately with issues of equitable distribution of land; perceived or anticipated marginalisation of less-populated ethnic

19 Media Development Association, Katiba News, Issue No. 06.02, February 2006.

20 See Odoki, Benjamin, "National Consensus as a basis for a Viable Democratic Constitution," a paper presented at the symposium on East African Constitutionalism in the 21st Century: Reflections and Prospects organised by the Kituo Cha Katiba, 10 to 11 September 2004.

21 See Pothier, Mike, "Constitution-Making and Human Dignity: The South African Experience," in this booklet, pp 22-32.

22 Ihonvbere, Julius, op cit.

23 Constitutions, once promulgated should be implemented and not remain 'mere paper tigers'. That is the spirit behind constitutionalism. Implementation requires political will, adequate national resources, popular understanding and support among others. See Odoki, Benjamin, op cit. The Eritrean Constitution is implemented piecemeal. For example, while it provides for an independent press, the state has suppressed press freedom. See Katiba News, Issue No. 06.02.

24 Although Kenyan-African representatives were in the Lancaster Conference, the African delegation lacked the professional know-how to negotiate satisfactorily.

groups; and the unresolved question of the then Northern Frontier District.[25]

These issues have continued to plague Kenya over a 15-year-old constitutional review process. They have never been fully catered for in the current constitutional dispensation, despite numerous amendments. Other issues, largely concerning governance have also informed the demand for constitutional reform. The following are some of the challenges for a new constitution to address:

- the enormous and unchecked powers wielded by the presidency and even the legislature;
- the unresponsiveness and lack of accountability of state institutions to the people;
- the clogged up and weak judiciary;
- problems in the socio-political life of Kenyans especially the marginalisation of women, youth and the physically-challenged in society;
- inequality, inequity and poverty.

Many Kenyans have stated the need for an all-inclusive, people-driven process that brings the key stakeholders together.[26] Thus, the need for change is not only compelling but also legitimate and popular.

While input by well-educated lawyers, academics, and politicians is valid, the constitution-making process must be informed by the thinking, understanding and aspirations of the majority of people.[27] Constitution-making which does not involve the people and does not respect the principle of participation is bound to fail.

To ensure maximum popular participation, key stakeholders from government and civil society (including religious institutions) formulated a bill that would, upon passage as an act of parliament, guide Kenya towards a new constitution. They listed the following reasons

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The delegation focused primarily on immediate independence and land issues rather than on the substance of the constitution. African spirituality and traditional administrative structures were never taken into account. Also, the constitution contained many aspects that were non-negotiable such as the judiciary, legislature, executive and the bill of rights.

25 See Choto, King'ori, "From Lancaster to Bomas: 'Is it a Case of Tragedy Recurring as a Farce?'", The Lawyer, September 2003, pp 13-18.

26 Ibid, pp. 13-18.

27 Ihonvbere, Julius, op cit.

for reviewing the constitution[28]:

a Guaranteeing peace, national unity and integrity to safeguard the well being of the people of Kenya;

b Establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;

c Recognising and demarcating divisions of responsibilities among various state organs including the executive, the legislature and the judiciary to create checks and balances and to ensure accountability of the government and its officers to the people of Kenya;

d Promoting people's participation in governance through democratic, free and fair elections and the devolution and exercise of power;

e Respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;

f Ensuring the basic needs of all Kenyans through the establishment of an equitable framework for economic growth and access to national resources.

The following principles were to guide the constitution-making process:

- recognising the importance of confidence and consensus building;
- eschewing violence and acts of provocation;
- respecting the independence of the Constitution of Kenya Review Commission (CKRC).

In the bid for a new constitution, several organs were tasked with varying responsibilities. The CKRC would spearhead the process.[29] The National Constitutional Conference (NCC) was mandated to de-

28 See the Constitution of Kenya Review Act (1997), as amended by the Constitution of Kenya Review (Amendment) Act (2001), Section 3 (a-k).

29 The CKRC collated the views after the Constituency Forums, compiled the draft bill and an attendant report and conducted civic education. It was also tasked with examining the various forms of government whether federal or unitary; checks and balances in the arms of government; past problems of land; state institutions; electoral system; and accountability of leaders. See the Constitution of Kenya Review Act (1997), as amended by the Constitution of Kenya Review (Amendment) Act (2001), Section 17 (a-d).

bate the CKRC draft bill and send it to the National Assembly. Despite some of the best brains in the legal fraternity occupying key positions in the review organs, confusion ensued.

KENYA: FROM CONSTITUTION-MAKING TO CONFUSION-MAKING

From the beginning in the 1990s, the process was underpinned by bad faith on the part of the state. Fears and suspicions were rife – especially towards those in power. To many Kenyans, the current power holder – Kenya African National Union (KANU) – was not committed to the review process. Furthermore, many were suspicious that those outside of power no longer sought a new order but to ascend to political power themselves, using the constitutional review process.[30] Confirming these suspicions, National Rainbow Coalition (NARC) luminaries, upon gaining power, contradicted their early submissions, either verbal or written.[31]

In March 2004, the Ringera ruling[32] stipulated the need for a definitive national referendum on the draft constitution, which had not been catered for in the review act as it existed then. This led to the formulation of Constitution of Kenya Review (Amendment) Act (2004) which favoured the ruling party, now NARC. The act was never entrenched in the constitution.[33] It gave parliament the power to resolve 'contentious issues' by debating the draft bill as adopted by the NCC, handing it over to the Attorney General for publishing and then facilitating Kenyans to express their verdict through the referendum.[34] The law itself was faulty with parliament as the only body in

30 Mutua, Makau, "Voices of Reason: Constitutionalism and Referendum Politics," paper prepared for the African Centre for Economic Growth, Nairobi, October 2005.

31 Visit the CKRC website, www.kenyaconstitution.org. For example, the submissions made about powers of the presidency and how they should be decongested by having an executive prime minister differ sharply with what some NARC members stated before they ascended to power.

32 This ruling, delivered in Miscellaneous Civil Application No.82 on 25 March 2004, asserted the right of every Kenyan to vote on the draft constitution through a referendum. The ruling raised doubts on the validity of the draft emanating from the NCC. Some viewed the NCC as distinct from a constituent assembly and therefore incapable of writing a new constitution for Kenya. They saw the Attorney General as having no authority to present the NCC draft to parliament to enact or reject and even parliament's role to enact a new constitution as unconstitutional. These different views threw the review process and the act guiding the review process into a stalemate that lasted for over a year.

33 Mutua, Makau, op cit.

34 See the Constitution of Kenya Review Act (1997), as amended, Section 27 and 28.

the country that could amend the constitution.[35]

In terms of content, there were three main constitutional drafts – The first draft of 18 September 2002, the National Constituency Conference draft of 15 March 2004 and the proposed new constitution of 22 August 2005. Other bodies within civil society also wrote drafts. These included Ufungamano, the Kenya private sector, the Law Society of Kenya, and so on. While various drafts added value to the process, they also brought confusion to many people as to which was the legally-sound draft that would replace the current constitution.

The three main drafts contained considerable and sometimes sharp divisions when addressing such issues as executive, legislature and judiciary powers; land (especially access to and inheritance by women); devolution of power; and transition.[36]

While the first draft was not subject to much controversy, the latter two – also referred to as the 'Bomas draft' and 'Wako draft' respectively – contributed much to the acrimony. As Mutua contended, 'to one crowd [the 'orange' camp], the Bomas draft was the voice of God. To the other [the 'banana' camp], the Wako draft was sacred. To both, the other's draft was either a mongrel, a screed, or a tool for dictatorship, or a wholly illegitimate document."[37]

Kenyans were literally split into two camps divided along ethnic lines, with the majority of the Agikuyu in the 'banana' camp led by President MwaiKibaki, a Kikuyu, while many Dholuos joined the 'orange' camp under Raila Odinga, a Lou .

Ideally, each Kenyan should have voted on the proposed new constitution after either reading or receiving civic education on the draft. This did not happen. While the CKRC was mandated to conduct civic education, the process lacked both content and time.[38] Even within the CKRC, there were splits in terms of which methodology and ma-

35 See Nyamu, Habel, "The Law Review was a Red Herring," The Daily Nation, 14 April 2006, p. 9.

36 For a detailed analysis of the three drafts together with others see Mutua, Makau, op cit.

37 See Mutua, Makau, op cit, p. 22.

38 Within 90 days from the publication of the proposed constitution, the CKRC was to provide civic education. The timetable to train the grassroots at the district level was 26 September to 6 October 2005. Those trained at the districts would then go to the constituencies to train community based organisations (CBOs). Many resources, ranging from financial, to materials (booklets for training) and other logistical matters were not ready until the second week of October leaving only 45 days of civic education.

terials to use.[39] One document was even reprinted because the colour of the cover was orange!

Early on, politicians began partisan campaigning for their respective symbols, whether banana or orange. Rather than engage in principled debate allowing Kenyans to make an intelligent choice, they polarised citizens.[40] Examples abound. While law was very clear that the proposed new constitution would replace the current constitution, some politicians confused the electorate by suggesting that the Bomas draft should also be brought to the referendum where Kenyans would be asked to make their choice between it and the proposed new constitution. The 'orange' camp claimed that the presidential powers in the proposed constitution were more than those contained in the current constitution. In the 'banana' camp, lies were peddled that all appointments and dismissals by the presidency would be vetted by parliament.

Generally, the referendum campaigns were intensely competitive and divisive processes, sometimes even violent leading to deaths and injuries.[41] For both camps, to outwit the other and garner support was more important than truthfully stating the provisions contained.

Under pressure, civic education providers (CEPs) were unable to counter the propaganda. Some CEPs were also biased. As a result many Kenyans favoured one view, even before seeing the draft or having objective information.

