

Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa

Recommendations to Commonwealth Heads of Government

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Commonwealth Human Rights Initiative
1999

About Us

The Commonwealth Human Rights Initiative (CHRI) is an international, independent nonprofit organisation headquartered in India. Its objectives are to promote the practical realisation of human rights in the Commonwealth. It educates on human rights issues and advocates for greater adherence to human rights standards.

CHRI believes Commonwealth human rights defenders must develop and share amongst themselves good practice in pressuring state agents to respect human rights. Human Rights advocacy and education are core elements of CHRI's approach. CHRI's strategies are:

- **Researching** successful strategies and methods and advocacy in adverse circumstances
- **Collaboration** with various groups such as NGOs, lawyers, journalists, parliamentarians, doctors, and others
- **Developing** a curriculum with Commonwealth-wide application to strengthen the advocacy strategies of human rights defenders
- **Advocacy Conferences**
- **Advocacy** around particular issues of concern for human rights

About These Recommendations

Constitution-making was a key area identified for collaborative action by civil society at the Conference on Pan-Commonwealth Advocacy for Peace, Good Governance and Human Rights held by the CHRI in Harare in January 1999. Constitution making was seen as so important because it is a key way in which citizens can participate in governance. For this reason CHRI's advocacy focuses on the participatory aspects of the process, with an aim towards finding strategies for deepening democracy. To take two extraordinary examples, the South African and Uganda experiences proved that citizen input can have serious impact in making and reforming constitutions into democratic documents that can be said to truly belong to the people.

In August 1999 CHRI convened a working group in Pretoria, South Africa to develop a position paper on best practices in constitution making. The recommendations which resulted have been circulated to the wider human rights community and experts across the Commonwealth for their comments and endorsement. The need to follow the principles set down in the Harare Declaration (1991) and the Millbrook Plan of Action (1995) are more relevant now than ever. CHRI now takes these recommendations on participatory constitution making to Commonwealth Heads of Government and urges them to take their commitments to human rights and good governance seriously.

Commonwealth Human Rights Initiative CONSULTATION ON
PARTICIPATORY CONSTITUTION-MAKING, 16 – 17 August 1999
Holiday Inn Burgerspark, Pretoria

Recommendations to CHOGM '99

1. There are several initiatives from different areas within Africa to promote the exchange of experiences in constitutionalism and constitution making. The CHRI, together with the support of NGO's throughout the Commonwealth, have held various consultative conferences in this endeavour.
2. In 1995 the Heads of Government adopted a Commonwealth Plan of Action at Millbrook, New Zealand, to ensure that the fundamental democratic values enshrined in the Harare Declaration (1991) would be made a reality. The Commonwealth Secretariat was enjoined to "enhance the capacity to provide advance, training and other forms of technical assistance to governments, including assistance in constitutional and legal matters, including with selecting models and initiating programmes of democratisation."
3. In keeping with this commitment, Commonwealth States should work with civil society to ensure that their constitutions, the rule of law and human rights are promoted. Governments must proactively seek to deepen democracy, which is largely still inaccessible to many citizens of the Commonwealth. They should therefore seek to effectively include and represent the views of all peoples. We also need to dispel the myth that it costs more to keep such processes open than to keep them closed.
4. There is a desire amongst many countries, particularly in Africa, to arrive at truly democratic and legitimate constitutions. The experience of countries that have achieved this objective is that Governments must adopt *credible processes* for constitution making; that is, a process that constructively engages the largest majority of the population. This is necessary to ensure that the end product is seen as legitimate, and owned by all the people. To achieve these objectives, Governments are encouraged to ensure that:
 - 4.1. The process of constitution making is, and is seen to be, as important as the substantive content of the constitution itself.
 - 4.2. The management and administration of the process is credible and respected.
 - 4.3. The public is informed and involved at all stages of arriving at the aims and objectives of the exercise of constitution making and how these objectives are to be achieved. This would ensure that the process is transparent, participatory and credible.

- 4.4. The process is made receptive and open to the diverse views existing in society.
- 4.5. The process by which citizens can make contributions is made truly accessible in terms of physical proximity, languages used, plain language and within a reasonable period of time.
- 4.6. Ordinary people are empowered to make effective contributions by giving them the necessary tools to participate through ongoing public education programmes using appropriate media and other methods to reach out especially to the disadvantaged and marginalised.
- 4.7. Dissenting views are valued as enriching to policy debate and ensuring that various sectors of society are represented.
- 4.8. Conflicting aims and views are mediated in a manner that enriches policy debates and does not stall it. In this regard, adequate provision should be made for conflict resolution and consensus building.
- 4.9. There is a continuous review and evaluation of the processes undertaken to confirm that operating principles and minimum standards are being adhered to.
- 4.10. The process of continuing education of the public, even after the adoption of the constitution, on its content and the values of constitutionalism continues to ensure that these are internalised by the people.
- 4.11. Constitutions are drafted in plain and simple language and translated into all the languages used in a country.
- 4.12. In the interest of protecting constitutionalism, all actions violating these values are unequivocally rejected.
- 4.13. Universally accepted rights are entrenched in the constitution along with independent institutions supporting a constitutional democracy, including specifically the Human Rights Commission, Women's Commission, Constitutional Court, Electoral Commission, Public Protector and the Auditor General.
- 4.14. Constitutions must enshrine the separation of powers.

5. Governments should also consider the following structural and institutional mechanisms:

- 5.1. An independent commission or body, with the necessary power and legal authority, must be established to facilitate a constitution making process and have sufficient time to do so.
- 5.2. The state should commit itself to adequate funding for the constitution making process.

