

Title

Constitutional flaws at the heart of the Zimbabwean crisis, illustrating the flaws and proffering proposed solutions

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Course

SSC351; Comparative Political Institutions

Words

5303 (excluding quotations and references)

2009

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Acronyms

ACHPR	African Commission of Human and People`s Rights
AU	African Union
EU	European Union
UNCHR	United Nations Charter for Human Rights
SA	South Africa
SADC	Southern African Development Community
US	United States

'we are not amending the Lancaster House constitution but moulding it in our own image as you cannot have a nation which breathes the historical experiences of another nation' Justice

Minister, Eddison Zvobgo

1. Introduction

In chapter eleven, Rhodes¹ and others discuss constitutions and constitutionalism. They begin by giving a definition of what constitutions are: namely that they are written or unwritten sets of rules, practices, and customs that polities regard as their fundamental supreme law. According to Lijphart² and indeed many constitutional and political science experts, constitutions are not self-living documents; they are always operationalised by other institutions such (courts, governments etc). Where as the above is true, the opposite is not false; constitutions conversely influence and shape the actions of other political/government institutions through many ways, four (but not only) of which are the most prominent. The first and probably most important is that constitutions ***contain and***

¹ Rhodes and Co. The Oxford Handbook of Political Institutions

² Lijphart, A. (1999) Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, New Haven and London (Yale University Press)

implement key founding bargains; when a state or new political regime is formed there are always differences in opinion and bargains that take place between different actors. An example for this is the US senate where every state has equal amount of representatives even though different states have different population size (This is an example of the bargains which were reached by the Philadelphia fathers in 1787). This bargain is contained in the US Constitution and was essential for the formation of the federation. Secondly Constitutions **structure the exercise of power;** they create the basic skeleton of offices and official processes through which government power shall be distributed and exercised. An example is the separation of powers (checks and balances) present in many constitutions. Thirdly, Constitutions **limit the exercise of government power** through separation of powers (above), Bill of Rights under which governments' excessive exercise of power is constrained in order to protect individuals and keep government from becoming law unto itself. Lastly, Constitutions **create affirmative government obligation³;** many constitutions provide for the establishment of social welfare which means that governments are placed under an obligation to ensure certain social, cultural and economic rights to their citizens. The right to education, for instance, is often interpreted to mean that primary education must be made free for all citizens.

Zimbabwe has been experiencing a multi-faceted governance and legitimacy crisis. Needless to say that the crisis has virtually collapsed the entirety of government functions from social, political and economic which highlights the government's failure to deliver on its constitutionally enshrined obligations. There are fundamental differences among scholars as to the root cause of the complex challenge which the Zimbabwean crisis presents. In this paper I will argue that the problem in Zimbabwe is a problem of a constitutional crisis borne

³ Social, economic and Cultural Rights are recognized under the United Nations Charter for Human Rights Charter

out of the fundamentally defective process which brought about the present constitution of Zimbabwe.

In this thesis, I will argue that the Zimbabwean constitution lacked from the beginning key founding bargains and the requisite national consensus needed to give the constitution both legitimacy and a sense of ownership among the citizens of the country. It will be explained later why this is of imperative importance. In terms of the second function; limitation of arbitrary exercise of power⁴ and providing checks and balances, it is imperative to note that the constitution did not provide strong and resilient constraints to minimize chances of abuse and manipulation.

As a result the government could easily pass draconian laws and amendments under the guise of constitutionality which will be elaborated on below⁵. There is ample evidence to show that the first seventeen⁶ amendments to the constitution were solely for the purposes of entrenching the power of the ruling party and its leader. A short comparative analysis will show that if the Zimbabwean constitution had the same status and resilience like that of the US and /or South Africa; the situation could be different. I will try to prove that these two problems have proven to be elementary to the crisis that is facing Zimbabwe today.