The Catholic bishops called for thorough civic education in one of their statements just before the referendum. They noted the necessity of all citizens to be adequately informed[42] so that they could vote using their conscience.[43] This fell on deaf ears. The majority of people had already made a decision before civic education began because of political posturing and appeals to ethnicity made by the two competing camps.

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39 See Mwangi, Paul. "Lessons from the Referendum: What to do Next?," in Katiba News, Issue No. 06.02, February 2006. Published by Media Development Association.

40 Mutua, Makau, op cit.

41 See Nyong'o, Anyang', "Reconciliation: Kibaki must Show the Way" in The Daily Nation, 21 November 2005.

42 Catholic Bishops of Kenya, Press Release, "On the Proposed New Constitution for Kenya," 30 August 2005.

43 Catholic Bishops of Kenya, Pastoral Letter, "Be Not Afraid," in The Daily Nation, 18 November 2005, p. 20.

According to Catholic Social Teaching, the Church should respect the autonomy of the democratic order and allow people to make their own decisions. The Church is not entitled to

> express preferences for this or that institutional or constitutional solution nor does it belong to her to enter into questions of merit of political programmes, except as concerns their religious or moral implications.[44]

In this regard, the bishops openly stated that they had reservations about issues such as reproductive health, life and abortion.[45] However, many Kenyans, including the faithful, expected the bishops to suggest to them which way to vote. They also claimed that church leadership was divided.[46]

The role played by the print and electronic media, especially at the NCC and after, was characterised by inaccurate reporting and misinterpretion of the provisions of the various draft constitutions. This worked to the detriment of civic education.

While the media eventually improved, especially after a debriefing session with the CKRC, it had already created the impression that the 'constitutional battle' was between the President, Mwai Kibaki, and his alleged nemesis, Raila Odinga.[47] Politicians in the "banana" camp added to this impression when they openly stated that voting 'yes' meant accepting and validating Kibaki's presidency. Those in the "orange" camp gave the impression that voting 'no' would be tantamount to a vote of no confidence in the Kibaki presidency.

Lack of consensus both at Bomas and outside added to the confusion in the review process. For example, the law which clearly defined a 'contentious issue' (that which failed to garner 2/3^{rds} in the conference, or that over which 1/3rd of membership would submit a memorandum) was ignored. Instead, contentious issues became those not agreeable to the respective contending parties, especially revolving around the issue of presidential powers.

Even the law itself was mathematically faulty, implicitly stating that 2/3^{rds} is equivalent to 65 percent.[48] After the National Constitution

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44 Pontifical Council, *Compendium*, op cit, p. 228.

45 Catholic Bishops of Kenya, "On the Proposed New Constitution," op cit.

46 This division was reported numerously in the media. See dailies from 30 August to 21 November 2005.

47 See Mutua, Makau, op cit.

48 See the Constitution of Kenya Review Act (1997), as amended by the Constitution of Kenya Review (Amendment) Act (2004), Section 27(5).

Conference adjourned sine die politicians and others in civil society argued that 20 percent of the draft amounted to contentious issues. At no point was the 20 percent defined in relation to the articles in the various draft constitutions. Politicians travelled from Naivasha to Kilifi to iron out those differences. Yet as the country headed towards the referendum, the proposed new constitution was still said to contain 20 percent contentious issues.

While politicians were equipped with the power to resolve differences, they woefully failed since their perceptions were limited to bridging partisan and political differences as opposed to building consensus on the issues. Efforts at Naivasha and Kilifi were held at a time when the political tension had escalated with feuding within the ruling party.[49] The National Assembly mandated to spearhead consensus building was itself torn internally with numerous querulous factions.[50] Contrary to Catholic Social Teaching, politicians did not build solidarity nor did they uphold a sense of responsibility towards the weak.[51]

The failure of the National Assembly to resolve the contentious issues denied the referendum the legitimacy it deserved. Kenyans were faced with a dilemma. Voting 'yes' meant to accept the good and the bad in the draft constitution. Equally, voting 'no,' meant to reject both the good and the bad.

The process ended with the rejection of the proposed new constitution. Out of the over 11.6 million registered voters, 2.5 million voted for whilst 3.5 million voted against the proposed new constitution.[52]

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49 Some members of parliament (MPs) either reneged on the positions agreed upon, wholly boycotted voting in the said meetings or did not appear altogether. The MPs could not even agree on the composition of the Parliamentary Select Committee on Constitutional Review, the organ tasked to identify the contentious issues. Membership to this committee was contested since some MPs deemed to be anti-government were ostensibly left out. See Mwangi, Paul, op cit.

50 Ibid.

51 Mofid, Kamran, op cit, p. 64.

52 Pursuant to powers conferred by Section 28A of the Constitution of Kenya Review (Amendment) Act 2004 and Regulation 37 (1) (c) the Constitution of Kenya Review (Referendum) Regulations 2005, the Electoral Commission Kenya (ECK) published the results of the referendum held on 21 November 2005. These results contained in annexed schedule in The Republic of Kenya Gazette Notice No. 9511, indicated the tallied results as 2,578,831 for 'bananas' and 3,579,241 for 'oranges'. Thus, 6,239,355 Kenyans cast valid votes out of the 11,608,899 registered voters nationally. Among the remaining 5,457,172 Kenyans, these either did not cast their votes in the referendum or were barred due to technical reasons as provided for by the National Assembly and Presidential Elections Act.

Overall, the politicised process divided the country and frustrated consensus building based on information and education of the people. Further, it hampered full and meaningful participation of the people of Kenya. Most politicians did not exercise their authority towards the common good, but sought prestige or personal advantages in preparation for the general elections of 2007. Unfortunately, politicians put their short-term political interests into the soul of the constitution-making process.[53]

Lessons and Recommendations

Despite many efforts and years of waiting, Kenya still does not have a new constitution. However, the foundation of Kenya's quest for a new constitution is still unshakeable. Kenya is challenged to establish better and more responsive governance structures than those in the current constitutional dispensation. While many initiatives to jumpstart the process will come and go, there are four key lessons learned which formed the pits into which Kenya's constitutional quest fell. These include:

Deeply rooted ethnicity: Ethnicity is deeply rooted in Kenya and is exhibited whenever adjustments are being made to power structures and allocation of resources. The referendum brought out this reality in its true colours.

Politicians are Kenyans' enemies: Politicians trivialise issues that have serious ramification on the people. While civic and political education over the last 20 years has taken root and democracy is maturing gradually, politicians are eroding the gains made in appealing to their ethnic communities for votes.

Civic education needs more time: Inadequate time was allocated for debate, consensus and civic education. Many Kenyans went to the polls inadequately prepared. This could also have contributed to the high number of spoilt votes (over 80,000).

Controversial provisions: Behind the façade of ethnicity, political battles and inadequate time for debate, are contested issues left unresolved. Key among these provisions is the structure of the executive and legislature, devolution of power, religious courts in a secular constitution and transitional arrangements.

53 Kendo, Okech, "Referendum is Bigger than Politicians and the 2007 Elections," The Standard, 15 September 2005.

In the future, the review process must be safeguarded from both constitutional challenges and political hijacking. However Kenyans decide to jumpstart the review process, six crucial recommendations should be taken into consideration:

1. The next review process must be all-inclusive, legitimate and legally sound.
2. The content of the draft constitution is as important as the process.
3. Future legislation must ensure that the document cannot be manipulated in its formulation and that its legitimacy be taken into account.
4. Continuous and participatory civic and voter education countrywide is needed for Kenyans to own the process and more importantly, to vote on that basis.
5. The future constitution-making process and content must be grounded in the needs, hopes, desires and aspirations of the people of Kenya. While the thoughts of "experts" or eminent persons are crucial, they can never replace the people's views upon which constituent power is based.
6. Lastly, all those individuals and institutions involved in the above stages must be thoroughly scanned and sanctioned to ensure that they are morally upright, sincere and have professional integrity.

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Constitution Making and Human Dignity: The South African Experience

Mike Pothier

> Human dignity is rooted in the image and reflection of God in each of us. It is this which makes all persons essentially equal. The integral development of persons makes more clear the divine image in them. In our time the Church has grown more deeply aware of this truth; hence she believes firmly that the promotion of human rights is required by the Gospel and is central to her ministry.
>
> Pope Paul VI
> Concluding Message to the Synod of Bishops, Rome, 1974

> As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights... Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water, or in the case of persons unable to support themselves, without appropriate assistance?"
>
> Former Chief Justice Arthur Chaskalson
> "Human Dignity as a Foundational Value of our Constitutional Order"
> *South African Journal on Human Rights, 16, 2000, p.* 204

INTRODUCTION

The Constitution of the Republic of South Africa (Act 108 of 1996) was adopted by the Constitutional Assembly on 8 May 1996, some two years after the historic democratic elections of 27 April 1994. While the formal adoption was an occasion of much public and official celebration, it did not give rise to the same sense of joy, even euphoria, among the populace as was seen when Nelson Mandela emerged from prison in February 1990, or when crowds of tens of thousands gathered to express their freedom during the three days of voting in 1994. But for anyone who understood the importance of human rights and the rule of law, the adoption of the constitution was an occasion of at least equal significance. Leaders, no matter how great, come and go. And elections, no matter how eagerly anticipated, give way to daily realities. As has often been said, having a vote does not get you a job or a house or put bread on your table. If political leaders and public representatives are to fulfill their duties and remain true to their promises, a nation needs a foundation upon which its future can be built. This grounding establishes a basis for

determining any infringements on the rights of a citizen by either a fellow citizen or the state. Ideally, a constitution should go a long way to providing such a foundation.