- 5.3. It is also necessary to cost the various structures and institutions proposed for establishment by the constitution and the implications this has for the country.
- 5.4. At the same time, it is necessary to ensure that governments are committed to the effective financing of institutions that support constitutional democracy.
- 5.5. Governments should assist and empower civil society groups to effectively participate in the constitution making process and in the promotion of constitutionalism.
- 5.6. Constitution makers should have sufficient and easy access to international experience, precedents and materials to enable them to take informed decisions.
- 5.7. The creative use of media is especially important. Attention must be paid to the use of popular culture such as music, theatre, art, as well as other conventional methods. Technology must also be made available and used creatively.
- 5.8. Academic institutions can and should play a special role in providing the necessary research and support to the constitution making process.
- 5.9. The public should be regularly informed at every reasonable stage about the progress of the constitutional process.
- 5.10. Conflict management and deadlock-breaking mechanisms are essential.
- 5.11. Mechanisms used for adopting or ratifying constitutions should be credible and truly representative of the peoples' views.
- 5.12. There must be clear and transparent mechanisms for the regular review of the constitution that will be made clear from the outset so that people can commit themselves to the development of the constitution.

Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa

Background paper to accompany
CHRI's Recommendations to CHOGM '99

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Introduction

At Harare in 1991, Commonwealth Heads of Government pledged to work for the protection and promotion of the fundamental political values of the association, namely democracy, and democratic processes and institutions. In 1995, the Heads of Government adopted a Commonwealth Plan of Action at Millbrook, New Zealand to fulfil more effectively the commitments contained in the Harare Commonwealth Declaration. This Programme had three components:

1. Advancing Commonwealth fundamental political values;
2. Promoting sustainable development; and
3. Facilitating consensus building.

The Heads of Government also identified measures to be taken by the Commonwealth Secretariat to assist in implementing the Harare principles. CHOGM enjoined the Secretariat to “enhance the capacity to provide advice, training and other forms of technical assistance to governments” and give:

Assistance in constitutional and legal matters, including with selecting models and initiating programmes of democratisation.¹

Constitutions in Africa have been treated with profound ambivalence, handed down by exiting colonial powers as a holy grail legitimising the supremacy of the state over society. For too long, constitutions have been only identified with legislation. But a constitution by its very nature should be more than a mere set of rules and laws regulating society and government. It is more than a social contract or even the *grundnorm*. It is rather an expression of the general will of a nation. It is a reflection of its history, fears, concerns, aspirations, vision, and indeed, the soul of that nation.

A constitution is obliged to express the mind of the majority; but, in doing so it also has to take into account the fears and concerns of the minorities. The constitution is that single document under which diverse and even ideologically opposed groups unite and rally in defence of democracy. However, for this to happen, the citizenry must claim ownership of the document. It must be respected and revered by all.

Commonwealth states must be encouraged to move away from a focus on legal *constitutionality* towards promoting the new *constitutionalism*, which is a process that not only bridges the gap between the state and civil society but also prevents societal conflicts from erupting into crises of governance.

¹ Quoted from the Millbrook Programme of Action released after the Commonwealth Heads of Government Meeting in Auckland, New Zealand.

1. Towards Constitutionalism in Commonwealth Africa and the Challenge of Reinventing the African State

In the tradition of the Westminster model, constitutions have largely been viewed as a set of rules and administrative arrangements, meant not to regulate or limit excessive state power, but rather to validate the post-colonial state by using the rationale that anything legal is by definition legitimate. Constitutions that sanctioned one-party states and racial segregation have been not only seen as legal, but also legitimate documents regulating the conduct of state affairs, often to the detriment of the population.²

For this reason, autocrats of the post-colonial era have recognised the usefulness of using written constitutions to legitimate their actions, while avoiding the values of constitutionalism which would have placed limits on arbitrary or excessive use of power. Even the most progressive post-colonial leaders have shown deep ambivalence about constitutionalism. However in counter to this the respected President of Tanzania, Dr Julius Nyerere, once remarked, “We refuse to put ourselves in a straitjacket of constitutional devices – even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution.”³

Post-colonial governments have used the letter of the law as an instrument for control and repression, and the military regimes that overthrew them perfected the art of manipulating the law to justify their hold on power. Helped by the dominant super-power politics of the cold war era that facilitated monopolies on power by coercive rulers, the manipulation, trivialisation, and disregard of the constitution has become the defining characteristic of governance in much of post-colonial Africa.⁴

The collapse of communism exposed this soft underbelly of the African State, and over the last decade the continent has witnessed many positive changes. Even so, the gap between constitutionality and constitutionalism is enormous. Many African countries are democratising in the formal sense, and significant strides have been made in the areas of rule-based governments, whether in the form of governments that emerged out of the various national conferences or ones elected by popular vote. Keeping the examples of perhaps South Africa, Uganda and Eritrea aside, it is still premature to speak of the existence of constitutional governments. The formal end of authoritarian rule has not yet led to an acceptance of the state as representing a broad social consensus, beyond what is made apparent during elections.

² Thus, some of the technical and administrative concessions granted in the post-independence constitutions of Kenya and Zimbabwe remain key sources of neuralgia in the current struggle for constitutional change in these countries.

³ H.W.O.Okoth-Ogendo, “Constitutions without Constitutionalism: Reflections on an African Political Paradox,” in Douglas Greenberg, (eds) et-al, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993) , pp.65-82.

⁴ Okoth-Ogendo (1993).