In the following paragraphs, I will start by offering a critical narrative of the development of constitutionalism in Zimbabwe from 1979 to present day. This will be used to elaborate and prove why the constitution remains vital in unlocking the socio-economic and political challenges which Zimbabwe is faced with. Having presented the problem, the

⁴ Its also known as constitutionalism, explained in the following paragraphs

⁵ The opposite of constitutionalism which is a mechanism of assessing whether laws are promulgated in accordance with the constitution-problematic in that laws may be constitutional but circumstances which brought about its constitutionality may not conform to the set standards of constitutionalism

⁶ The last two amendments, namely amendment number eighteen and nineteen were reached as a consequence of the negotiation process set up by SADC/AU and facilitated by South African Former President Thabo Mbeki

paper will proceed to proffer some alternative solutions. It should be noted that there is need to contemplate the feasibility of these proposed measures from an institutional framework point of view (in terms of content and process, both of which are crucially important) given the realities which confront us in this situation.

For example, one would argue that Zimbabwe must have a new democratic constitution in order to resolve the governance and legitimacy issues. But is the reality that simple? Can a constitution be authored that simple, can those who have been deriving benefits from the flaws of this constitution easily let go, watch the de-institutionalization of the very source of their entrenchment in power. These are the kind of challenges which will be discussed near the end of the paper, concluding with tying up the problem, solutions proffered and the means and strategies to go around the challenges such as the one above.

2. **The Historical Narrative: Constitutional Developments in Zimbabwe Since 1979**

The origins and seeds of the Zimbabwe crisis date as far back as one would want to trace them. It could be argued for example that the current crisis is a manifestation of the vestiges of the legacy of colonialism. For the purposes of this paper, the crisis will be traced from 1979, a key period in the transition from the Rhodesian settler regime to majority rule. There are three factors directly related to the emergence of a constitution which I have argued above to be the source of the crisis owing to its want of a broad based formation and legitimacy.

The violent process of colonisation rendered the black people devoid of their humanness which characterized them as desolate of novelty and accomplishment through denigrating their intellect as puerile. This led the British to take it upon themselves to manage the transitional period and author the constitution of Zimbabwe in a manner which they deemed fit. This led to a constitutional process which failed to gain national consensus and ownership.

Secondly the above problem was compounded by a violent struggle against colonialism which led to a facade of independence lacking the requisite material gains for the majority of the ordinary people of Zimbabwe. This created vicious disconnect among the interests of the various classes among the black population-a serious source of problems in the future. A transitional constitution exported from the United Kingdom could not adequately articulate, let alone reconcile these acrimonious aspirations.

Thirdly, the unwillingness of the liberation leadership to reform the oppressive colonial state system into a democratic institution, leading to the consolidation of the colonial regime`s repressive infrastructure including the Lancaster house constitution itself. In this way the liberation movements failed to deliver on their promise of freedom and instead began to see the repressive laws of the Colonial regime as handy instruments for the consolidation of their power.

All this was possible under the guise of a transitional arrangement which everyone was supposed to support until the new government found its footing. A good example is the fact that the Lancaster house constitution did not abolish the law and order maintenance act-which the colonial regime had relied upon to repress liberation movements. It is possible to see how Mugabe was later able to easily resort to these institutions in a manner that was *prima facie* legal and constitutional and yet entrenching his power and perpetuating repression.

The above assumptions are summed up by Kagoro, B. (pp2, 2002) when he said `the culture of intolerance and impunity inherited from the country's colonial past. This is not Robert Mugabe's invention, but rather a sad relic of the Rhodesian era. The Mugabe regime has used it as a fallback position when its fortunes have been severely compromised`. Thus far, I have argued that the origins of the current crisis was created by this fight between the settler regime and the liberation movements culminating into a compromise document , a compromise between the transfer of power to the majority blacks and the protection of the economic privileges of the minority whites and the international markets. To state the obvious, this was inherently undemocratic.

The protection of (ill-gotten) minority privileges was always going to be a source of troubles in the future. Secondly, it has created despondency among the ordinary people in the ability of the state institutions to transform their lives. There was a great feeling of betrayal; the people felt that the liberation leaders had betrayed them. Once the people lost faith, they disengaged from political participation and this gave the liberation movement the space to manoeuvre through the constitution and consolidate their power.