Many have attempted to sum up the South African Constitution. Few, if any, have done so with the grace and clarity of the late Chief Justice Ismail Mahomed:

> The South African Constitution... retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.[1]

Our constitution looks to the past in order to repudiate it and to ensure a bright future. What characterised our past above all was the denial, under apartheid, of our human dignity. Accordingly, it is that very dignity that must form the core of the constitution as we move into the future. This paper attempts to provide an outline of the expression of human dignity in the constitution and its translation from an abstract notion to concrete reality in South African society. I comment briefly on the degree to which South Africa's constitutional notion of human dignity corresponds to that articulated in Catholic Social Teaching.

The Constitutional Notion of Human Dignity

Section 10 of the constitution recognises the following: "Everyone has inherent dignity and the right to have their dignity respected and protected."

Two aspects of this clause are of particular importance. Firstly, dignity is not described as a right in itself, as are such things as, for example, the right to privacy (section 14) or the right to freedom of expression (section 16). Dignity is seen as an automatic characteristic of being human and this places it on a higher level than other fundamental rights. While most of the rights laid out in the bill of rights[2] can be limited in cases of necessity, dignity is one of only

1 S v Makwanyane 1995 (3) SA391 (CC) para [262].
2 Chapter 2 of the constitution.

two which are entirely non-derogable (the other being life).

Secondly, the constitution provides that dignity is inherent to human beings. Unlike many other rights, especially in political and socio-economic spheres, dignity does not require any action in order to come into existence. It pre-exists other rights (again, the one exception being life itself) and is a precondition for their existence.

The singular nature of dignity and life has been explicitly recognised by the Constitutional Court:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[3]

But human dignity does not appear in the constitution only as a clause in the bill of rights (albeit a pre-eminent clause). It is given a foundational role in the whole enterprise of building the new South Africa. Section 1 of the constitution reads as follows:

> The Republic of South Africa is one sovereign, democratic state founded on the following values:
>
> a Human Dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> b Non-racialism and non-sexism.
>
> c Supremacy of the constitution and the rule of law.
>
> d Universal adult suffrage. [...]

Again, when it comes to limiting rights, the restriction must be "reasonable and justifiable" in a society "based on human dignity, equality and freedom".[4] Indeed, this triad of human dignity, equality and freedom occurs elsewhere in the constitution and has become by far the most important and often-used reference point in judicial interpretations of constitutional issues. It is no accident that, of these

3 S v Makwanyane 1995 (3) SA 391 (CC) at para [144]. This case, which declared the death penalty unconstitutional, was one of the first heard by the Constitutional Court. Given its subject matter, it provided a rigorous analysis of the concepts of dignity and life and their constitutional meanings. The case predated the adoption of the present constitution; it dealt with the interim constitution (Act 200 of 1993) which was a precursor of the 1996 Constitution and, for our purposes, similar in its formulation of fundamental rights.

4 Section 36(1).

three basic values, human dignity always occupies first place on the list.

If, then, human dignity is accorded an almost absolute priority in the constitutional scheme, we may well ask how it has been defined, and what concrete meaning the Constitutional Court has given it. In fact, far from attempting to define the concept, the Constitutional Court has recognised that "[d]ignity is a difficult concept to define in precise terms."[5] Nevertheless, this does not mean that its implications are obscure:

> At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.[6]

The 1995 case, S v Makwanyane, clarifies that:

> Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.[7]

Minister of Home Affairs v Fourie confirms the rights of gays and lesbians as,

> foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.[8]

From these and numerous other dicta we can deduce at least the basic content of the concept: people have worth; the worth is intrinsic and inherent to them as human beings; each individual has the same worth as all others; and this worth is unaffected by whatever differences – of race, gender, creed and so on – that may distinguish us.

Although dignity remains a somewhat nebulous concept, perhaps incapable of precise definition, its value as a legal and constitutional

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5 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at para [29].

6 Ibid (emphasis added).

7 S v Makwanyane 1995 (3) SA 391 (CC) para [144] (emphasis added).

8 Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae);Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC) at para [50] (emphasis added).

tool remains. As Pope John Paul II indicated in his address at Puebla[9], it is often not at all difficult to know when dignity is being attacked. To define dignity in legal terms is unnecessary as long as we are able to identify and transform acts, policies and attitudes that violate or undermine dignity.

From Abstract Notion to Concrete Reality

Numerous acts of parliament since 1994 have attempted to promote dignity or to ensure that this value finds application in ordinary laws. Thus, section 2 of the Correctional Services Act[10] provides for the detention of prisoners "in safe custody whilst ensuring their human dignity." Section 8 of the Mental Health Care Act[11] requires that "person, human dignity and privacy" of mental health patients be respected. Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act[12] prohibits "any practice, including traditional, customary or religious practice, which impairs the dignity of women." Even in the seemingly mundane world of facts and figures, the Statistics Act provides that when a government official enters private property for purposes such as taking a census, he or she must do so "with strict regard to decency and order, including the protection of a person's rights to dignity, to freedom and security and to privacy."[13]

As these few examples show, the protection and respect of dignity permeates much of the legislation of the last decade. Perhaps more importantly for people's daily lives, however, is a greater awareness of the citizen's right to dignified treatment at all levels of government. Various programmes encourage public servants, the police and officials in general to respect the dignity of those with whom they interact. Of course, the situation is far from perfect, but there would be few South Africans who could argue honestly that there has not been a noticeable improvement in this respect. Above all (and so obvious a consideration is easy to lose sight of), the mere fact that the majority of our population are no longer officially designated as second-class citizens has been the single most significant advance in the quest for full human dignity.

The pre-eminence accorded to human dignity in the constitution

9 Address to the 3rd Conference of the Latin American Episcopate, Puebla, 28th January 1979, para III, 2.
10 Act 111 of 1998.
11 Act 17 of 2002.
12 Act 4 of 2000.
13 Section 15 of Act 6 of 1999.

has resulted in its being analysed, contextualised and applied in literally hundreds of court cases since 1994, not only in the Constitutional Court, but in High Courts and Magistrate's Courts throughout the country.

Ultimately, the courts must decide whether particular conduct or policies meet or fail the test of promoting and protecting dignity. We have already referred to the application of the dignity standard to the question of the death penalty. Some other unequivocal pronouncements of the Constitutional Court on dignity stem from its firm views on marriage and from its consideration of the rights of gay and lesbian people, a group still subjected to social prejudice:

> The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance... It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.[14]

In each of these cases unconstitutional legislation was struck down. The state either ended a certain practice (such as the death penalty) or amended the offending laws to bring them in line with the constitution. Very little by way of a positive duty was imposed on the state to do something extra or something that it had previously neglected to do.

The question that had long concerned social activists was whether or not the core constitutional value of dignity could be invoked in the sphere of socio-economic rights such as health, education, housing and land. This question was answered in the case of Grootboom:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food,

14 Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) at para [37]. The court was dealing with immigration legislation that forced foreign spouses of South African citizens to remain outside the country while consideration was given to their applications for permanent residence.

> clothing or shelter... The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[15]

Applying this principle to the right to housing, the court went on to state:

> The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. In short, I emphasise that human beings are required to be treated as human beings.[16]

The Constitutional Court has returned to this theme on various occasions. In Port Elizabeth Municipality v Various Occupiers, the court concluded:

> It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies, rather than mitigates, their marginalisation.[17]

In Khosa and Others v Minister of Social Development and Others, the court determined that:

> The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.[18]

There is little doubt that the courts will continue to link dignity to the exercise of socio-economic rights, thus making the abstract concept manifest in the lives of ordinary people. Accordingly, we can look forward to a growing recognition in the legislative, executive and judicial spheres of the importance of human dignity as a mea-

15 Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para [23].

16 Ibid, para [83].

17 Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para [18].

18 Khosa and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC) at para [52].

surement for state-citizen relations. It will, of course, be a gradual process for two reasons. First, the courts are reluctant to impose positive duties on government which may exhaust resources or offend the separation of powers. Secondly, the process for citizens to bring matters to the Constitutional Court is a challenging one. Still, if the focus on human dignity in previous parliamentary acts and court cases is any indication, the constitutional notion of dignity will become more, not less, real in years to come.

Correspondence with Catholic Social Teaching (CST)

If, as we have seen, it is not feasible to arrive at a complete definition of human dignity in the constitutional or legal sphere, the same is true in the field of theology, and specifically in the Church's social teaching. The idea of dignity, of course, lies at the very core of Catholic Social Teaching (CST), and virtually every document dealing with social issues, whether a papal encyclical or a bishops' conference letter, proceeds from the starting point that human beings have the quality of dignity. Mirroring, again, the constitutional experience, CST has acknowledged the inevitable consequences of a society which lacks respect for human dignity; it has identified and condemned abuses of dignity; and it has encouraged proper respect for dignity in the whole range of human endeavours and organisation: politics, economics, culture, science, international relations and so on.

From all this, certain basic propositions can be distilled which represent perhaps the key components of the Church's understanding of human dignity:

> Human dignity flows from, and reflects, the fact that we are made in the image of God; it is something intrinsic to us as human beings. "[B]eing in the image of God the human individual possesses the dignity of a person, who is not just something, but someone.[19]

Human dignity manifests itself socially:

> …the human person is not only sacred but also social. How we organize our society […] directly affects human dignity and the capacity of individuals to grow in community.[20]

19 Catechism of the Catholic Church, 357.

20 United States Catholic Bishops' Conference, "Economic Justice for All," 1986,. para 14.

Because all men and women are made in the image of God we all have an equal dignity. "…all people have the same dignity as creatures made in [God's] image and likeness."[21]

The existence and nature of human dignity implies the existence and demand for respect of human rights:

> …the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity. […] In fact, the roots of human rights are to be found in the dignity that belongs to each human being.[22]

Human dignity is, thus, an intrinsic quality, which we all have in equal measure, which has a necessary social dimension, and which gives rise to human rights.