Although an essential feature of peace-building and conflict management is often the degree to which consensus can be achieved among contending parties, elections have nevertheless become the “legitimate” method of demonstrating democracy abroad while consolidating political exclusion at home. Left with little or no alternatives, disaffected parties have often resorted to violent means of challenging the status quo. The use of military force now prevalent in several parts of the African continent must be seen as the inevitable consequence of the acute nature of internal contradictions and the almost total absence of any credible mechanisms for conflict mediation and transformation within societies.

Since multi-partyism by itself had proved to be an inadequate conflict management tool in newly post-colonial states of Africa, advocates for democratic transition have stressed that elections can at best only be one stop along the road towards bringing about democracy. They argue that elections alone do not necessarily lead to a deepening of democracy nor do they stop anti-democratic trends. This is especially true in countries where the pressing issues of identity, nationality and citizenship raised by constituent communities have been ignored by politicians in their search for electoral legitimacy. Ethnic conflict is a prime inheritance of the colonial period which arbitrarily divided Africa into states.

Africa is caught between two forces: on the one hand is the paradox of economic globalisation that has compounded the problem of insecurity, violence and militarisation through the forced policies of structural adjustment and the untoward influence of transnational corporations. Debt and competition for scarce resources leaves the poor to fight it out amongst themselves. The worsening of poverty by these economic factors also enhances communal conflict, which in turn poses one of the greatest threats to making democracy a reality.

In light of these challenges, reconstituting the African State along equitable and just lines is being pursued with extraordinary fervour. At every level on the continent, the idea has taken root that the Leviathans of Africa must no longer function as “virtual democracies” (Joseph, 1997) but must be refashioned to reflect the realities of their multifaceted societies. This has been reflected in the constitutional conferences in Benin, Togo, Niger, the Democratic Republic of the Congo, and Cameroon in the early 1990s, in the successful constitutional arrangement of South Africa, and in the process-based Constitutional commissions in Uganda and Eritrea.

From the experience of these countries, the last decade in Africa has witnessed an upsurge in the demand for constitution-based governance that broadly reflects, in terms of *process and outcome*, the will of the people. Today, the struggle for constitutional reform in Kenya, Zimbabwe and Nigeria⁵ typify the reason why the *Commonwealth cannot stand aside at this moment in Africa’s constitutional*

⁵ In the three Commonwealth states, civil society coalitions have emerged to emphasise many ideas of political constitutionalism in the quest to change the nature of the state itself.

evolution. This struggle has been led predominantly by civil society in Africa, since the political parties proved incapable of pushing for just and equitable societies, being instead distracted by a chance to exercise power.

The change in focus from constitutionality to constitutionalism, where constitutions are now seen as a tool for bridge-building among members of civil society, has become part of the rhetoric of international institutions including the Commonwealth. Activities in this field, however, continue to focus mainly on government, giving less importance to consensus building amongst civil society and between the ordinary citizen and the state.

Yet in order to formulate African political cultures grounded in human rights, an organic link is needed between the constitution as a rule of law instrument primarily concerned with restraining government excesses, and the constitution as a legitimization of power structures and relations based on a broad social consensus in diverse societies. The task at hand is to move away from the old constitutionality which overemphasised law and state power towards a new political and socio-economic *constitutionalism* that will have much more relevance to the needs of African citizens.

2. What the Commonwealth must do

In the quest to advance fundamental political values, promote sustainable development and facilitate consensus building, the Commonwealth must work with governments as well as opposition groups, with the state as well as civil society. It must promote the fundamental values in process-led constitutional mandates instead of imposed constitutional frameworks and help promote the shift from juridical *constitutionality* to political *constitutionalism* by emphasising process as well as substance in the quest for constitutional and democratic governance.

A nation's constitution should be its most valued document. Preparing it is a sacred and weighty undertaking that should not be addressed in isolation of the people. Nothing is more important in the political culture and history of a nation than the Constitution by which its citizens are ruled. There is therefore a growing consensus that the new struggle for process-led constitutionalism represents Africa's second liberation, reminiscent of the anti-colonial struggle.

Yet, as with the struggles waged against colonialism, apartheid and dictatorship, the international community will play a significant role in supporting the unequivocal yearnings of the people. The Commonwealth has played such positive roles in its fifty years of existence. Indeed, it has gone ahead to articulate in clear and precise terms, both in the Harare Commonwealth Declaration of 1991 and the subsequent Millbrook Programme of Action in 1995, how it would go about upholding fundamental political values.

Unfortunately, while the essential ingredients of Commonwealth action in the arena of constitutionalism is contained in the Harare Declaration and the Millbrook Programme of Action, a gap between Commonwealth rhetoric and practice remains. Constitutionality is still promoted in narrow, legalistic terms. Short-term experts are sent in the name of good governance to give countries international legitimacy through reform gestures that can at best only scratch the surface of the realities faced by the larger populace. As in election monitoring, governments adept at manipulating international sensibility have used the Commonwealth to legitimise constitutions which have been virtually uncontested by the people and therefore do not represent any sort of new social contract, even if their legal validity is impeccable.

While crucial features of democracy are political representation and regular elections, a constitutional framework is required if governance by the people is to be sustained. Furthermore, there is a grave danger in aspiring and fledgling democracies that when limited to its juridical foundations, constitution making will be treated as a trivial undertaking. It is already viewed in some countries as a repetitive ritual that need make no reference to the daily struggle of social and political forces. Thus, in addition to the current over-emphasis on the importance of elections in promoting democracy, efforts must be made to bring states in line with the principles of process-led, participatory constitution making.

