

Constitution Making Under Governments of National Unity: The Zimbabwean Case 2009-2013

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Abstract

Constitutions are the bedrock of democratic governance in the contemporary world and any state claiming democratic credentials needs to base its claims on a good constitution and positive constitutionalism. In the period from 2009 to 2013, Zimbabwe was ruled by a negotiated government of national unity (GNU). The government, a result of inconclusive presidential elections in 2008 was tasked with writing a new constitution to take the country out of the crisis that it has undergone since the turn of the century. The GNU duly set upon this task and wrote the constitution which was passed by parliament in May 2013. Against this background, this paper seeks to analyse the Constitutional Parliamentary Committee (COPAC) driven constitutional making process. Using a qualitative methodology based on participant observation and document analysis, the paper shows that the process was fraught with irregularities and ushered in a negotiated constitution in place of the initially touted people driven constitution. Thus the paper intends to reveal the pitfalls of a negotiated constitution making process. The paper concludes that in a transitional period, people driven constitution making is at the least too ambitious and at the worst totally unfeasible.

Keywords: Constitution, Zimbabwe, COPAC, government of national unity, constitution making, ZANU (PF), MDC

Introduction

Constitutionalism and constitutional reform is often a contradictory and highly contested process with different parties bringing different political agendas and competing imaginaries to the process. Constitution-making processes are a central aspect of democratic transitions, peacebuilding and state-building. In any post conflict nation, some form of constitutional review or reform is often a key component of comprehensive settlements (as evidenced by Cambodia, East Timor, Afghanistan and most recently Iraq) to a conflict and the transition from violent conflict to peace. Zimbabwe has been no exception to this trend, and the major political parties have since the late 1990's often fought out their competing conceptions of change and democratization on this terrain. In the same vein, the period between 2009 and

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2013 in Zimbabwe was characterised by a struggle for constitutional reform. Article VI of the Global Political Agreement (GPA) set out the ‘fundamental right and duty of the Zimbabwean people to make a constitution for themselves’, also stipulating that the process would be carried out by a Select Committee of Parliament composed of the parties to the agreement.¹ The Committee carried out its mandated task and it is this process which this paper seeks to analyse.

Terms and Definitional Framework

Constitutions form an obstacle to certain political changes, which would have been carried out had the dominant majority had its way. A constitution is a set of norms and principles limiting the political power of the majority and protecting the rights of individual and minority groups.² It is a set of rules that govern the basic structure and operation of institutions of governance in a state. In a modern constitution the rules will also provide for the basic rights of people within the state, and may include some guiding principles for national laws and policies more generally. In most countries the word refers to a particular enactment that contains those rules. But some countries have no enactment that is called the constitution, a few have several that together make up the constitution, and in a few the constitutions comprise a mixture of conventions and laws.

Although it is very clear that constitutions can guarantee very little in the absence of robust institutions, a constitution is nonetheless a very important document for a nation – it is the “autobiography of a country” as a respected South African jurist, Justice Mahomed, has pointed out. The constitution therefore should strongly represent the desires of a nation, both in resolving the problems of the past and in framing the way of the future. This implies that it will reflect as strongly as possible the widest consensus of the citizens of a nation: a constitution that reflects the compromises between polarized groups is merely framing the problems and doubtfully resolving them.

Theoretical Framework

This paper makes use of Gramsci’s theory of hegemony to analyse the constitution making process in the period under discussion. Gramsci defines hegemony as the ability of a social group to direct society both politically and morally. He notes that,

The hegemonic group acquires authority through the intellectual, moral, and cultural persuasion or consent of the governed population without applying violent, political or economic means of coercion. Nevertheless, coercion is always latently used in support of its hegemony. In order to become hegemony, a group must unite the

¹ Ministry of Constitutional and Parliamentary Affairs *Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe*, (2008) Government of Zimbabwe

² Michele B et al *Constitution-making and Reform: Options for the Process* (2011) Geneva: Interpeace

features of coercion and consent through the notion of a 'dual perspective'.³

Iseri cites Gramsci as arguing that a social group, which intends to become the hegemony or the leader, can either use the means of coercion or the means of consent by persuading society to accept and assimilate the norms and values of its own prevailing world-view.⁴ However, coercion does not always mean domination but may equally mean consent or the acceptance of the hegemony's leadership (ibid). Thus the constitution making process in this regard is seen in the context of gladiators who try by all means possible to not only control the process and ultimately outcome, but also wanted to use the resultant constitution to further their political goals. Thus, the political institutions in Zimbabwe strove to dominate and exert control over constituencies involved in the constitution making process through coercion and consensus.