All four of these characteristics of the Church's notion of human dignity are also found in South African constitutional jurisprudence. In the majority of cases where the courts have applied the notion of dignity or have ruled on a claim that an applicant's dignity has been violated, the outcome has corresponded with the Church's position on the issue. These decisions cover a wide range of matters, from the death penalty, the right to a fair trial and the right to equal treatment, to various socio-economic issues and matters that fall under the general heading of family law. When reviewing South Africa's Bill of Rights, especially the clauses dealing with socio-economic rights,[23] some might even conclude that CST played a role in its drafting.[24]

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21 Catechism of the Catholic Church, 1934.

22 Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church (Rome, Libreria Editrice Vaticana, 2004) paras 152-3.

23 That these socio-economic rights are enumerated in the bill of rights at all, is by no means common practice internationally.

24 This is not surprising. The 20th century saw a growing awareness of human rights and the adoption of various international instruments setting out and describing them. The Church, no less than states, grew in its understanding of, and commitment to, these rights. The great social encyclicals of the second half of the century reveal this clearly, as does the Church's frequent and laudatory reference to such bodies as the United Nations. There was, in other words, an increasing consensus on the question of rights, to which both the Church and many states were part. In the case of the South African Constitution in particular, the drafters were able to draw from various other bills of rights, constitutional charters and international instruments. Important among these were the constitutions of Germany and Canada, both of which, one would surmise, owed rather more to CST than would those of many other nations.

Differences in Interpretation and Application

Does this mean, though, that we would be justified in concluding that there exists a complete congruence between the Church's idea of dignity and that propounded by the constitution?

One difference is obvious: while both see human dignity as inherent, the Church proclaims the origin of human dignity as God and our creation in God's image. The constitution, and the courts that interpret it, simply acknowledge its existence and centrality without commenting on its origin. In this secular approach, human dignity is, to borrow a phrase from the American Declaration of Independence, a 'self-evident truth'.

In two areas specifically, the Church's notion of dignity and that of the constitution do not coincide. The first relates to the rights of homosexual individuals and couples. Briefly put, the courts have taken the consistent view that discrimination against people on the basis of their sexual orientation offends their dignity (largely via their right to equality, which itself is a function of dignity). Consequently, it has been held that gay people have the right to adopt children and to share in each other's estates; that they can be considered as spouses for the purposes of pension payments; that 'same-sex' couples should enjoy the same rights of immigration and residence that apply to citizens married to foreigners; and that parliament must provide for some form of same-sex union that will equate in all respects to heterosexual marriage.

Clearly, the Church's view of the demands of dignity in this area would be directly opposed to that taken by South Africa's courts. In simple terms, the Church holds that the practice of homosexuality undermines human dignity. While it is unclear to what extent the Church would claim that homosexual individuals or couples should be denied patrimonial or immigration rights, there is no doubt that she would oppose their right to adopt children and, above all, to marry each other.

The second area of friction between the constitutional view of dignity and that of the Church concerns the always contentious questions of abortion and euthanasia. South Africa has a permissive abortion law that, since 1996, has allowed abortion up to the 12th week of pregnancy, and thereafter for various reasons of escalating seriousness for subsequent periods of gestation. This law was challenged in the High Court on the grounds of the right to life, but the

court held that the word 'everyone' in the clause guaranteeing the right to life[25] did not refer to a foetus.[26]

Full certainty will not be reached before the Constitutional Court has considered the issue, but most academic commentators believe that the court would not go so far as to rule that a foetus' right to life would supersede a woman's rights to privacy, bodily integrity and decision-making concerning reproduction. This group of rights is closely related to the right to dignity, so one can envisage a 'dignity argument' being employed in order to defend a woman's right to have an abortion.

Concerning euthanasia, no current legal provision allows for the active ending of life, but various interest groups have put forward proposals, and draft legislation was prepared some years ago. Those in favour of some form of euthanasia rely heavily on the argument that dignity requires that a terminally ill person be given the choice of ending his or her life if its quality has passed the point of endurance. It would offend dignity to force such a person to live in pain with no hope of successful medical intervention.

Obviously, in both cases, the Church's views on human dignity and human life would be at odds with the anticipated constitutional view.

Conclusion

South Africa's Constitution is often described as among the most progressive or advanced in the world. Built upon foundations established elsewhere over the last sixty years, the constitution goes further than most in safeguarding individual rights, in making socio-economic rights justiciable, and in recognising the social or community nature of human rights. It also acknowledges our shared and equal dignity as humans which is crucial, given South Africa's past. Despite certain striking divergences, as mentioned above, it is a charter of rights that corresponds largely with the core principles of CST and which echoes the primacy which the latter accords to the notion of human dignity.

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25 Section 11 of the constitution: 'Everyone has the right to life'.

26 Christian Lawyers Association of South Africa v National Minister of Health 1998 (4) SA 1113 (T).

Constitutional Review and Human Dignity in Malawi

Gerard Chigona

INTRODUCTION

IN 1964 MALAWI OBTAINED INDEPENDENCE. Since that time the country has experienced three regimes of constitutions. The first was in 1963, negotiated at Lancaster House.[1] This constitution provided the basis for the attainment of independence. A key feature was a marked lean towards parliamentary supremacy.

In 1966, a review was hurriedly carried out, leading to a constitution that provided for the republican status. Like the first one, the new constitution was not ratified by the population through a national referendum. Fundamental to the reviewed constitution was a marked departure from the parliamentary supremacy model to that of the executive presidency. This resulted in the speedy degeneration of national politics into a one-man autocracy under which torture, detentions, exiles and mysterious disappearances proliferated for many years.

While the parliamentary model ensured that power was invested in the elected representatives of the people, the executive presidential model reclaimed power and placed it in the hands of one man, alienating the people from the political space. In this case, the human person, who, as the Church's social teaching says, constitute the centre of and reason for state and government, became severely compromised.[2]

The culture of random reviews of independence constitutions, followed by quick shifts to one-man rule for life, was, as George Ayittey says, quite typical of politics in immediate postcolonial Africa. He

1 This constitution was not ratified through a referendum. The people who had fought for independence were marginalised and left out of the constitution-making process.

2 John XXIII, Encyclical Letter, Mater et Magistra, (1961), n.20. See also John XXIII, Encyclical Letter, Pacem in Terris: AAS 55, (1963), 273; Catechism of the Catholic Church, 2237; John Paul, Message for the 2000 World Day of Peace, 6: AAS 92 (2000), 362; John Paul II, Address to the Fiftieth General Assembly of the United Nations (5 October 1995), 3; L'Osservatore Romano, English Edition, 11 October 1995, p.8.

writes:

> Inchoate democratic structures hastily erected by the departing colonialists were perceived by the new leaders as "Western." As a result, they were quickly uprooted and replaced with systems that were, in many cases, far more repressive than the hated colonial system. The constitutional democracies installed, for instance, in Ghana, Uganda, Tanzania, Zambia, Malawi and Zaire, soon degenerated into one-man dictatorship built on personality cults.[3]

Slightly ten years have passed since Malawi democratised (1993/94), and 40 years since the first substantive constitutional review (1965). Presently, another constitutional review is in progress. The consultative process has attracted immense interest from a cross-section of society who have brought many issues to the table for debate.[4] Yet, the question remains whether the review process itself carries hope for the majority of Malawians in terms of their political and economic participation.

The Colonial Legacy of the State

The essence of a constitution is not primarily law. Rather, at its core is a people's shared history, value system, beliefs, and aspirations.[5] These elements, therefore, not only make each constitution distinct, but also act as a source of particularity and continuity of a people in a given historical context. Hence, the solid basis of popular nationalism, as opposed to either territorial or resource nationalism. Precisely for this reason, a constitution, among other functions, expresses the people's identity; entrenches their collective experi-

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3 See Ayittey, George B. Africa Betrayed (New York, St. Martin's Press Inc., 1993) p.100.

4 These issues include national language, separation of powers, fundamental principles, death penalty, marriage by repute or permanent cohabitation, political rights, citizenship, women participation in parliament, sexual orientation, arrest, detention and fair trial, right to education, rights of youth, age of marriage, rights of children, the non-discrimination provision, labour rights, administrative justice, tenure and qualification of members of parliament, members of parliament doubling as ministers, the speaker, court injunctions by members of parliament, convening parliament, electoral commission, electoral system, swearing of the president/vice-president, etc. See Malawi Law Commission, "Constitutional Review Programme" Consultation Paper.

5 See Tengetenga, James, "A Community of Character: Constitutionalism in Malawi," a paper presented at the Constitutional Review Conference, Lilongwe, 28 to 31 March 2006.

ences and memory; and defines and regulates the relationship between the people and the leadership.

In 1994 and 1995, through national constitutional conferences, Malawi negotiated a new constitution that would uphold the 1993 choice of political pluralism. This constitution, unlike the one of 1966, is premised on key principles of democratic governance such as those found in the bill of rights.[6] Critics frequently comment, even ten years after its ratification by parliament, that the constitution is a typical hybrid - a synthesis of the rudiments of parliamentarism and presidentialism. This feature, they contend, makes the constitution problematic, serving, quite inadvertently, as the genesis of the current crisis of state politics. The caricature contributes to a host of political and economic troubles that have now become very characteristic of national life.

The constitution, for example, is not rooted in the shared historical experience, values and aspirations of the majority of the Malawian people. Instead, it is extroverted and elitist-bourgeoisie, reflecting and serving the interests of the minority.[7]

Fundamental to the current constitutional review is the perennial question, "What do the masses passionately long for the State of Malawi to be?" This very question was either totally abandoned or highjacked by the minority both in 1966 and 1994/95. The majority, who struggled for change during the first and the second republic, are still on the periphery of state politics.