3. Principles of Constitution-making

Ironically, best practice in constitution making, the importance of a constitutional democracy, and the essence of a participatory democracy has been harvested from the bitter conflicts in Africa and other developing nations. It is therefore useful to refer to positive experiences from Uganda, and South Africa, and from beyond the Commonwealth to Eritrea.⁶

3.1. Legitimacy

The legitimacy of constitution making processes will be defined by the domestic social and political context in individual countries. Legitimacy can be facilitated by bestowing a legal mandate upon Constitutional Commissions, Assemblies or similar bodies to solicit citizen input, draft a new constitution, and present a final document for adoption by a representative body such as Parliament. This situates the entire process firmly within the framework of the rule of law.

⁶ This paper relies heavily on information presented at the CHRI consultation in Pretoria, South Africa 16-17 August 1999. See Julius Ihonvbere, "Constitutionalism and Democratisation in Africa"; John Mary Waliggo, "Constitution Making Processes: Lessons from Uganda"; J'Kayode Fayemi, "Beyond Elections- Strengthening Nigeria's Constitution for Sustainable Democracy: The Role of the Centre for Democracy & Development"; Fungayi Jessie Majome, "Experiences from the Constitutional Commission of Zimbabwe Regarding Participation Constitution Making", Hassen Ebrahim, "Constitution-Making in South Africa – A Case Study". See also papers presented at International Conference on Constitutionalism in Africa, Faculty of Law, Makerere University, Kampala, Uganda, 5-8 October 1999: B.J. Odoki, "The Challenges of Constitution-Making and Implementation in Uganda", and Bereket Habte Selassie, "Constitution Making in Eritrea: Democratic Through Popular Participation". See also Ihonvbere, "The 1999 Constitution of Nigeria: The Limitations of Undemocratic Constitution Making" presented at Centre for Democracy and Development conference in Abuja, Nigeria 29 June – 3 July 1999.

The South African elected Constitutional Assembly of 1994 already had a legitimate mandate in terms of which its members were entitled to draft the country's final constitution. The Constitutional Assembly however decided that this was not sufficient. The wisdom of this decision lies in the lessons learnt and experience gained.

One of the stated objectives of the Constitutional Assembly was that the process of constitution making had to be transparent, open and credible. Moreover, the final constitution required an enduring quality and had to enjoy the support of all South Africans irrespective of ideological differences. Having regard to the history of political conflict and mistrust, the credibility of the final constitution was an important goal. This depended on a process of constitution making through which people could claim ownership of the constitution. It was also necessary to placate the fears and concerns of minorities and yet find favour with the majority. In short, the constitutional foundations of democracy had to be placed beyond question.

Legitimacy can also be developed in other quantifiable ways. In Uganda history had caused the population to at first doubt the sincerity of the government to implement constitutional reform. Trust grew when the President followed the guidelines laid down for him by statute in appointing Constitutional Commissioners; namely that they be persons of integrity, expertise, and experience to perform their task.

When interest groups complained about the appointment process, the President responded by appointing representatives from their organisations to be on the Commission. Likewise the independence of the Ugandan Constitutional Assembly was promoted by the fact that it consisted of elected members in addition to ten presidential nominees.

Another factor which made the process seem legitimate to the people was the lack of foreign funding allocated to it. Since making the new constitution was supported financially entirely by the people and the government of Uganda, it was immune to criticisms of foreign intervention.

While Eritrea did accept foreign funding, it nevertheless drew upon the ample resources of its Diaspora and domestic commercial enterprises to fund the constitutional consultation process in that country. This not only helped finance the constitutional effort but also turned potential supporters of the constitution into literal stakeholders.

Many countries have indeed relied on some degree of foreign funding to facilitate constitutional reform. The legitimacy of doing so, and of the constitution itself, is enhanced if conditions are not seen to be attached to such funding. What is important is that the process of obtaining funds for constitution making should itself be transparent.

3.2. *Inclusivity*

The principle of inclusivity agreed upon by the South African Constitutional Assembly made it essential to embark upon a programme of public participation. The South African people not only had to feel a part of the process, but the content itself had to be representative of their views.

The programme developed was audacious and difficult. All the odds were against its successful implementation. There was no precedent of such large-scale public participation anywhere in the world. The challenge was to find a means of entering into an effective dialogue and consultation involving a population of more than 40 million people. South Africa has a large rural population, most of whom are illiterate and do not have access to the print or electronic media. Also, South Africa has never had a culture of constitutionalism, or human rights for that matter. This made it difficult to enter into consultation with communities that did not recognise the importance of a constitution.

In spite of such challenges the governments of South Africa, Uganda, and Eritrea all engaged in significant consultation exercises with the citizenry that made enormous efforts to draw in the views and concerns of people from all walks of life. This meant including the voices not only of the more empowered sections of society and the Diaspora, but in particular the large numbers of illiterate, poor, rural dwellers, women, disabled, and other interest groups such as traditional leaders.

Women must indeed play and be encouraged to play an active role in both constitution making and insuring that constitutional guarantees are implemented.⁷ Uganda seemed to recognise this, as one third of the 25,000 submissions received by the Ugandan Commission were made by women. In order to privilege all submissions equally, each and every one was summarised and translated into English from local languages for the Ugandan Commissioners' use.

Uganda in particular also understood the importance of taking whatever time was necessary to truly receive wide citizen input. The first phase of the consultation process stretched over one year, and focussed on determining whether the citizens of Uganda believed a new constitution was required for the country and if so, what the new document should contain.