Love understands hegemony as domination across the economic, political and ideological domains of a society.⁵ To her it is about constructing alliances and integrating rather than simply dominating subordinate classes through concessions or through ideological means to win their consent. In the Zimbabwean context, hegemony can be regarded as leadership of both the MDC and ZANU PF that vied for the control of political office and the influence it has on the outcome of the constitution making process.

Gramsci's comprehensive work presents probably the most promising place to begin the exploration of the difficulties experienced in constitution making in Zimbabwe. Through Gramscian theory we are able to observe the struggle for power by ZANU PF and MDC as detrimental to progressive constitution making. A constitution making process that embraces the people's views would perhaps diminish the ruling regimes chances of remaining as the political hegemony in Zimbabwe because ZANU PF on one hand has been accused of manipulating the constitution for its own benefit thus they were unwilling to see a constitution that diluted their influence. It is likely that such a process could have swung the struggle for dominance on Zimbabwe's political landscape towards opponents of the ZANU PF regime.

Tenets of Constitution Making Processes

Under normal circumstances, the constitution-making process includes a number of clear cut, straight forward elements. If properly done, an ideal constitution-making process can accomplish several things. For example, it can drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict. It must also put in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.

³ Iseri E *Neo-Gramscian Analysis of US Hegemony Today* (Unpublished PhD Thesis, School of Politics, International Relations and the Environment (SPIRE), University of Keele, 2007) 2

⁴ *Ibid.*

⁵ Love A 'Realising Alternatives in Zimbabwean Political Discourse', (2000) *Zambezia* xxvii. 27-36

This however, is only attainable when the constitution making process is properly done. First and foremost, the process need and assessment of the need for a constitution-making process.⁶ This is an activity that should be done well before the actual constitution making process. In conflict and post-conflict situations, a constitution-making process may be provided for in a peace agreement or similar instrument.

Once the need for a constitution making process has been identified and agreed upon, high-level negotiation between key constituencies leading to an agreement on how constitution-making is to proceed should be held.⁷ This should ideally lead to the constituencies establishing a structure and blueprint for the process, including who will be involved in preparing a draft, how they will be selected, how consensus will be built, how the constitution will be adopted, what the timeline will be, and how disputes will be resolved.

This should naturally lead to the establishment of a representative body (e.g. constitutional commission) to lead public education and consultation campaigns, and to prepare a draft of the constitution.⁸ It is envisaged that this representative body should be inclusive and fully representative of all sectors of the concerned country's population. In line with the establishment of the representative body, should be the establishment of a secretariat or other body to support the mandate of the constitutional bodies, in particular with the logistics involved in carrying out public education and consultation campaigns.

Once the representative body and secretariat have been formulated, a wide ranging, inclusive public information and civic education campaign on the constitution-making process⁹, and the role and implications of the draft constitution should be done by the representative body. This should then be naturally followed by a public consultation process led by the representative body to gather views and ensure input of the public on the draft constitution. Once the consultation process has been undertaken, the representative body should ideally appoint a team of drafters to work on the draft constitution from the results of the consultation process.

Once this is done, the representative body should then submit the draft constitution to a representative forum¹⁰ (e.g. constituent assembly, constitutional convention, or parliament) to debate it and make any amendments. Once parliament has debated and factored in any necessary amendments, the constitution should go through final adoption procedures (e.g., qualified majority in the representative forum, or a referendum). The final step once this happens is the post constitution-making education on the newly adopted constitution and development of a strategy for its implementation.

However, it is vital to note that constitution-making processes usually have many elements, ranging from a high-level negotiation between key constituencies leading to an agreement

⁶ Michele B et al *Constitution-making and Reform: Options for the Process* (2011) Geneva: Interpeace

⁷ *Ibid.*

⁸ Michele B et al *op cit.*

⁹ *Ibid.*

¹⁰ *Ibid.*

on how constitution-making is to proceed, to final adoption procedures. There is no “one size fits all” framework for a process. Sometimes, such as in Cambodia, it will be useful to have a more detailed framework that includes the principles to be enshrined in the constitution. At other times, the framework should be more skeletal, such as in Afghanistan, to allow for flexibility to respond to the inevitable changes in the political context. All this should be done with the view that constitution-making can provide a key opportunity for peacebuilding in conflict and post-conflict countries. Deliberative processes that promote national reconciliation, conflict resolution and consensus building take time. In the Zimbabwean case, opportunities to make the process more genuinely participatory were missed, in part, because of tight timelines.