The state is a product of society,[8] and, as such, should be founded on the moral fabric of that society, and not any other. Malawi, like most African states, has not drawn its historical and moral foundation from the indigenous society but rather from imperial interests and colonisers. Unfortunately, parties or political platforms organising the independence movement were, themselves, based on colonial state organisations competing for the mere occupation of colonial state positions. In the quest for power, those political formations that

6 See The Constitution of the Republic of Malawi, Chapter IV.

7 During the constitutional review conference nearly all the resource people were top government officials, politicians, foreign diplomats, heads of non-governmental organisations and foreign and local consultants. A few traditional leaders were there mainly as tokens. The conference catchphrase was 'The nation is here, really?'

8 Osaghae, Eghosa H. "Ethnicity in Africa or African Ethnicity: The Search for a Contextual Understanding," in Ulf Himmelstrand, et al (Eds), African Perspectives on Development (Harare, St. Martins Press Inc, 1994) p.146.

addressed the central matter of politics in the colonies, i.e. the colonial question, were suppressed by the colonial state itself.[9] Subsequently, national independence was entrusted to those favourable to the neo-colonial agenda - the reformist nationalist model. In the end, the content of politics became the occupation of the colonial state rather than its destruction. As René Dumont observes:

> Too many African elites have interpreted independence as simply meaning that they could move into the jobs and enjoy the privileges of Europeans. Along with high salaries often go beautiful houses completely furnished, sometimes palaces for governors and a large domestic staff, on the expense account and cars usually with chauffeurs.[10]

Following the colonial model, Malawi moved into a post-colonial state reliant upon brute force, economic terrorism and violence, with little accountability to the masses. Thus, a distorted and dislocated relationship exists between the state and society. Malawi, as a political transplant, exists in a moral vacuum. Its imported social institutions are glaringly devoid of moral legitimacy as far as the majority of the population are concerned.[11]

The challenges of democratising and manufacturing a people's constitution within a post-colonial state need critical reflection. Unfortunately, the current constitutional review does little to critique the neo-liberal model of state politics or the state itself as a theatre of this political and economic experimentation. Only through conscientious recourse to the people's shared history, values and aspirations can this flaw be resolved.

Discarded Politically and Economically

Since independence, politics has been monopolised and reclaimed from the masses and all other social formations: trade and labour unions, professional associations, schools, colleges, workplaces, churches, markets and so on. Consequently a culture of serious political protest is absent in Malawi even in the face of abuses of power

9 In this case one can think of the likes of Masauko Chipembere, William Murray, Kanyama Chiume, Patrice Lumumba, and Kwame Nkrumah.

10 See Dumont, Rene. A False Start in Africa (London, Cox & Wyman Ltd, 1988). p.86.

11 Corruption is not only a product of people's greed, but is also a reflection of the alien nature of the state itself. The state is not yet part of the popular consciousness of the people; they do not feel obliged to it. Instead, it is somehow, a space for private use and personal enrichment.

by leaders. Political debate itself is very shallow and confined to newspaper reports.

The abandonment, or suppression, of emancipatory politics rooted in the masses, and the subsequent handing-over of the colonial state to the reformists, meant the ideological menopause of emancipatory politics and subsequent marginalisation of the masses. This key historical problem must be addressed by the review if the revised constitution is to promote participatory and emancipatory politics.

The (re)introduction of multipartyism in early 1990s, mistakenly equated to democracy, has not yielded much apart from a temporary relief from the years of terror of the reformist nationalists that had seized control of the state. Overall, politics remains a sectarian affair of this group, with popular participation distorted and reduced to mobilisation for periodic elections. In Malawi, like the rest of Africa, the key challenge lies in deconstructing this model of state politics as well as the rigidity of traditions invented or imagined by colonialists and adopted as indigenous.

The question posited during the review conference,[12] "How has our constitution served us since 1994?", is a source of distraction in that it regards the post-colonial state as a given, rather than the problem. So far, the constitutional review remains a private debate of the elite in the political and non-governmental sectors in the name of, and, of course, financed by the same marginalised peasants.[13]

Another key issue the review has yet to deal with is the national economy. The colonial state was not a developer, but rather an expropriator of capital. Precisely for this reason, it was a rogue, brutal and terrorist political entity. As Bill Freund describes:

> The colonial rule began with an act of political expropriation, with the use or threat of force, to extract surplus from Africa in the form of either direct labour or the product of labour that could then be commoditized. The state acted as a tribute taker.[14]

12 The First National Constitutional Review Conference took place from 28 to 31 March 2006.

13 When the President opened the Constitutional Review Conference on 28 March 2006, poor men, women and street children from the surrounding slum thronged the venue, chanting praises. Ideally, these would have been the focus and constant reference in the course of the deliberations: How can the constitution be a source of power for them to participate in politics beyond songs and praises? How can it promote their economic welfare?

14 Bill Freund, The Making of Contemporary Africa (London, The Macmillan Press Ltd, 1984) p.111.

This mentality continues through coercive institutions created and left behind by the colonialists in the name of government. State paternalism or populism exists with the masses labeled as "immature" and those in power seen as the only actors and sources of truth in politics and economics.

The current review has yet to criticise the national economy, as is the case with state politics. Malawi's economy, like in the majority of African states, is a denationalised economy privatised by international capital and distanced from the control of the masses as evidenced in section 13 (n) of the constitution itself.[15] The entrenchment of the neo-liberal economic model in a substantive part of the constitution,[16] not only implies that Malawi's economy is firmly controlled by external forces, but is a principal source of the escalated poverty of the politically marginalised masses.[17] The economy's marginalising nature is not yet a matter of concern to the political 'patrons' who, whether in the government or the non-governmental community are highly dependent on the international capitalist class.

Thus, popular political and economic participation remains illusory without a new historical mode of state politics. The model must be born out of the renewed vision of the state which can empower the masses – women, youth, workers and poor peasants – who are the invisible majority to take the center stage of history-making. As long as elitist neo-colonial state politics and neo-liberal economic policies are treated as the given, constitutional reviews both now and in the future risk becoming merely emotional whims and exercises in vanity disconnected from the masses.

In closing, the current political and economic models of Malawi's Constitution do not reflect the shared history, values and aspirations of the masses in Malawi. Emancipatory politics require political organisations, mass mobilisation and civil society movements rather than simply parties. The cosmetic replacement of the single-

15 The following are economic policies that are part of the forbidden debate within government-led public consultations: fiscal policy, monetary policy, financial liberalisation, privatisation, domestic investment and public investment.

16 According to the Constitution of the Republic of Malawi, any provision belonging to the substantive part of the constitution, such as the neo-liberal economic model can be changed only through a referendum.

17 Nearly every country that has adopted Structural Adjustment Programmes (SAPS) in Africa has ended up in far worse conditions than before. See Kanyandago, Peter (ed), Marginalized Africa: An International Perspective, (Limuru, Paulines Publications Africa, 2002). p.55.

party system by multi-party politics without the arduous task of re-conceptualising state politics, is no guarantee for a democracy with popular political and economic participation. The neo-liberal mode which the constitution entrenches is hardly conducive to the advancement of the interests of the peasants. We await a Malawi with participation beyond periodic elections along with economic growth that benefits the majority.

Whither the Faith Community?

In relation to the state and wider society the Church is often described as the "conscience of the nation," the "voice of the voiceless" or the "salt and the light of the earth'. The Church is viewed as an expert particularly in matters of faith and morals and has a legitimate stake in constitutional review since any constitution is a value-laden document. Although the Church, like other major organisations, has been involved in the current review process, it has not yet influenced the process in relation to its social doctrine. The Church must ensure the protection of the socio-economic rights of the vulnerable, as well as their participation. This is the space that the Church is obligated to fill in the review to ensure the marginalised are not forgotten.

Catholic Social Teaching on matters of subsidiarity is a rich resource from which the Church could make a practical contribution in shaping a constitution that promotes participatory and emancipatory state politics.[18] The same is true in the economy. If the welfare of the vulnerable is of value, then, contrary to the thinking of neo-liberals, the state must maintain a role in the national economy beyond policy prescription. The common good, solidarity, and option for the poor constitute a solid basis to constructively argue against the current adoption of neo-liberal economic policies in favour of socially-oriented models. As Pope John Paul II states:

> The action of the State and of other public authorities must be consistent with the principle of subsidiarity and create situations favourable to free exercise of economic activity. It must also be inspired by the principle of solidarity and establish limits for the autonomy of the parties in order to defend those who are weaker.[19]

18 See Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church (Rome, Libreria Editrice Vaticana, 2004) p.104ff.

19 Ibid, p.198ff. See also John Paul II, Encyclical Letter, Centesimus Annus, 39: AAS (1991) 843.

A consultative process, well-informed by relevant principles of the social doctrine, within Church structures, like the deaneries, youth and women groups, the small Christian communities, etc, would enable the Church to establish a collective position on necessary constitutional reform. Only then could the Church, in view of human dignity, provide additional value to the current constitutional review.

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Constitution-Making and Human Dignity: The Ugandan Experience

Sr. Specioza Kabahuma

INTRODUCTION

A constitution, as the supreme law of the land, is a human rights document - a people's document. The methodology in drafting a constitution must have the above elements at the center. A constitution created by the people finds its base in the historical background, people's experiences and the general environment in which they live. For a nation or a country to produce a people's constitution, its citizens themselves must be a crucial resource. A credible and legitimate constitution should win the approval of the masses who will defend its statutes, ensuring that it withstands the test of time.

UGANDA'S EXPERIENCE

Background:

Uganda is a land-locked Eastern African country bordering with Kenya, Tanzania, Rwanda, the Democratic Republic of the Congo and the Sudan. Its final territorial borders were fixed on 1 February 1926. Uganda became a British protectorate in 1894 and was under 'divide and rule' policy until independence on 9 October 1962. It is composed of 56 ethnic groups, some very big like the Baganda and Acholi and some small like the Iks in Karamoja which total roughly 100,000.[1]

The great expectations of Ugandans at independence were frustrated with a constitution negotiated at Lancaster House in London which strengthened and promoted the values of the British system and the colonial powers by remote control.