⁷ From the Kampala Declaration (1/10/99) Made by participants of a Uganda Human Rights Commission conference on the "Rights and Empowerment of Women in the Constitution and Constitutionalism in Africa". Further recommendations include that women and girls must be helped to fully understand their rights, especially in rural areas, including by improving general literacy skills.

Attention was also paid, in the various countries that are viewed as having had successful constitution-making experiences, to the participation of all sectors of society in terms of the composition of the constitutional reform leadership. In Eritrea this meant that just short of half of the membership of the Constitutional Commission were women, and all nine ethnic groups were represented.

3.3. *Empowerment of Civil Society*

Although the need for an inclusive process may be easily recognised, particularly amongst poor and illiterate populations, the ability of citizens to participate in a public consultation process for constitutional reform cannot be taken for granted. Without the necessary assistance to understand the process in which they are involved, people cannot make appropriate recommendations as to its outcome. Consultation would then be hollow and without meaning.

By empowering civil society to participate in the constitution-making process, the respective Constitutional bodies in South Africa, Uganda, and Eritrea were able to add a new dimension to the concept of democracy in their countries. They set a tough precedent for governments to follow and provided insight into what a participatory democracy could be in the future. Empowering civil society to participate also creates a culture of openness and scrutiny that becomes increasingly difficult to suppress over time.

Civil society was empowered to participate in the consultation processes of the Uganda, South Africa and Eritrea through vigorous public education programmes [see Section 4]. In Uganda female leaders were trained in all 167 counties to solicit women's views on the constitution. A common women's memorandum was eventually submitted to the Commission.

3.4. *Openness & Transparency*

Even if citizens have started to take part in consultations regarding their constitution, faith in the integrity of the process must be maintained. It must be seen as being transparent and open.

The consultation process was made transparent in Uganda through the publishing of three volumes containing submissions to the Constitutional Commission, an analysis of the submissions and subsequent recommendations, and the draft constitution. In South Africa everyone sending in a submission received a reply from the Constitutional Assembly along with copies of the subsequent drafts of the constitution itself. In this way individuals could

follow developments with regard to specific issues of interest to them as well as know that their input had been registered.

In addition to such specific ways in which consultation processes should be kept transparent, public participation programmes are useful for ensuring that the processes are, and seem to be, open to the public. In South Africa three approaches were used for promoting public participation: community liaison, media liaison and advertising. This was a move which broke with public service conventions, however it helped forge an open and transparent process.

The function of community liaison was to initiate interactive programmes between members of the Constitutional Assembly and the broader public. These were of a face-to-face nature, mainly in the form of public meetings.

To ensure effective communication, a Media Department was established. This involved the use of print, radio and television as well as a national advertising campaign. The primary objectives of the media strategy for the Constitutional Assembly were to - inform, educate, stimulate public interest, and create a forum for public participation. It was important that the disadvantaged rural communities be reached through information dissemination and constitutional education.

The media campaign launched just before work in the Constitutional Assembly began was aimed at raising public awareness about the constitution-making process to encourage individuals and interest groups to make submissions, and to publicise Constitutional Public Meetings. The primary message was that an important process was unfolding - the outcome of which would affect the lives of all South Africans both now and in the future. Every South African was provided with a unique opportunity to take part in the process. The specific message carried in the various adverts was - **"You've Made Your Mark, Now Have Your Say"** and the other was **"It's Your Right to Decide Your Constitutional Rights"**.

3.5. Accessibility

It is a key principle that the process must at all times be made accessible to the broadest possible community. It is not sufficient that public calls for submissions are advertised widely. It is important to ensure that ordinary members of the public are able to access the process both physically and intellectually.

Uganda, Eritrea and South Africa all disseminated documents needed for understanding the context of constitutional reform in their countries to the people in both national and vernacular languages in the early stages of the consultation process. In the case of Eritrea this involved translating international covenants into vernacular languages. 400 trainers were

mobilised to educate the public, reaching ½ million people. In Uganda the existing constitution was reprinted and disseminated along with booklets entitled “Guidelines on Constitutional issues”, “Guiding Questions on Constitutional Issues” and a booklet explaining how to prepare memoranda to submit to the Constituent Assembly.

In South Africa the public was provided with toll-free telephone numbers, addresses and public opportunities in different localities to take part in the process. The principle of accessibility was also considered and addressed from the perspective of language. Aside from the use of the different languages, it was ensured that all information, including the constitution itself, was published in plain and accessible language.

3.6. *Continuous Review*

Taking into account the importance of the outcome of the constitution- making process for the future of the country and the enormous effort and human energy expended to make it all happen, the South African Constitutional Assembly undertook a national survey to assess the penetration and impact of the media campaign as well as public attitude to key constitutional issues. The results revealed that the Constitutional Assembly media reached 65% of all adult South Africans in the three months since it started work. However, the survey also revealed that the public was clearly sceptical about the seriousness of the Constitutional Assembly in calling for their involvement, and about the treatment their submissions would receive. The survey revealed that the credibility of the process was an issue that needed some attention. Levels of knowledge about the constitution were fairly high, but a sizeable proportion of the population still needed education about the nature and function of a constitution. They also needed information about the Constitutional Assembly and the constitution-making process. These were nevertheless encouraging results, and provided information to the Assembly which could be acted upon.

3.7. *Accountability*

To remain true to the principles of public participation constitutional consultation bodies must be seen to be accountable. This was achieved in Uganda, Eritrea and South Africa through effective publication of developments, and by maintaining transparency of the process. South Africa posted copies of all working drafts of the constitution to those who had made submissions, thereby ensuring that contributors were aware of developments and could track the consultation bodies’ responsiveness to the people.