During the constitution drafting process, decisions are made as to the limits and practices of the new regime, and the rights and duties of the citizens. The process is a rare moment in a state’s history when detailed discussion rises above the give-and-take of everyday majority politics and focuses on the nature and future of the state. The process of drafting a constitution may significantly contribute to national reconciliation. It requires negotiations among key groups on constitutional principles. It also requires public participation in order to gain legitimacy and to reflect popular aspirations. Thus, constitution-making has the potential of contributing both to the short-term goal of conflict resolution and peace-making and to the long-term goal of peace-building and strengthening of the state institutions. Also, it has the potential of ensuring that universal principles such as respect for human rights are enshrined in the new constitution.

Rationale for a New Constitution in 21st Century Zimbabwe

The Lancaster House Constitution: The recently introduced new constitution was long overdue in Zimbabwe. First and foremost, Zimbabweans have since independence been using a constitution that is not their own making. The immediate past constitution in Zimbabwe was a product of negotiations at the Lancaster House Conference that ushered in independence to Zimbabwe. The conference in addition to being a peace making process also served as a constitution making forum. However, due to the circumstances leading to its being held (the protracted violent armed struggle that had been fought from 1966), the resultant agreement and constitution were largely compromise documents. Resultantly, the constitutional compromises agreed to at Lancaster House in 1979 were the result of a convergence of national, regional and international pressures that inaugurated the politics of the post-colonial state.

For the nationalists coming out of the liberation movement constitutionalism and the law had a complicated history. On the one hand these discourses were constitutive of their demands against the colonial state and in conceptualizing their own legality and legitimacy, and have thus played an important role in both locating their demands and in imagining the possible forms of a future state.¹¹ On the other hand for this generation of leaders the liberation struggle was also viewed as an alternative to constitutionalism with the war for liberation conceived as leading to the destruction of the colonial state and the

¹¹Alexander, Jocelyn, ‘Nationalism, Self-Government in Rhodesian Detention: Gonakudzingwa, 1964-1974.’ (2011) *Journal of Southern African Studies*, 37 2, September: 551-569

establishment of 'people's power' however nebulously defined.¹² Once in power Zanu PF, as in the case of other post-colonial political parties, instrumentalised the use of the constitution to concentrate power in the presidency and used constitutionalism to reconstruct the power relations of the state to deal with political opposition. This was to create multiple problems leading to a protracted conflict between 2000 and 2008.

The Lancaster House Agreement provided a number of lessons for future situations. The most prominent of these was that negotiators should not combine the conclusion of a peace agreement with constitution-making. Bosnia and Herzegovina and Zimbabwe are quintessential examples of countries where the peace agreement and the drafting of the constitution were combined into one negotiation process. In both cases, the constitution entrenched disagreements without providing avenues for political change.

In the Zimbabwean case, the militarised nature of the conflict conflated the peace-making process with the making of the 1980 constitution. The constitution was not conducive to the resolution of conflicting interests in the long-term. The deeply entrenched protection of white farms, a necessary component of the peace-making process, proved to be an intractable problem. The Lancaster House case indicates that, although co-ordination between the constitution-making and peace-making processes may be beneficial, their coincidence is not.

The 1987 amendments – Rewriting a constitution without the people: Having lived with an imposed constitution since independence and in an effort to further entrench their hold onto power the ruling elites in Zimbabwe introduced wide reaching amendments to the constitution after the signing of the Unity Accord in December 1987. Chief amongst these was the now notorious Amendment number 7 which introduced the executive presidency.¹³ The amendment also ushered in the Presidential Powers (Temporary Measures) provisions which would be used many a time to introduce legislation through the back door. These amendments not only created room for autocracy but also laid the ground for the governance and constitutional crisis of the early 21st Century.