While other countries may talk of constitutional review processes after independence, in Uganda we can talk of three successive constitutional overthrows. After the introduction of the illegitimate Constitution of 1966, the country suffered from political dictatorships, absence of the rule of law, civil wars, armed struggle and military coups.

1 John Mary Waliggo, "The Uganda constitution-making process and implementation," a presentation to the Constitutional Review Commission, 2001, p.1.

Lessons:

1. The majority of Uganda's people were not involved in the drafting or adoption of the first three constitutions. Therefore, they regarded these constitutions as illegitimate instruments of oppression, dictatorship and exploitation of Africans by the Africans who replaced the colonialists.
2. Previous constitutions have supported the ruling elite who aim to remain in power indefinitely.
3. Uganda has a long history of illegitimate rule prompted by illegitimate constitutions.

The New 1995 Constitution:

Uganda's fourth constitution, adopted in 1995, is a product of ten years of hectic work. Efforts were made in its drafting to correct past mistakes and to produce a people's constitution based on the common good. These efforts included countrywide consultations; analyses of the past as well as current political, social and economic environment; and predictions for the future. In addition, legal officers were sent abroad to study the making of national constitutions and to consult on other issues.

Observations:

(I)The theoretical framework:

a Great attempts were made to put the people at the center of the constitution-making process, involving them at a number of initial stages of the process.

b A constitutional commission was set up to consult with the people nationwide on their desires for the constitution.

c Adequate provisions were made and are included in the constitution for involvement of the people in their own governance and development.

d Participation of once marginalised groups, specifically, people with disabilities, women and youth, is now a constitutional matter.

e The three arms of government and their functions were clearly defined. These are the executive, the judiciary and the legislative.

f Human rights which enforce human dignity are part and parcel of the values emphasised by the constitution.

(II) Practical framework:

The implementation stage is crucial in demonstrating the quality and validity of a constitution. Uganda has had both its success stories and failures.

a Regular elections are held at all levels where people participate in choosing their leaders.

b The military is widely pro-people as opposed to the past bitter experience of the '70s and '80s.

c An act of parliament has established the Uganda Human Rights Commission, a constitutional body entrusted to address violations of human rights. Its decisions are binding. At times this commission has put government to task where security officers have been involved in the torture of civilians. Still some issues remain disturbing, such as trials of civilians in military court martials.

d The judiciary still has the power of arbitration although some government agents have tried to threaten its operations.

e The war in the northern part of the country remains a challenge to the constitution's protection and promotion of human rights and human dignity. Uganda is prone to political violence and war with those opposed to certain articles of the constitution intent on fighting it from the bush. They pose a threat to the establishment of a culture of constitutionalism in the country.

The 1995 Constitutional Review Process

On the 9th of February 2001, the Minister of Justice and Constitutional Affairs issued Legal Notice No.1 establishing the Constitutional Review Commission (CRC). Chaired by Professor Frederick Ssempebwa, people commonly referred to it as the Ssempebwa Commission. The commission submitted its findings in December 2003, after countrywide consultations with institutions, influential people, and decision makers among others.

The commission's formation became a controversial issue during and after the review process. Established by legal notice rather than an act of parliament as per the Commission of Inquiries Act, the commission could play only an advisory role to the Minister of Constitutional Affairs. Subsequently, its findings and recommendations had no legal binding. After reviewing the commission's findings, the government submitted a 'government white paper" stating its final decisions and proposals. Although members of parliament protested, they lacked power in the process. One could ask where they were when the CRC was established by legal notice instead of by act of parliament.

Many agreed that the commission did a commendable job in its consultations. However, because most of the population lacked knowledge of the constitution they could make only minimal contributions. As such, the findings of the CRC did not contain most of the voices of the grassroots population.

The Social Teaching and Constitution-Making in Uganda:

The Catholic Bishops of Uganda: The Local Social Teaching

Overview:

All the pastoral letters of the Catholic Bishops in Uganda have had the human person at the center. Since 1962 they have built on each other and contributed to the making of the 1995 Uganda Constitution. They contain guiding principles for good governance and rule of law; prophesies of what may befall the nation if leaders confuse their voices for the voice of God; and information that formed a basis for the new constitution.

The Bishops' Pastoral Duty:

During the turbulent political and constitutional history of Uganda, the bishops voiced their concerns mostly through pastoral letters and messages to the flock and their leaders. The universal and local social teaching together with the holy scriptures became the bishops' major source of inspiration and consolation. In their letters they call leaders to turn to participatory democracy, good governance, respect of human rights and rule of law. They helped to lay the foundation for the cultivation of the culture of constitutionalism in Uganda, a basis for the respect and promotion of human dignity.

In their letter, "Shaping our Destiny" (1962) the bishops stressed the following human dignity and human rights issues:

- An independent Uganda will be assured a national destiny of happiness, confidence and prosperity if leaders lead the people with wisdom, a sense of responsibility, justice with charity and unity in diversity.
- Every human being has the right to develop a full civic, social and intellectual life.
- A patriotism related to the fundamental law of charity must inspire us to love our country. The basis of this is found in scripture: "Thou shalt love thy God and thy neighbor as thy self."
- The nation that neglects its women is a nation that is backward. Parents must teach their children true values and build confidence in them, especially the girl-child.

During the liberation war of 1979 the bishops issued another letter, "Reshaping Our Nation" (1979). Its main purpose was to rebuild the shattered hopes of Ugandans. This letter indicated that Ugandans must take liberating action to emerge from the violence and build a better future.

In 1980, the situation seriously deteriorated with massacres in the West Nile region by government forces. The bishops published "I Have Heard the Cry of My People". In it they called for:

- Government to desist from killing and torturing innocent people.
- Leaders to discipline the army and create security as a condition for restoring peace and order to the people.
- All to have discipline in the elections.

They also expressed solidarity with the suffering in the region and seriously condemned the brutal activities taking place.

In 1981, the Uganda People's Congress (UPC) returned to power. Angry Ugandans planned their next action to fight against the self-imposed dictatorship. The bishops wrote "Be Converted and Live" to address the approaching catastrophe and to call upon the people to reflect on sin as the cause of their suffering.

By 1982, the massacres and atrocities had escalated to the extent that most civilians felt no choice but to join the bush war. As the situation spiraled out of control, the bishops released "In God We Trust".

From1983 to 1985, the majority were lost and confused in the midst of civil war. But immediately following the war the bishops responded by writing "With a New Heart and a New Spirit" (1986). They aimed to provide hope for the people to rebuild a new Uganda, calling for reconciliation, forgiveness and unity while offering a program of rehabilitation. They also insisted on the need for the people to know their rights and participate in their own governance and development.

In 1989, the bishops wrote "Towards a New National Constitution" after the government issued a statute empowering the National Constitution Commission to work out the new arrangements for the government of the people. Their major aim was to call upon the people to actively and seriously participate in the making of this important document – the law of the land. The letter provided the nation with guiding principles to direct the conduct of all people in making the new constitution while remaining mindful of the history of the country. The bishops also gave their views and suggested some of the content of the new constitution while calling for the following:

- For every citizen to play his/her role.
- For government to prepare the people for meaningful participation in the exercise.
- For all people and the leaders to put God first and allow for the guidance of the Holy Spirit.
- For a fundamental change for the better so that Uganda could become a heavenly kingdom on earth where everyone would be a member of the family of God.

The bishops also made a strong submission to the constituency assembly in June 1991, applying social teaching to Uganda's situation.

After their submission to the assembly, the bishops forged ahead with another letter, "Political Maturity: Consolidating Peace and National Unity in Uganda" (1995). Here they reminded the constituency assembly to debate and agree on the content of the new constitution, seriously considering the supremacy, power and sovereignty of the people of Uganda. They also asked that the spirit of patriotism, based on the common good rather than personal political gain, guide the process and all deliberations.

Other pastoral letters that followed expressed concern over the implementation of and adherence to the constitution. Most importantly

were: "Be my Witnesses" (August 1996), "The Evil of Abortion" (April 1998), "True Peace comes from Respect for Human Rights" (January 1999) and "Test the Spirits" (June 2000).

The Easter Message of April 2004, "A Concern for Peace and Harmony in Uganda," is the bishops' contribution to government efforts to begin the transition process. It addresses diverse issues and advises the government to:

- Make the transition process transparent and peaceful.
- Adhere to the constitutional moral principles of good governance.
- Dialogue genuinely with opposition groups.
- Maintain the independence of the judiciary and constitutional bodies in order to ensure the necessary checks and balances on the organs of the state.
- Ensure that any amendments of laws during the transition are mandated constitutionally.
- Work for a peaceful end to the war in Northern and Eastern Uganda so that the transition process to a multiparty system of governance may benefit all equally.

The recent letter, "Towards a Democratic and Peaceful Uganda Based on the common Good" (November 2005), calls upon Ugandans and especially the government to adhere to the rule of law and the spirit of constitutionalism before, during and after all elections.

CHALLENGES:

Serious challenges accompany constitution-making with human dignity at the center. These include:

a. Ensuring the constitution adequately addresses historical legacies, such as the 'divide and rule' policy, providing justly and evenly for the needs of Uganda's 56 ethnic groups and languages.

b. Reconciling differences between elites rooted in academic traditions and rural communities whose thinking and interpretations are locally and culturally based.

c. Finding the most relevant methodology for meaningful participation.

d Assisting incumbent government leaders to accept guiding principles for the common good, even ones that may count against their stay in power.

e Ensuring an independent constitutional commission.

f Encouraging the political will of the ruling government.

g Building a durable constitution amidst the complexity of a population that cannot be uniformly satisfied to render the document's 100% legitimacy.