It is interesting to note that all three constitutions stipulate that the citizens and/or armed forces of each country are required to defend the constitution, thereby calling upon them to be accountable for upholding the document they themselves contributed towards creating.

The Constitution of Ghana goes further by conferring an award to anyone who defends the constitution.

3.8. *The importance of process*

A profound lesson learnt from experiences from various countries has been that the process of arriving at decisions is often as important as the substance and implementation of those decisions.

In the case of South Africa, a unique national characteristic emerged: the fetish with consultation. South Africans tend to be suspicious of any process they have not been consulted about. Process therefore tends to be as important as the substance of all agreements. As a result more time and energy was spent on negotiating the process of arriving at the final constitution than on negotiating the substance of it. The most vigorous opposition, disruptions, and disturbances took place in support of demands relating to the process of drafting the constitution. The levels of political violence during the negotiation also manifested this trend.

Consensus-building is an important societal value in Uganda. This was reflected in the Constituent Assembly statute requirement that (in the absence of a 2/3 majority) contentious issues should be sent back to the citizens for consultation. Nevertheless at times Assembly members walked out of talks when it was felt consensus wasn't going to be possible. In any event the degree of consensus achieved on important topics (such as the federal structure of the government and on land ownership), as well as the amount of issues which remain unresolved upon the promulgation of the Ugandan constitution highlight the importance of process.

While some issues were resolved during the making of the present Ugandan constitution, the exercise in participation and negotiation which the entire constitution-making endeavour represented laid the framework for ongoing negotiation on the contentious issues. One such issue that will be decided by national referendum was whether to allow a multi-party political system in the future. Thus the Ugandan people will be continually allowed to review their constitution in an on-going participatory constitution-making process. At the same time requirements for amending the constitution have been made sufficiently rigorous to safeguard against whimsical tampering by political forces.

3.9. *The role of political parties*

In keeping with South Africa's unique history, political parties had an important role to play in the constitution-making process. They became facilitators of the Constitutional Public Meetings organised by the Constitutional Assembly to draw in public views. The politicians who were

members of the Constitutional Assembly reported on their activities directly to the public, who then voiced their views on the various issues addressed during negotiation. Each submission was then recorded and transcribed for consideration by the various political structures established by the Constitutional Assembly.

Most of these meetings were held in rural and disadvantaged communities. The rationale was that people in these areas did not have access to media to follow the process. Furthermore, they were not equipped to contribute on issues without assistance. Hence, it was necessary to ensure that the programme had an educational orientation. To this end the Constitutional Education Programme was developed.

This project adopted a participatory workshop approach. This exercise also consisted of consultation with local structures of civil society to prepare for each public meeting. Between February and August 1995, 26 public meetings were organised in all 9 provinces. More than 200 members of the Constitutional Assembly were involved at these meetings, 20,549 people attended and 717 organisations participated.

For most, this was the first experience in which they were able to directly interact with their elected representatives. More important, this was the first occasion in South Africa that public meetings were held involving politicians who were previously at war with each other jointly talking to the people. The public meetings held were successful. Discussions were lively, ideas original and the exchange of views appreciated. These meetings also served to highlight the point that constitutions are about basic values affecting society and are understood by even the most uneducated. It was a humbling experience for Assembly members to realise that constitutional debates and issues are not the sole domain of the intellectual elite. They belong to all.

3.10. *The role of civil society*

The term *public participation* denotes the involvement of civil society in decision making. When consulting with the public to develop a new constitution, governments should utilise civil society structures for mobilising mutual communication efforts.

In South Africa the National Sector Public Hearing Programme emerged out of a need for the various Theme Committees in the Constitutional Assembly to consult and engage those structures of civil society with an interest in particular debates. Examples of this were the consultations on the different rights in the Bill of Rights, the judiciary, security services, and institutions supporting constitutional democracy and public administration. Each issue required consultation with a particular sector of civil society.

The preparation for these hearings was executed by a partnership between the Constitutional Assembly and structures of civil society. This was a deliberate part of the strategy. It avoided the possible accusation of being partisan. It also ensured the greatest possible representation in the hearings and an agenda that was acceptable to all stakeholders.

The majority of hearings took place within a four-week period. Given the limited time that the Constitutional Assembly had to develop and implement this programme, it was to its credit that **596 organisations** were consulted. In addition, Theme Committees hosted many seminars and workshops when expert opinion and further debate was required on specific issues. Many of these workshops included international experts.

It was only after the Easter recess of 1996 that the issues of deadlock potential crystallised. To facilitate agreement, parties held various bilateral and multilateral meetings. This did not augur well with both media and civil society alike. Moreover, consultations with affected interest groups were limited to those areas of deadlock only. Also, when these consultations did take place, they were carried out with very little time to plan or prepare. With the benefit of an excellent database, developed in previous rounds of consultations, the organisation of these consultations did not prove too difficult. However, this did not mean that there were no problems.

The Constitutional Assembly had throughout prided itself on an excellent relationship with structures of civil society. This relationship was based on the concept of partnership in the process of drafting the single most important legal document. However, several structures saw themselves as still being outside the process. This was particularly so when political parties found it necessary to hold bilateral or multilateral meetings. The complaint was that even if consultations did take place, the agreements reached between the elected representatives in the Constitutional Assembly still had to be open to comment by these structures.