The Constitutional Commission of Zimbabwe and the 1999 Constitution Draft: In the face of the undesired and imposed independence constitution and the retrogressive slide to autocracy in Zimbabwe, civil society organisations began to call for constitutional reform after the lapse of the 10 year moratorium imposed at Lancaster House. In this regard, they began moves towards writing an inclusive people driven constitution. In reaction to the emergence of a mass democratic movement and emergent political opposition calling for constitutional reform, Zanu PF attempted to control this process from above through a government controlled constitutional review process. This it aimed to do by curbing the demands for popular sovereignty and once again seeking to secure centralised Presidential powers. Thus in the face of opposition demands for a new constitution, the government set up a Constitutional Commission.

¹² Mandaza IJ. "Movements for National Liberation and Constitutionalism in Southern Africa." In Shivji I (ed.) *State and Constitutionalism: An African Debate*. (1991) Harare: SAPES Books 71-90.

¹³ Government of Zimbabwe *Presidential Powers (Temporary Measures) Act*

The Commission was directed to submit its recommendations by 30 November, 1999 and given specific terms of reference, charging it with the responsibility to set in motion a process the outcome of which should be a new constitution to be presented to the President of Zimbabwe on or before 30 November, 1999. The Commission consisted of 400 members: the Zimbabwean Parliament of 150 members constituted the core of the Commission's membership; and the other 250 members were drawn from the private sector and a cross-section of civil society entities and individuals many of whom represented the best Zimbabwe has produced across the professions. An impressive leadership bureau was appointed: the then Judge President of the High Court, now Chief Justice Godfrey Chidyausiku, was appointed Chairman of the Commission, with prominent female statesperson, Mrs Grace Lupepe, Anglican Archbishop Jonathan Siyachitema and renowned academician and lawyer, the late Professor Walter Kamba, as his deputies. The commission duly executed its mandate and presented a draft to the president. However, upon presentation to the electorate in a referendum in February 2000, the draft was rejected. The rejection of the draft led to issues of constitutional reform going on the back burner.

The 2001 NCA Constitution Draft: The National Constitutional Assembly is a civic organisation formed in 1997 a conglomeration of civil society organisations to campaign for the writing of a new constitution. When the referendum was called in February 2000, the NCA campaigned for a no vote largely because the CCZ draft had retained an all-powerful president not different from the executive president introduced in 1987.¹⁴ After defeating the government draft in the February 2000 referendum, the NCA initiated its own parallel process of collecting the views of Zimbabweans on a new constitution and came up with its own draft in 2001. The draft, an improvement on the government draft did not however gain any support from the government. Furthermore, it was also not very inclusive as it was largely a product of the views of CSOs rather than the common people.

The Kariba Draft: In 2007, ZANU (PF) and MDC came up with a draft constitution under the auspices of the SADC negotiations. It was finalised and signed at Kariba on 30 September 2007. It is the draft acknowledged by the GPA but this acknowledgement was interpreted differently by the main protagonists in the Zimbabwean political scene. It was largely a reproduction of the rejected 2000 draft of the CCZ.

2008 elections, GPA and the creation of COPAC: In March 2007, opposition leaders involved in prayer campaign dubbed Save Zimbabwe Campaign were beaten by the police and arrested leading to SADC intervention through calling for negotiations to the Zimbabwean impasse. With the SADC mediation the issue of the constitution became one of the central concerns of the political facilitation. In June 2007 the parties agreed to 'negotiate a draft constitution, after which a select committee of parliament would take the draft constitution through a public consultation exercise culminating in the enactment of that constitution before the 2008 election.' Moreover the parties negotiated the amendments to the Constitution of Zimbabwe Amendment Bill No. 18, 'on the express understanding by the Zanu PF negotiating team that they would not renege on the enactment of the agreed draft constitution before the 2008 election.' Leaders of both MDCs 'sought and obtained guarantees' from then President Mbeki that Zanu PF 'would not be allowed to renege on

¹⁴ Ncube N 'NCA Rejects Draft', *Financial Gazette* 6 January 2000 1

the agreement to implement a new constitution before the next election.’ By December 2007 it was clear that Zanu PF had decided to renege on this agreement as Mugabe unilaterally declared that the elections would take place in March 2008 without a new constitution. Thus the contested 2008 elections took place under the Lancaster House constitution.