Again this reiterates the very theme of this paper-that the constitutional process lacked legitimacy, ownership and left no motivation for the people to play their watchdog role. How did the people's disengagement lead to the current crisis? It will be argued below that once the processes of liberation and independence took off from a warped position, stripping the people of their watch dog role, the Harare regime sort to maintain and even perpetuate this status quo in order to entrench their positions. Kagoro, B. Argues that `thus it is fair to state that the seeds of Zimbabwe's destruction were contained within seemingly benign concerns for collective national development`

3. Power consolidation under the guise of undoing the colonial legacy

After the war, the government sought to consolidate its constitutional order by relying on its popularity as a liberation movement. As Lijphart rightly observed, the formation of the state can be aided by identifiable threats which can force the people to unite in order to protect themselves. Soon after independence, Zimbabwe lived under perpetual threats to its constitutional order from the apartheid regime in South Africa, Renamo Bandits along the eastern border with Mozambique and more significantly the insurgency groups within the country.

Thus from as early as 1982 the government could make seemingly genuine arguments for the need to strengthen government in order to protect the people. It will be shown later how these excuses have facilitated rather than limited the consolidation of the executive power leading to the multifaceted crisis that is currently ravaging the country from virtually all spheres.

The fact that government could argue for the need to liquidate dissent and to focus on human development meant that any attempt to question the behaviour of government was easily dismissible as residual elements of the colonial regime or simply as unpatriotic. As a result the post colonial Zimbabwe steadily progressed towards an authoritarian regime with the blessings of the people. I referred earlier on to the retention of repressive colonial laws like the law and order maintenance act; this was made possible by keeping the colonial ghost fresh in the memories of the people (residual elements above) and aided by the continued presence of threats (real and imagined) from South Africa, Renamo and internal dissent.

When the government eventually crushed internal dissent and formed a government of national unity with its erstwhile opponents, the flood gates for power consolidation were wide open. The hypocrisy and the failure of the international community to nip the problem in the bud worsened the situation. While Mugabe crushed internal dissent in the process killing more than 20 000 civilians from the minority tribe (in the early 80s), the international community cast a blind eye and even praised him as an iconic African statesman who should be emulated by other African statesman. Britain had long abdicated its role of monitoring the defective process which it had started leaving Mugabe with excessive power with no censure.

As a result of the unity accord of 1987, the government began a series of constitutional amendments which would render Mugabe a monolithic dictator with powers synonymous with those of a president of a one party state. All these amendments had the passive blessing of the people on the basis of two reasons. First the fact that the constitution never gained people ownership inherently disempowered them to question anything, it was perceived as a preserve of the elite who had attended the Lancaster house talks and the government gladly encouraged this mentality. Secondly, the continued support of Mugabe by the international community led the people to believe that he was right and that his argument of protecting them against internal and external enemies was valid and therefore whatever Mugabe was doing was in their interests.

4. Constitutionalism versus constitutionality

The Zimbabwean constitution has been amended a record nineteen times in a space of less than thirty years. A sample through the amendments exhibit two typical characteristics. Firstly, it seems that most of the amendments were designed to facilitate rather than inhibit the power of the executive (particularly the Presidency) and severely curtailing that of the other branches of government, namely the legislature and judiciary. Secondly, while the amendments and interpretations of the constitution are seemingly legal, there is a point worth mentioning; if the amendments and actions of the government fulfilled the requirement of constitutionality, they completely did the opposite with that of constitutionalism: they violated it.

For the avoidance of doubt constitutionality is the condition of acting in accordance with the provisions of an applicable constitution whereas `Constitutionalism is the idea, often associated with the political theories of John Locke and the "founders" of the American republic, that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations` (Stanford Encyclopedia of Philosophy, 2007)⁷.