Some sectors which lobbied for particular views that were not carried in agreements became disenchanted with the process itself. Examples of this can be found in the views of the Human Rights Committee, Business South Africa, religious organisations such as the Roman Catholic Church, Animal Rights groups and the South African Gun Owners Association (SAGA), etc. Fortunately, this discontent did not reflect the views of the public or the majority of the structures of civil society.

3.11. *The role of experts*

Experts may take on various degrees of importance in constitution-making efforts depending on prevailing attitudes in different countries. International advisory boards were convened to

give Eritrea expert input, while it was felt in Uganda that while foreigners could provide examples of constitutions and constitution-making processes, all the work necessary to develop these things at home should be done entirely by Ugandans. There was likewise an unwritten understanding in South Africa that no foreign experts would be used as advisors to the constitution-making process beyond experience-sharing, although domestic experts played different roles at different times in the negotiation process.

During the early period of ‘talks about talks’, experts were employed in a non-partisan capacity to consider the various political submissions and formulate draft proposals. However, political parties also retained the services of various experts to advise them on various constitutional and legal matters.

In the final drafting of the constitution, experts were engaged in three different capacities. They were retained in Technical Committees attached to each Theme Committee to assist and advise political parties in formulating various constitutional arguments. Additionally, a Panel of Independent Experts was established as part of the deadlock-breaking mechanism. However, structures of the South African Constitutional Assembly often invited foreign experts to assist in sharing experiences from other parts of the world to the various public meetings. In spite of this, there was a generally held belief that while experts would be indispensable, they would be engaged purely to advise the politicians and not to play any more direct a role in the process itself. There was a determination that the process was not going to be led by academics and experts. It was the elected and mandated representatives who were to play this role.

4. Mechanisms used in the Public Participation Process

Several ways in which civil society can be drawn in for consultation on their constitutions have already been identified. The costs involved in carrying out the various activities can vary greatly, but costs should not be seen as prohibitive to the educational and empowering activities which are so necessary to ensure public participation.

For example, training of private citizens in civic and constitutional affairs can be a cost-effective way of reaching many people. Existing potential educational channels such as schools, churches, and popular radio programmes can be mobilised without much added cost. TV and radio programmes, and essay competitions proved to be successful methods of reaching the people in Uganda. In Eritrea artistic and musical methods were quite popular.

South Africa was able to utilise many mechanisms for outreach. It may then be useful to look at the South African experience in more detail, as several tools of communication proved extremely successful. These tools included the newsletter, television and radio programmes, all bearing the title, "*Constitutional Talk*", a telephone talk-line and an Internet home page.

The television programmes were launched on 24 April and continued till 10 October 1995. The 1996 programme was launched on 18 February and continued until 12 May. The format of the programmes allowed representatives from structures of civil society organisations to engage a multiparty panel of Constitutional Assembly members in debate on important issues.

Radio was as an even more effective delivery mechanism as it could reach people in both rural and urban areas. In collaboration with the SABC Educational Directorate, a weekly constitutional education radio talk show was launched on 1st October 1995. These were weekly hour-long programmes and were broadcast on eight SABC radio stations in eight languages. Constitutional experts appeared as studio guests. These programmes reached 10-12 million South Africans each week and proved popular.

The Constitutional Assembly's official newsletter, ***Constitutional Talk***, was produced to provide information to members of the public. It sought to present material in a detailed and educational manner. It usually consisted of an eight-page publication produced fortnightly and was distributed to 160,000 people. Of this number, 100,000 copies were distributed nationally through taxi ranks and another 60,000 sent to subscribers. This newsletter generated a substantial following by those who were keen to follow the process of constitution making.

To extend the level of education and information, new communication vehicles such as the Constitutional Talk-line were used. The talk-line enabled people with access to a telephone, to get an up-to-date briefing on political discussions. Callers were also able to leave messages requesting information or record their comments and submissions. This service was available in five languages. Over 10,000 people made use of it.

The Constitutional Assembly was one of the first constitutionally established institutions to have an Internet website. This project was established in conjunction with the University of Cape Town who assumed responsibility for maintaining it. This home page consisted of a database of all information, including minutes, drafts, opinions and submissions of the Constitutional Assembly. This was also an overwhelmingly successful project.

The success of the strategy was also seen in the 1.7 million submissions received. The bulk of these however were petitions, rather than submissions. The petitions dealt with a wide variety of issues ranging from animal rights to abortion, pornography, the death penalty and

the seat of parliament. Of the submissions received, just over 11,000 were substantive. These however, were often wide-ranging and amounted to little more than “wish lists”. This can be explained by the fact that they arrived at an early part of the process. Political parties were at this point in time still developing their thinking on many aspects. These submissions were however a reflection of the views of a fair number of people and could hardly be ignored.

The Working Draft was a complete set of formulations required by a constitution. It was a novel format of what was effectively a first draft of a Bill. It provided alternative options to contentious formulations and supporting notes explaining formulations. It effectively was a report on progress on the negotiation of the final constitution. It also clearly reflected the way in which the ideas and submissions made were addressed. The distribution of Working Draft took place on 22 November 1995. Over 5 million copies of the Working Draft in tabloid form were distributed throughout the country. The format of this publication was in a user-friendly style.

The production of the Working Draft required a different level of consultation and public participation. A supporting media campaign was launched with the publication of the Working Draft in November 1995. The campaign ran through the period of public debate to 20 February 1996. In this campaign, the public was invited to make further submissions. However, on this occasion the public was asked to comment specifically on the provisions of the Working Draft. The submissions that followed were accordingly much more focused.