The harmonised elections in March 2008 handed ZANU (PF) a defeat in the legislative elections and its leader the incumbent Robert Gabriel Mugabe was relegated to second place by the MDC’s Morgan Richard Tsvangirai. However, the results for the presidential poll were only announced after 45 days giving rise to suspicions that they had been manipulated to avoid an outright defeat for Mugabe. Thus, under the country’s Electoral Act as amended in 2007, the two protagonists had to square off once again in a runoff. Campaign for the runoff set for 27 June 2008 turned very violent leading to Tsvangirai pulling out after more than 200 of his supporters had been murdered. Mugabe went on to stage a one man race and won with a landslide figure. He was immediately inaugurated and went for an African Union meeting in Egypt where he was told to negotiate with the MDC. SADC which had initiated negotiations between the two parties was given the mandate to find a solution. Under the mediation efforts of the then South African President Thabo Mbeki, the parties reached an agreement named the Global Political Agreement which they signed on the 15th of September 2008. It was this agreement which ushered in the constitution making process under discussion in this paper with article 6 of the agreement stating that it was a ‘fundamental right and duty of the Zimbabwean people to make a constitution for themselves.’¹⁵ This article set both the important stages and the general principles of constitution making process. Under this article the constitution making process was meant to be people driven, inclusive and democratic.

The Inclusive Government and Constitution Making

When time came for the GNU to write a new constitution, the process was riddled with controversy, squabbling, and politicisation of the process. The whole process was purely political party driven with the 3 parties represented in parliament ZANU (PF), MDC-T and MDC driving the process. It was carried out in a polarised environment characterised by a media war, conflict with civil society, external influence, financial challenges and was a top-down elitist process

Phases in the Constitution Making Process: In terms of the Global Political Agreement COPAC divided the constitution making process into three phases. These were the Preparatory Phase, the Consultation Phase and the Drafting phase.

The Preparatory Phase: The preparatory phase involved the identification of all the interested stakeholders. This was done and the first All Stakeholders’ conference was convened in July 2009. The Stakeholders’ Conference developed 17 thematic areas to guide the outreach teams in soliciting the views of the people. It also laid the principle that in all

¹⁵ Ministry of Constitutional and Parliamentary Affairs *Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe, (2008)* Government of Zimbabwe

the organs to be established in this process, civil society representatives had to constitute at least 70% with parliament constituting the other 30%. The conference also adopted the principle that as much as possible, the 50: 50 gender representation principles should be followed.

The Consultation Phase: The public outreach program was launched by the Principals to the Global Political Agreement. These were the President, the Prime Minister, and the Deputy Prime Minister who doubled as the leaders of the political parties represented in Parliament. At that launch, each principal reiterated the commitment of his party to the constitution making process. They all undertook to respect the views of the people and not to temper with them. There was also a commitment of all the political parties to non-violence during the public consultation process.

At the completion of the outreach process, a total of 4 821 meetings were completed. A total of 1 118 760 people attended the meetings and comprised of 416 272 (37%) males, 441 238 (39.44%) females, 252 240 (22.64%) youths and 8 020 (0.72%) being people with special needs.¹⁶ COPAC enlisted the views of Zimbabweans in the Diaspora as well as institutions and other interest groups. At the end of the outreach program COPAC had the following set of views; views of the Zimbabweans gathered in public meetings during the outreach process, views of the Zimbabweans in the Diaspora, constitutional submissions by various Zimbabwean institutions, views of the children and views of Zimbabweans living with disabilities. The whole consultation process took about 100 days.

During the outreach phase, civil society demanded that they be accorded observers status. The objective was to have people outside the formal administration of the program to make sure that the outreach process complied with the fundamental principles set in Article 6 of the Global Political Agreement as well as acceptable common international practices. They were grudgingly allowed to observe this process.

At one public forum, a SAPES Trust's Policy Dialogue Sessions in mid-2012, Professor Welshman Ncube asserted that, given the numerous problems attendant to the COPAC exercise, the latter would have to resort to the "negotiation" method if a draft constitution was to emerge at all.¹⁷ Therefore, COPAC should have confessed publicly that this is precisely what it is doing towards producing the (incomplete and contentious) draft, instead of claiming to have adhered to a "people-driven" process.