It can be argued that the fulfillment of one and violation of any of these two fundamental requirements rendered the whole process of democratization futile. This instead created the current governance crisis, the Zimbabwean government has consistently concerned itself with fulfilling constitutionality without due regard to constitutionalism. A sample of some of the key amendments is outlined below to show how the constitutional crisis has been the cause of the crisis in Zimbabwe and how it is exacerbating it.

5. Random Sample of the Key Amendments

⁷ Stanford Encyclopaedia of Philosophy (2007)

The Zimbabweans constitution needed (as of 1980 before succeeding amendments) (Chikuhwa, J. Pp 30)⁸ two thirds majority of the lower house and not less than seventy members of the senate to amend. Lijphart, A. (pp 220, 1999)⁹ shows that two thirds majority can be problematic, he cites the example of India which won a huge majority in 1984 (76.5% of the seats) many more than the majority of the two thirds needed to amend the constitution. This was a problem because the 76.5 percent was merely 48.1% of the entire population that had voted. Given the lower voter turnout in Zimbabwe between 1985 and 2000, the above scenario clearly applied with the consequence of creating a less constraining system of amending the constitution-which explains why the government was able to amend the constitution so many times in such a short space of time.

Amendment number 3 allowed the appointment of a minister (by the President) without the requirement of being a member of parliament though he was required to become a member of parliament or senate within three months. Amendment four reduced the number of years required for one to be eligible for appointment as a judge from seven years of practice to five. It also introduced direct political control by allowing the President to appoint judges, the ombudsman, director of prison, defence forces officers, the comptroller and the auditor-general` Chihukwa, J. Pp 38. Amendment five illegalised dual citizenship. Amendment seven perhaps marks the hallmark of the consolidation of the power of the Presidency.

In 1987, parliament abolished the ceremonial presidency and replaced it with an executive presidency, incorporating the post of the prime minister into the same-in essence amalgamating the two posts into one and thereby eliminating whatever checks they provided for each other. The new executive presidency could appoint the commissioner of police, defence commander, attorney general, permanent secretaries and their deputies.

⁸ Chikuhwa, J. Pp 30 :A Crisis of Governance

⁹ Lijphart, A. pp 220, 1999

The amendment also provided that presidential prerogatives could not be challenged in court (Chihukwa, J. Pp 39), amendment eight merely sharpened presidential powers and gave the attorney general the power to stop investigations against a minister of an executive appointee.

Amendment 9 allowed the constitution to be amended with two thirds including the bill of rights. In October 1990, after 25 years the state of emergency was finally repealed however Chihukwa argues that Zimbabwe remains in a permanent state of emergency because of the `... existence of the presidential powers (temporary measures) act which allows the president to assume legislative powers on behalf of parliament`. ¹⁰

Amendment 11 overturned the judiciary's ruling that corporal punishment was inhuman and degrading and said anyone under 18 years of age could be subjected to corporal punishment, formally established Zimbabwe as a republic , incorporated customary law and authorized the acquisition of land for resettlements, amendment 12 excluded the courts from enquiring into compensation acquired land among other things while thirteen constitutionalized capital punishment, amendment 14 required opposition parties to have a minimum of 15 seats to access financial support from government, a measure designed to ensure that the opposition could not mount a meaningful challenge against the ruling party which enjoyed absolute majority at the time. Amendment sixteen allowed police to hold suspects of economic crimes for four weeks without appearing in court.¹¹ It is clear that these amendments and many others not cited were designed to increase the power of the executive rather than limit it.

¹⁰ Using these powers on November 27, 1998, the president suspended parliamentary powers for six months and amended the labour relations act to make strike action illegal

¹¹ This was extensively used to punish perceived political opponents by detaining them for long periods of time

By 2000, a wholesale of measures had been taken to entrench the power of the regime and seal whatever democratic political space remained. These included the replacement of the entire bench by ZANU PF loyalists, passing of the public order and security act, access to information protection and privacy act (which facilitated the closure of the only independent daily news paper and one weekly, expelled foreign journalists and created severe punishments for journalists who report `falsehoods` on sensitive issues. Confronted by the disregard for the judiciary, the Supreme Court judges petitioned the President urging him to re-affirm the rule of law publicly following four contempt of court orders for the release of two independent journalists who were being tortured in a military base. The President`s response was quite telling of the attitude of government towards those who seemed to challenge its power and worth quoting verbatim, he said:

`The petition is an act of utter indiscretion...an outrageous and deliberate act of imprudence. The Presidency in the first place arises from the constitution of the country and its incumbent emerges as a result of national presidential elections. I am that incumbent and as head of state I am also the head of the executive. Accordingly, I have the right to appoint judges in the manner prescribed by the constitution and due laws of the country. In accordance with the constitution and the separation of powers, the judiciary has no right whatsoever to give instructions to the president on any matter as the four judges purport to do` President Robert Mugabe. It is clear that the President emphasized constitutionality as opposed to constitutionalism.

6. **Comparative proof: the US and the South**

African Constitutions

Having outlined the evolution of the concentration and consolidation of power by the Mugabe Regime through skilfully manipulating the constitution to suit its own needs, it is imperative to question how this could become possible. Would the same scenario occur in countries like the US and South Africa, if so why have we not seen that and if not how have these respective constitutions managed to curtail the power of politicians to manipulate constitutions. The answer lies in a number of key fundamental prerequisites of any genuine democracy.

Firstly, the US and South African constitutions are home made products, they are national expressions of the respective peoples of these countries and they endow the values and expressions of their own peoples. They are sacred and omnipotent, the people own them. Secondly they were never transition/interim documents-they were substantive constitutions. There are two differences between the US and the South African constitution which bring an interesting dynamic when compared to that of Zimbabwe.

The US constitution was not people-driven; it was authored by a group of intellectuals who even put clauses which were meant to prevent disastrous decisions from the excitable masses (Tocqueville). On the other hand the South African constitution was constructed with a broad based process earning the constitution ownership by the citizens. However, there are two issues which stand out with regards to the US constitution, 1. The US constitution is very difficult to amend and the major amendments made have been to create the bill of rights and to abolish slavery as opposed to the Zimbabwe`s amendments which seemed to curtail the bill of rights. 2. Considering the time that this constitution was written (1781), it was ‘a miracle’ as President Benjamin Franklin¹² had described it at the time.

¹² Was the oldest delegate at the Philadelphia convention and provided mediatory leadership. He was 81 years old when the US constitution was ratified. He was too old he had to be helped to sign.

For a constitution as modern as the Zimbabwean one (1980), the process ought to have been different. The leaders should have taken concern to strike balance between not delaying independence for Zimbabwe and not making the independence too quick. Sadly, the Lancaster house delegates went for the former and by overlooking the latter postponed the problems to later-day generations. The US also has a very strong judicial review process which has made sure that the constitution has fluidity to live up to the modern day aspirations without losing its key characteristics.

On the other hand, the South African constitution presents an interesting comparison with that of Zimbabwe. It is somewhat a mixture of unicameral and bicameral, like that of Zimbabwe it is a product of a bitter struggle against domination. But because the process was so extensive and the fact that South Africans had endured so much pain, every effort was taken to ensure that never-again would South Africa go through such horrendous times. Thus the tight screws on the South African constitution are an expression of the South African themselves forgiving each other without forgetting and vowing to create a better place for all where the rule of law would be the supreme leader. The South African constitution is the model template of my proposal for the solution of the constitutional crisis of Zimbabwe.

7. Proposed Solution: A new People Driven and Democratic Constitution

"Every sovereign people are entitled to give birth to their own constitution." President

Mugabe,

Zimbabwe is already well on course towards democratization, albeit with residual elements of resistance still popping up. What is encouraging is that the process which has been set up since the 15th of September 2008 has opened an unprecedented window of opportunity for Zimbabweans to determine the course of their destiny with the active oversight and assistance of the international community.

After two rounds of highly disputed elections of March 29, 2008 and June 27, 2008 respectively, SADC and AU facilitated dialogue which led to the formation of a government of national unity(GNU). This government has already gone a long way in neutralizing the powers of the Mugabe regime. Firstly, it has recreated the Prime Minister`s post and given the opposition a substantial amount of say in the new government. In this regard, there have been some minimal reforms which points to a process that could ultimately disentangle Zimbabwe from its political upheavals.