CONCLUSION:

A constitution is a human rights document and an instrument for the promotion and protection of human dignity. Likewise, human dignity is at the center of every verse and chapter of any document of Catholic Social Teaching (CST). For this reason CST has been a stronghold of the Church's inspiration and a mandate for the Church's irrefutable intervention in both processes of constitution-making and review. In order to build a culture of constitutionalism that defends and promotes the dignity of the human person, the social teaching must be a major driving force and a rich legacy for future generations. The Church, therefore, faces the huge challenge of popularising and making the content of the social teaching as simple as possible for the benefit of all people, irrespective of any differences.

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Constitutional Review: The Zambian Search for an Ideal Constitution

Simson Mwale

INTRODUCTION

IF YOU ASK ME TODAY to summarise — in one sentence — constitutional review in Zambia over the last 41 years, I would say: "It has been a search, a search, a search and a search… for an ideal constitution."

Four times attempting and still searching! That is how elusive the search has been for a constitution ideal to the Zambian situation, for a constitution we can call our own, for "a people's constitution". As I reflect on the Zambian experience, I recall one statement I learned while studying human rights law: "A flawed constitution-making process is a recipe for constitutional instability."

The design of a process – in law or in practice – either assures respect for people's views (the source of the content and custodians of a constitution) or disregards people's input. As such, the process largely determines and protects the content. Therefore, these two aspects – process and content – must not be discussed in isolation.

Civil society groups in Zambia consistently argue that if a constitution is a "mirror" of people's aspirations, visions, beliefs and values, then a broad-based representative body (referred to as either Constituent Assembly or National Convention) must debate and adopt it.

The process should empower individual members of society, rather than inhibit them, creating and opening avenues for their constructive participation. All this surely takes time. Indeed, participation is a process, not a one-time event. Therefore, an examination is necessary not only of the levels of people's participation, but also of the current government's tolerance or denial of participation.

CONSTITUTIONAL DEVELOPMENTS

Constitutional development in Zambia began during colonial times with the creation of the Federation of Nyasaland and Rhodesia's Or-

der in Council (1953).[1] It, among other things, defined the powers of the federal government and those of the territorial governments.

This was followed by the 1962 Constitution, designed by the colonial administration to accommodate the participation of both the white settlers and Africans in the legislative council whilst ensuring that the former had electoral advantage over the latter. The goal was to bring about a constitution based on adult suffrage and to grant independence to Northern Rhodesia outside the federation. The federation was dissolved in 1963, after Nyasaland was allowed to secede.[2]

Negotiations among major political players of the day to resolve the conflicting interests of indigenous Africans, the settler white community and the colonial government produced The 1964 Constitution. Essentially, like previous constitutions, this one was not a creation of the people of Zambia, as they were not involved in its making. Instead, it was based on a Westminster model designed for emerging nations of former British colonies and protectorates.[3] The constitution came into being through the Zambia Independent Order of Council (1964).

Constitutional Reviews

Thus far, Zambia has had four constitutional reviews since independence. Constitutional changes followed upon recommendations from the Chona (1970), the Mvunga (1990) and the Mwanakatwe (1993) Commissions, resulting in the 1973, 1991 and 1996 constitutions. The Wila Mung'omba Constitution Review Commission (2003) is the fourth.

The 1973 Constitution

The 1973 Constitution was highly influenced by political factors, including inter-party political violence. The objective, then, was to eliminate political conflicts, build a united political order and introduce a one-party state constitution. Some argued that this one-party state would foster unity and socio-economic development.[4]

1 From 1953-1963, Malawi (known as Nyasaland), Zambia (Northern Rhodesia) and Zimbabwe (Southern Rhodesia) existed as the Federation of Nyasaland and Rhodesia.

2 Zambia, Mung'omba Constitution Review Commission, Final Report (Lusaka, 29 December 2005).

3 Ibid.

4 Ibid. p. 60

This transition was carried through by the Commission of Inquiry, headed by Vice President Mainza Chona. The Chona Commission was mandated only to recommend the form of one-party state that Zambia should adopt, not to suggest whether it was desirable or not. The commission made many recommendations, including that a president's length of office should be limited to two terms.

Under article 4 of the 1973 Constitution, only the United National Independent Party (UNIP) would exist. Accordingly, no one was to attempt to form any political party or organisation. Also, the UNIP Constitution was annexed to the country's constitution for reference.

This constitution made the President a dominant player in the political scene, exercising considerable influence over the legislature. His power was further strengthened by his use of the state of emergency declared by the last British Governor of Northern Rhodesia, Sir Evelyn Hone, in 1964, to detain without trial, declare curfews and control assemblies for 27 years after independence.[5]

The 1991 Constitutional Amendment

The legitimacy of one-party rule was challenged in the late 1980s. The one-party system could no longer withstand popular pressure mounted by a coalition advocating for a return to multi-party democracy. By September 1990, President Kenneth D. Kaunda appointed the Constitution Review Commission, chaired by Solicitor General Mphanza Patrick Mvunga, to design a constitution suited to plural politics.[6]

The government's proposed constitution bill gave rise to serious differences among the political players of the day, who threatened to boycott the elections. The Church, under the Chair of the Anglican Bishop Stephen Mumba, organised an inter-party dialogue during which a compromise was reached. This facilitated the enactment of the Constitution Act on 30 August 1991. Multi-party elections were subsequently held under a new constitution on 31 October 1991.[7]

The 1991 Constitution was seen only as a temporary answer to the immediate pressures of the time since there was not enough time to do a comprehensive constitutional review.

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5 Ibid.

6 Zambia, Mvunga Commission: Governments' Reactions to the Summary of Recommendations, (Lusaka, 1991).

7 Zambia, Mung'omba Constitution Review, op cit.

The 1996 Constitution Amendment

President Fredrick J.T. Chiluba renewed the search for a lasting constitution after the landslide victory of the Movement for Multi-Party Democracy (MMD). In 1993, he appointed a Constitution Review Commission, chaired by John Mwanakatwe, State Counsel (SC), a former minister in the First and Second Republics.

The Mwanakatwe Commission's constitutional draft made substantive and progressive recommendations. Unfortunately, the government rejected most of them upon finalising the 1996 amendment to the constitution. These included the widening of the scope of the bill of rights to include women's rights, children's rights, economic, social and cultural rights (e.g., health, education, food, clean water and sanitation); introduction of a constitutional court; and adoption of the constitution through a constituent assembly as insisted by civil society groups.[8]

The "Dragged" 2003 Constitutional Review

The government's rejection of most of the Mwanakatwe Commission's recommendations re-fuelled a deep constitutional crisis in the nation. As a result, contending political parties in the 2001 elections pledged immediate review of the constitution after the elections.[9] In addition, flaws were noticed in the electoral legislation and practice, such as the presidential election petition process and the use of the public media.[10]

Therefore, in April 2003 President Mwanawasa appointed the Mung'omba Constitution Review Commission to review the constitution in order to enhance democracy and good governance. And in August the Minister of Justice constituted the Electoral Reform Technical Committee to review the electoral legislation and to propose comprehensive electoral legislative reforms.

Overall, the December 2005 Mung'omba Commission documents (final report and draft constitution) are seen as progressive. For example, the commission recommended the expansion of the bill of rights to incorporate economic, social and cultural rights; women and children's rights; rights for the elderly and physically challenged

8 Zambia, Mwanakatwe Commission: Summary of Recommendations and Government's Reaction to the Report, The Post, 3 October 1995.

9 Zambia, Mung'omba Constitution Review, op cit.

10 JCTR, Zambia's Constitutional Review: What sort of Principles and Issues?, Third Quarter Policy Brief (Lusaka, JCTR, 2005).

people; the appointment of cabinet and deputy ministers from outside parliament; parliamentary involvement in the loan contraction process; provision for fast track ad hoc electoral tribunals to settle disputes arising from presidential, parliamentary or local government elections; and the adoption of the constitution by the constituent assembly.

The mode of adopting a new constitution through a constituent assembly has been at the core of Zambia's constitutional review process' controversies. Only recently did the government, after mounted pressure from civil society, endorse it.

The constitutional review process this year has been put aside amid government assurances of addressing it later – most likely after this year's presidential, parliamentary and local government elections.

Constitutional Shortcomings

The experiences of four constitutional reviews reveal one crucial feature: constitution-making in Zambia has not been easy. Several notable flaws have accompanied the government-driven process.

First, there has been a continued lack of civic education on the content of the current constitution. Most Zambian citizens do not know the constitution's content, neither in full-text nor abbreviated summary. A simplified vernacular translation is non-existent. Worst still, it is even difficult to get a copy of the full-text whether from a bookstore or from the government printing office.[11] Hence, people's contributions are always very limited.

People's participation in the constitution-making process from its beginning to its completion is a prerequisite of any democratic institution, community or society.[12] In its absence, the final product of that process (the constitution) suffers setbacks with regard to ownership by the people who are its ultimate custodians.