The Drafting Phase: After the consultation process COPAC appointed three drafters to do the actual writing of the constitution. The COPAC drafters were faced with the mountainous task of sifting through the more than 100million responses that represented in many respects complaints about the way people were being governed than constitutional issues. The drafting team of neutrals consisting three credible legal minds Brian Crouzier who had worked as a drafter in the Attorney General's office, Priscillar Madzonga from the same office and Justice Chinengo and High Court judge in Botswana did their job exceptionally well.

¹⁶ COPAC

¹⁷ Ncube W

These drafters did their work assisted by a technical team of five people from each party. For instance in MDC there were people like Matshobana Ncube and Josphat Tshuma in the MDC-T the late Professor John Makumbe and Dr Alex Magaisa, In Zanu PF Goodswill Masimirembwi and Jacob Mudenda. The drafters managed under the difficult conditions and continuous assault by the ZANU controlled media to come up with a credible draft. However but when it was about to be presented to the select committee ZANU PF came up with a new set of demands that were contained in a 29 page document. The parties felt that now that the ZANU PF party had brought in new demands it was no longer an issue of the drafters to deal with but rather an issue of the management committee of the three parties to deal with the new demands.

The management committee was composed of negotiators from the three parties namely Ministers Priscillar Misihairabwi Mushonga, Minister Moses Mzila Ndlovu and co-chair Edward Mukhosi from the Professor Welshman Ncube-led MDC, then Ministers Elton Mangoma and Tendai Biti as well Hon Douglas Mwonzora from the MDC - T and then Ministers Nicholas Goche and Patrick Chinamasa and co-chair Munyaradzi Paul Mangwana from ZANU PF. Also sitting in the management committee was Eric Matinenga the then Minister of Constitutional Affairs. The management committee sat to find ways in which they could compromise in light of the new demands contained in the 29 page document by ZANU PF. In the process of negotiations the teams were given an opportunity to continuously refer to their party organs and principals whenever a contentious issue arose. And indeed in more occasions that one, the ZANU PF team asked for a time out to ask their superiors on how to approach certain issues for instance on the issue of running mates they went to ask their principal Mugabe on how to deal with it and they came back saying Mugabe had agreed and Mugabe being the President and Secretary General at the same time because he is the first secretary it was assumed that all was in order.

At the end of the negotiations a compromise emerged and was signed by the three members from the three parties. After three years of delays, obstructions, logistical and financial squabbles, and a problematic outreach programme, a draft constitution was produced through the Parliamentary Select Committee process, COPAC, in July 2012. While the COPAC product is clearly a compromise document it contains some important changes such as controls on executive power, accountability of the security and judicial services, a more independent national prosecuting authority, devolution of power and citizenship rights. Importantly, in terms of process, all the parties to the agreement were signatories to the draft, leading to the logical assumption that at all times the Principals of the parties and their respective leaderships were fully informed of the discussions of the COPAC team.

However in a move that replicated previous interventions to block constitutional reform and eschew its commitment to the GPA, Zanu PF once again initiated a strategy intended to foil a process that has the potential to unravel its political hegemony in the country. In August 2012 President Mugabe presented the leaders of the MDC formations with a Zanu PF re-draft of the COPAC draft, on the grounds that the latter was drafted in opposition to the 'views of the people' gathered during the outreach process. This re-draft, described by Zanu PF as 'non-negotiable' attempted to undo the COPAC process, undermine the GPA, and once again force the Zimbabwean citizenry into a national election without a new constitution. Moreover the re-draft effectively dismissed the major reforms included in the

draft and proposed a return to the kind of executive powers and party/state rule that Zanu PF has crafted since 1980. Both MDC formations objected strongly to the Zanu PF position. After weeks of political haggling the parties, under pressure from the SADC facilitation team, agreed to take the COPAC draft to an All Stakeholders Conference to be held from 21-23rd October. Surprisingly after the Second All Stakeholders' Conference, Zimbabweans woke up one morning to hear that the Principals to the GPA had reached an agreement on the new constitution paving way for a referendum. However, it is vital to note that the draft agreed upon by the principals was a great compromise between them and largely negated the views of the people.