One the key mandates of the new government is the authorship of a new constitution. Across the entire political divide, there is no doubt that there is consensus on the need for such a new constitution, which already resolves half of the prime defects which I have underlined in the essay, namely that the previous constitution was fraught with irregularities from the outset, secondly that the various amendments made to entrench the power of the Mugabe regime were possible as a result of and not in spite of the Lancaster constitution. It is imperative at the stage to underscore the importance of emphasizing the need of a new constitution in order to strengthen the already available consensus.

However, the major differences remain as to the manner in which to come about with the new constitution. This is not a new problem as it led to the rejection of a proposed constitution in February 2000 by a referendum. The 2000 constitutional referendum is quite telling on the need for the process to be as extensive, involving and transparent as possible. In 2000, the constitution was rejected owing to its want of legitimacy as opposed to content.

Madhuku, L (dr.) head of the National Constitutional Assembly (NCA) argued that the process was as important as the content and because of that the NCA had been compelled to campaign for a NO vote despite some positive elements in the constitution. CDD also concluded their research by saying that `In Zimbabwe, the public saw through the hoax and responded by negating the process with a “no” vote in the referendum of 2000`.

The tragedy which faces the renewed efforts for a new constitution is the reincarnation of the 2000 mistakes. The government once again insists on a government dominated process and the NCA, and a wide range of other civic society groups have vowed to campaign against the constitution. The Movement for Democratic Change Party partnering Mugabe in government recently passed a resolution of its annual conference concurring with the need for a people driven, democratic constitution.¹³ As I argued above, this stalemate was always foreseeable; the Mugabe regime will not negotiate itself out of power.

There is no other way to resolve the Zimbabwe political crisis besides coming up with a new democratic constitution arising out of a democratic process ultimately endorsed by a referendum assent. The solution lies in the MDC and its civil society and International sympathisers remaining resolute. The International community enjoys a considerable *carrot and stick* leverage in the form of aid and sanctions. They should work closely with the democratic forces to squeeze ZANU PF to agree to a people driven democratic constitution. Secondly, the International community must provide financial and material support to the constitution making process before any other non-emergency bilateral support except humanitarian aid. Modern constitution-making is incredibly expensive, posing one of the major challenges, and an argument which Mugabe might try to use. The budget of the proposed Rwanda constitution for example was 700 million US dollars (Hart, V, 12, 2003)

¹³ Resolutions of the MDC Ninth Annual Conference: 31st of May 2009, Harare

The Mugabe regime is desperate to end the economic crisis as this is threatening its hold on power¹⁴ and the agreement to join with MDC in the Government of National Unity was in the hope of luring international aid. Thus, the international community must take a principled benchmarked approach in dealing with Zimbabwe and keep the constitutional making process and strengthening and supporting democratic institutions and reforms high on the agenda.

Internally, democratic forces must keep and even up the pressure to ensure that the constitution making process is executed in a manner which expresses the true aspirations of Zimbabweans. This can be based on numerous sources of law on top of mere political arguments, for example the UN declaration of civil and political rights, African Charter on human and people's rights have long extended 'the right to participate in public affairs' to include the right to constitution making. (*Marshall v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991)¹⁵. There are many more examples of this new ethos of constitution making¹⁶

¹⁴ Failure to access foreign currency to pay salaries of junior army officers has threatened Mugabe with military insurgence. Twice junior military offices have looted the shops before GNU was established and came up with mitigatory strategies , financially assisted by the International Community

¹⁵ See Also UNCHR General Comment on Article 25 of the ICCPR, the right to participation, issued on July 12, 1996