Second, constitutional review processes have been over-centralised as seen in the Chiluba administration's rejection of almost 80% of the Mwanakatwe Commission's recommendations and other abuses of the Inquires Act.[13]

11 Henriot, Peter, "What is a Constitution and Why do we have one?" www.jctr.org.zm/publications.htm, 2003.

12 Mwale, Simson, "Conflicting Interests in Constitution Process," The Challenge Magazine, 7, 4 (2005), pp. 6-7.

13 JCTR, Zambia's Constitutional Review, op cit.

Under the Inquiries Act, the government reserves the power to determine the terms of reference and to appoint commissioners. The commission, after collecting people's views, submits its documents (the draft constitution and the interim report) to the President. Then the executive (the President and Cabinet) issues a "White Paper".[14]

In the last 41 years, successive administrations have initiated constitutional reforms under the Inquiries Act much to their advantage and have defied the collective wisdom of the people and popular sovereignty. Using the Inquiries Act, the government hindered people's demands for a broad-based, inclusive and representative constitution-making process.[15]

Conflict continues in the inability to reach consensus between two interests: (i) the need to encourage popular engagement in the method of review of the constitution (through a constituent assembly) and (ii) the need to ensure that government's authority is not undermined (hence, frequent use of the Inquiries Act). And yet all stakeholders agree that one limitation in constitution-making is the continued application of the Inquiries Act.[16]

Third, adoption is a concept that is not recognised by the constitution, nor is it part of the practice of the Zambian Parliament. Previously, the executive has unilaterally adopted the draft constitution and tabled it to parliament. The Mung'omba Commission observes in its final report that although the term "adoption" is not defined in the constitution, "adoption of the constitution by popular mode" is ordinarily understood to mean that the people themselves make the constitution and give it their seal of approval.[17]

Fourth, deferred constitutional dialogue on contentious process issues, (e.g., roadmap for a new constitution, mobilisation of resources for a constituent assembly, overcoming legal constraints) has impaired the process. In the absence of dialogue, the constitutional review process is susceptible to political manipulation that satisfies only the ruling party's interests.[18]

Fifth, over time, suspicion of and mistrust in government institutions (e.g., parliament) has developed. These, in the worst of circum-

14 Zambia, Mung'omba Constitution Review, op cit.
15 Mwale, Simson, "Constitutional Hiccup," The Post, Lusaka, 30 August 2005.
16 Mwale, Simson, "Is change necessary in Zambia's constitution making process?" JCTR Bulletin, No.65, 2005, pp. 10-13.
17 Zambia, Mung'omba Constitution Review, op cit.
18 Mwale, Simson, "Conflicting Interests," op cit.

stances, have germinated and produced confrontation, bickering and apathy (e.g., the November 2005 demonstrations).

Moreover, past experiences have tended to harden attitudes against the Commission of Inquiry process, decreasing the level of active participation through submissions and responses to the commission's interim reports to the public. Others have openly and vehemently opposed the process in spite of government assurances to heed to people's demands.

Positive Contributions

In 2001, church leaders released a courageous statement challenging as unconstitutional and undemocratic the intention by the ruling government to alter the constitution so that President Chiluba could have a third term in office.[19] This stance gave birth to the Oasis Forum, an alliance of the Non-Governmental Organisations' Coordinating Committee (NGOCC), the Law Association of Zambia (LAZ), and the three church mother-bodies, i.e., the Evangelical Fellowship of Zambia (EFZ), the Council of Churches in Zambia (CCZ) and the Zambia Episcopal Conference (ZEC). Together, these groups mounted a nationwide campaign that led to President Chiluba's decline of a third-term run. Their efforts challenged the notion that constitutional review is solely a government endeavour.

The Oasis Forum's involvement in the constitution-making process has continued. Determined to preserve the role of civil society in constitution-making as well as the gains made in their previous efforts, Zambians have not left the stage to politicians, but remain vigilant and continue to advocate for strong constitutional values.[20] The spirit with which the Oasis Forum was founded continues as does the struggle towards a broad-based constitution reflecting the views of all the different spectrum of society.

The Church's involvement in constitutional review in Zambia has been remarkable. Recognising her right and duty to teach and guide Christians on social, economic, cultural and political matters, especially as they relate to the moral order, the Church has offered guid-

19 The Council of Churches in Zambia (CCZ), the Zambia Episcopal Conference (ZEC), and the Evangelical Fellowship of Zambia (EFZ), "Third term bid by President Chiluba," Press Release, Lusaka, 25 January 2001.

20 Hasungule, Michelo, "Experiences at Constitution-Making in SADC: The Zambian Experience," in Open Society Initiative for Southern Africa, 4, 3, November 2004, pp. 28-32.

ance to the nation with regard to electoral and constitutional reforms.[21]

Moreover, the three mother bodies have issued several joint statements imploring the government to respect the will of the people. For example, in their "Call For Legitimising the New Zambian Constitution" (1995), "Statement on Constitutional Debate" (1995), and "Open Letter to the President and Members of Parliament" (1996), church leaders offered a moral guide for the adoption of the amended constitution. Viewing the document as one of highest importance, they advocated that any amendments must be recognised and respected by all citizens.[22]

In their pastoral letter, "On the 2003 Constitutional Review Process," the Zambian Catholic Bishops made the following observation:

> Constitution making requires that the method used to adopt and enact the constitution is above suspicion of manipulation by the party in government. That is why (to have a) "road map" which shows the various stages that the constitution making process should go is important.[23]

They conclude that the government's role is "one of facilitation, rather than directing the process" and that "The people should always be the driving force behind any constitutional-making process in order to legitimise and popularise the Constitution."[24]

The urge for people everywhere (even in oppressive regimes) to participate in the events and processes that shape their lives could bring dangers (e.g., anarchy or social disintegration) or opportunities (innovation for the creation of a new and more just society). The future of Zambia depends on grasping the opportunities.

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21 The Catholic Bishops of Northern Rhodesia, "Joint Pastoral Letter Addressed to the Catholics of All Races" (1958), Komakoma, Joe (ed.) The Social Teaching of the Catholic Bishops and Other Christian Leaders in Zambia – Major Pastoral Letters and Statements, 1953-2001, (Ndola, Mission Press, 2003) para. 4 p.65.

22 Komakoma, Joe, op cit.

23 Zambia Episcopal Conference, "Let My People Go, Pastoral Letter on the 2003 Constitutional Review Process," Lusaka, 2003, p. 6.

24 Ibid. p. 4

Future hopes and Recommendations

The following are three recommendations for the country now that the government has endorsed a constituent assembly to develop Zambia's new constitution.[25]

First, wide consultation on the constitutional review process is necessary.

Government recently constituted an eight-member "non-partisan" committee, which is considering the recommendations of the Mung'omba Commission in view of the mode of adoption of the constitution through a constituent assembly. It is tasked to draw up the roadmap for its implementation and to mobilise resources. Sadly, the committee is made up of government officials only. Without the involvement of other stakeholders, the review process risks becoming unnecessarily long and partial to the government in power. Surely, political stability depends upon constitutional dialogue aimed at reaching consensus with all stakeholders.

Few Zambians have seen and or had access to the Mung'omba Commission's final report and the draft constitution. Presently, these reports are monopolised by a few elites and government officials and are rarely accessed by the general public. Under the current conditions, many Zambians are left behind in the process.

Second, the public needs civic education on all matters of constitutional review (for example, as it relates to the implementation process of the constituent assembly and the referendum). A durable constitution understood by the majority of Zambian citizens is a product of effective popular mobilisation. This increases wide participation at grass-root levels, and ensures that the people pledge to support the content of the constitution as committed stakeholders.

The success of the current constitutional review process largely depends on collaborative efforts of all stakeholders engaged in civic education of the public in urban and rural areas, among the young and the old and with all classes of people.

Third, representatives of various interest groups must give input to the constituent assembly with great competency. Certainly, there is need for real technical expertise in crafting the details of a constitu-

25 Mwale, Simson, "Constituent Assembly: Treading on a New Arena," JCTR Bulletin, No. 67, 2006, pp. 9-12.

tion. A constitution must be concise and unambiguous so that its interpretation does not generate conflict based on biases, prejudices and selfish interests.

Moreover, a constitution is much more than merely a legal document or a set of technical arrangements. It is an incarnation of the spirit, the hopes, the aspirations, the beliefs and the desires of the people. It explicitly expresses the highest values of its citizens in a simplified style and form. This is a great challenge indeed!

Undoubtedly, these three basic standards — consultation, civic education and competency — are essential. They would greatly contribute to national stability and would afford an opportunity for all to be heard.

Conclusion

An overview of the past 41 years of Zambia's constitutional development largely reflects the changed political environments. Perhaps, the question to ask in evaluating the review processes is: Is it better to have a government that listens but doesn't act, or a government that acts without consulting the people? Either way, the people lose out.

The wish of every citizen is for a government that listens and acts. This is indeed a great challenge for Zambia. People's input to both content and process issues must not be monopolised by only a few. Surely, a durable and functional constitution is one that enjoys internal legitimacy - inclusive of and owned by all citizens who are the custodians of the constitution.

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Reflection Questions

1)What are major obstacles to a good constitution-making process?

2) How can the majority of people be informed and involved in this process?

3) Are you familiar with your country's constitution? If yes, what are some of its guiding principles? If no, how can you gain knowledge?

4) Is there anything that you would add to or remove from your country's constitution?

5) What are the similarities and differences in various approaches to constitution-making and review?

Suggested Reading

On Political Participation and Human Rights:

Agustoni, Tarcisio. Every Citizen's Handbook: Building a Peaceful Society. Nairobi, Paulines Publications Africa, 2001.

Nherere, Pearson and Marina D'Engelbronner-Kolff (eds.). The Institutionalisation of Human Rights in Southern Africa. Norway, Nordic Human Rights Publications, 1993.

Wermter, Oskar. Politics for Everyone and by Everyone: A Christian Approach. Nairobi, Paulines Publications Africa, 2003.

On the Church's Social Teachings:

Flannery, O.P. (ed.) Vatican Coucil II: The Conciliar and Post Conciliar Documents. Grand Rapids, MI, William B. Eerdmans Publishing, 1992)

Pontifical Council for Justice and Peace. Compendium of the Soical Doctrine of the Church. Nairobi, Paulines Publications Africa, 2004.

Also see www.vatican.va for Encyclicals on CST.

Recent Pastoral Letters from African Bishops

Kenya Episcopal Conference. Pastoral Letter, "Unity, Peace, and Liberty: A Reflection on the Constitutional Review Process," September 2006.

Christian Council of Zambia, the Evangelical Fellowship of Zambia and the Zambia Episcopal Conference. "Joint Statement In Response to the Interim Report of the Constitution Review Commission and the Draft Constitution Released on 29th June 2005."

See www.afcast.org.zw for Pastoral Letters from Africa.

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