While it was necessary to consult with all stakeholders during the first phase in producing the working draft, the second phase required consultations specific to the issues of debate and contention. To assist in the education process material about constitutions, the constitution making process, including posters, copies of the newsletter ***Constitutional Talk***, and a booklet entitled ***You and Building the New Constitution*** was produced. The Constitutional Assembly also produced a pamphlet entitled, ***Constitutions, Democracy and a Summary of the Working Draft***, in all official languages.

The Constitutional Assembly received 250,000 submissions in the second phase. Again, the vast bulk of these were petitions. The petitions dealt with much the same kind of issues as in the first phase - the death penalty, sexual orientation and animal rights drew much attention. There was however much scepticism about the seriousness of the Constitutional Assembly's invitation to the public for written submissions in the media. This scepticism was also expressed in some of the submissions received. Although the Constitutional Assembly was praised for having involved the public, some of those who made submissions, still wondered whether the politicians would treat them seriously.

Once the areas of contention were identified, negotiations were able to begin. After including the views contained in the submissions, a further edition of the working draft was produced. This edition recorded where the submissions came from and the formulations that were accordingly affected. There were also reports by the experts who processed the submissions. A copy of this draft was sent to each person or party that made a submission. When the text was to be finalised, a seven-week multi-media campaign was designed with a focus on various socio-economic and political issues. The advertising messages for 1996 were ***“Securing your freedom. Securing your rights. The new Constitution”*** and ***“One law for one nation. The new Constitution.”*** These issues were used to highlight the importance and meaning of the new constitution to the South African people.

In keeping with the principle of accessibility the final project carried out by the Constitutional Assembly was the distribution of seven million copies of the constitution in all eleven languages. The distribution took place in the week of 17 - 21 March 1997. It was dubbed the "National Constitution Week". While intended as a mechanism to distribute the Constitution, National Constitution Week also aimed to create the impetus that would ensure that the constitution becomes a reference point for all South Africans as the foundation of our democracy. It also had to create a sense of ownership and engender respect for the new Constitution.

A distribution strategy was designed to ensure that the new constitution was accessible to all South Africans, particularly the historically disadvantaged sectors of society. Four million were distributed to secondary schools in the appropriate language of instruction. Two million copies were available at post offices countrywide enabling members of the public to pick up a copy in any of the official languages. In addition, 500,000 copies were distributed to all members of the police and defence forces as well as all members of the Department of Correctional Services and prisoners in the language preference. A further 500 000 were distributed through structures of civil society.

Each copy of the constitution was distributed with an illustrated guide in the same language. This guide highlights key aspects of the constitution and made many of the legal concepts contained in the constitution more accessible. Other publications produced included one million copies of a human rights comic. This was distributed to all schools and adult literacy organisations. A teacher's aid to introduce the constitution to students was also provided to all secondary schools. In addition, tape aids of the constitution and Guide as well as Braille was available for the visually impaired members of the community.

To ensure that the distribution of the constitution made a lasting impact, a campaign was planned to draw on all sectors of society. This took place in National Constitution Week,

which began in the week of 17 March 1997 and culminated on 21 March 1997 - Human Rights Day. The idea was to ensure that elected representatives at the national, provincial and local levels were seen by their constituents to be "delivering" the new Constitution.

5. Conclusion

For constitutions to be legitimate democratic documents which govern the interaction between the state and society, it goes without saying that certain principles must be reflected in their content, such as the separation of powers, independence of the judiciary, ultimate subjection of the military to the executive branch, inclusion of a bill of rights, and other requirements which are widely understood. This paper looks beyond conventional wisdom to present African experience from the recent past in terms of *how peoples' constitutions are made and maintained*. It is hoped that this knowledge may inform other African societies who are likewise hoping to reform not only their constitutions, but also the very essence of democracy in their countries.

Sceptics tend to require proof that a new technique actually works before they dare attempt to use it themselves. An important measure of the success of participatory constitution making is the degree of excitement it generates among the people. This excitement is clearly discernible in countries such as Uganda, Eritrea, and South Africa. Section 59 of the South African Constitution in fact obliges the Legislature to ensure effective public participation in ongoing legislative processes. Another sign is that in the two years since the promulgation of the final constitution, there have been a large number of important challenges brought before the Constitutional Court. There has equally been hardly a day when the print media does not publish an article referring to the constitution.

While it is still too early to pass judgement on the vibrancy of the constitution, there is little doubt that it has become part of the daily diet of public debate and discussion in South Africa. What is perhaps more telling is the fact that despite the vigorous debates conducted, there has been little argument – if any – related to the legitimacy of the constitution itself.

Such successes however provide little cause for complacency in any country. The public, and particularly civil society, in the countries mentioned here, and it could be argued, in many other countries in Commonwealth Africa, are coming to understand the essence and value of a participatory democracy and are beginning to demand just that. Democracy is young on the continent, and the process of transformation it has embarked upon is both arduous and difficult, thus poses exciting challenges for both government and civil society. Whilst there is much ground that needs to be covered to ensure greater interaction between departments of government and the public, civil society too is required to perform a much more exacting function in the transformation of our society.

For government, it is a question of how it prioritises its resources to realise a true and lasting participatory democracy. At the same time, civil society too needs to ensure that it actively mobilises the public around those matters that would defend the gains made and nurture democracy. In the final analysis, it is the ordinary citizen's respect for democracy and the country's constitution that provides the best defence we can possibly have.

CHRI is an independent international organisation headquartered in India. Its objectives are to promote practical realisation of human rights in the Commonwealth.

Our Advocacy Programme is part of our commitment to educate the Commonwealth about values of democracy and good governance.

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