¹⁶ A few examples suffice to illustrate the widespread adoption of new and open processes. In 1986, the Nicaraguan National Assembly invited comment on the draft of a new constitution. Some 100,000 citizens took part in open town meetings, forwarding 4,300 suggestions. In 1988, constitution makers in Uganda and Brazil requested suggestions before, as well as comment after, the drafting process, with equally impressive levels of response. In 1994, the South African Constitutional Assembly encouraged a nation of first-time voters to participate in the constitution-making process with the slogan: "You've made your mark, now have your say." Polls estimated that 73 percent of South Africans were reached by the assembly's campaign. The public made two million submissions. Between 1994 and 1997, Eritreans engaged in constitutional education and consultation, addressing a nation with markedly low literacy rates through songs, poems, stories, and plays in vernacular languages, and using radio and mobile theatre to reach local communities. In 2002, members of the Rwanda drafting commission and thousands of trained assistants fanned out to spend six months in the provinces, so that constitutional education and discussion could become an integral part of community life. In 2003, the constitution review process in Kenya is operating under a statutory requirement that Kenyans have every opportunity to participate. The goal, as the Kenyan Commission claimed, is "a people-driven review process whose final product will be a people-owned constitution."

This includes pushing for a process which is as inclusive as possible, within a reasonable timeframe to ensure that the process does not fatigue on the way. All this must lead to fresh democratic, non-violent elections, transitional justice and national healing process and strong protection of the media, human rights defenders, property rights and more importantly making the bill of rights a sacred heart of the new constitution by working towards a new political culture altogether based on both constitutionality and constitutionalism.

In order to achieve this, the democratic forces must emphasize forgiveness as opposed to justice as a strategy not to scare perpetrators of human rights abuses. All this must be done under the oversight of the AU and SADC which means that there must be very strong synergies in terms of communication , strategy, structure among the triad agencies; namely the international community(mainly the West EU, US¹⁷ etc), the African institutions and the key political players in Zimbabwe from across the political divide.

‘The tension between the security and stability offered by the traditional ideal of constitutionalism and the flexibility called for by new circumstances is what places process at the heart of the new constitutionalism. A permanently open process must itself satisfy qualitative standards that were previously applied only to the outcome of constitution making. We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable’.(Hart, V. Pp12, 2003)

The above quotation succinctly sums up what Zimbabwe needs at the moment, a constitution which also takes into cognisance the tribal divisions and producing a workable formula for existence. In order to achieve this, the Zimbabwean constitution making process

¹⁷ Zimbabwe is desperate for development aid from the west which makes the west a key player

must achieve to things-an extensive formula which embraces divergent views so that all people from all walks of the Zimbabwean society can identify with and feel ownership of the constitution. In this way, the constitution will become more enduring as people will push for its protection. Secondly, the new constitution must not be an end-finality. This might scare other cautious groups who might feel as agreeing to stagnation in case something later proves to be wrong with the constitution. Rather, as argued in the quotation it must be a sustainable framework of engagement in perpetual democratic discourse.

8. Conclusion

As already stated elsewhere in this essay, there are no illusions to the difficulties which confronts this idealized process. The South African model which I argue to be a perfect example for Zimbabwe to emulate was not devoid of its own problems. For example, it took seven years between the first meeting of the negotiators and the final product of 1994, outbreaks of violence threatened the process but in the final analysis, the South African example sets one thing clearly: Difficult yes, impossible no.

The constitutional process must start on a clean sheet, beginning with negotiating terms of reference, procedure and an interim constitution and transitional government in the intervening period between the constitution making process and the final document. In the case of Zimbabwe, amendment 19 to the constitution already provides a workable interim constitution, together with the current government of national unity. The trick is for the main actors to keep their eyes on the ball and thrive for a truly democratic constitution and constitution-making process.

This essay by no means covered the entire argument but sought to provide a detailed picture of how the constitution took centre stage in the crisis and how it has retained that prominence in the solution. It has and indeed remains part of both the

problem and the solution. A series of creative processes combined with patience can help Zimbabwe benefit from the constitution as a solution. The final Zimbabwean constitution must reflect its Zimbabweanness by being authored and shaped by Zimbabweans from all walks of life and reflecting what they aspire for.

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