Challenges to Constitution Making under the GNU

Violence, polarisation, political, social, economic, media, funding, NCA, civil society, regime change agenda power struggles transitional phase, suspicion, mistrust, lack of experts, lack of sincerity, etc. The constitution-making process faced the difficult task of carrying out broad-based consultations among the main political groups as well as extensive public participation. It also confronted the short-term priority of resolving disagreements among key stakeholders and the long-term priority of creating stable institutions. The constitution drafting process and the resulting constitution was never envisaged to alone resolve inter-group conflict. Nevertheless, it was hoped that if the constitution-making process was made inclusive and transparent, it could succeed in managing conflict and in facilitating bargaining, reciprocity and collaboration.

The Zimbabwean process took place within a particular historic, social, political and economic context. It came against a background of the civil, social and political unrest that characterized the presidential runoff election of 2008. A number of challenges were encountered in the process and these included the following:

Most crucially, the whole process was undertaken at the time that Zimbabwean government was recovering from the great economic meltdown of 2008. It also came at a time when Zimbabwe's relationship with the international community was at its lowest. Resultantly the program was plagued with financial problems. Save for the United Nations Development Programme, there were no other financial backers for the process.

Furthermore, the level of endemic political polarisation and mutual distrust among the major political parties in Zimbabwe remained very high and this militated against quick progress in this program. The polarisation was such that the committee could make progress only to see the progress reversed by the political parties in the various for a in which they met. The process was driven by a plethora of structures borne out of this tripartite arrangement: namely the three COPAC co-chairs, the COPAC Select Committee of Parliament, the Management Committee, which includes the Minister of Constitutional and Parliamentary Affairs, and the three GPA Parties' principles, President Mugabe, then Prime Minister Tsvangirai, and then Deputy Prime Minister Mutambara.

Worst of all, during the outreach program there were a number of incidents of politically motivated violence in some areas. These incidents were reminiscent of the pre 2008 era and made many wonder if anything had changed in the country's political environment at all. This led to a situation where some of the areas had to be redone much at the expense of

progress. It also meant a duplication of expenditure. Some of the factors militating against progress included, lack of a common vision among the stake holders, lack of support from the national institutions like the police and the public broadcaster and the political posturing and propaganda by political parties.

There is always a potential tension between democratic principles and constitutional principles, which was reflected in the constitution-drafting process. Constitutionalism limits majority decisions. Another tension between democracy and constitutionalism is that democracy institutionalises uncertainty, while constitutionalism institutionalises long-term principles, which are very difficult to change.

Four years after the signing of the SADC facilitated Global Political Agreement in Zimbabwe, the outcome of the process remained fiercely contested, under threat and in the balance. The Agreement, which set out to prepare the political process for a generally acceptable election after the debacle of 2008, had been marked by severe ebbs and flows, all too characteristic of the battle for the state that constituted the politics of the GPA. At almost every stage of the mediation from 2007 and the implementation of the GPA from February 2009, intense conflicts over the interpretation of the accord left their debris on the political terrain, at the heart of which was the struggle over the meaning of 'sovereignty'. Around this notion Zanu PF in particular wove dense layers of political discourse combined with the coercive force of the state that it continued to control. The major aim of this strategy was to manipulate and stall the reform provisions in the GPA, and to regroup and reconfigure its political resources after plunging to the nadir of its legitimacy in the 2008 electoral defeat.

Last, but not least, the leadership of COPAC did not comprise individuals who could sway decisions and influence in their own parties: no doubt a major factor and problem attendant to COPAC. The three co-chairpersons of COPAC were less than high-profile in their respective parties and enjoyed little or no tangible support from both their party leaders and the COPAC membership. No doubt, poor leadership accounted in no so small measure for the obvious organisation's weaknesses and slack coordination within COPAC

SADC and the Constitutional Impasse

The threat of an impasse in the process allowed for the invocation of a SADC resolution passed at the Heads of State and Government Summit in Maputo in August 2012, which stated that, in the event of any difficulties 'regarding the Constitution and implementation of agreements,' the Facilitator should be called upon to 'engage the parties and assist them resolve such issues, bearing in mind the timeframes and the necessity to hold free and fair elections.'

Since the inception of the mediation in 2007 SADC and South Africa in particular invested a good deal of diplomatic capital in the Zimbabwe facilitation. Moreover since the time of the SADC summit in Livingstone, Zambia in March 2011, the SADC leadership consistently restated its commitment to the full implementation of the GPA, fully aware of the points of blockage in the Zimbabwe equation. This remained the position of the regional body even when at times it was slow in following up on the implementation of its resolutions. Thus for example it was only in September 2012 that a resolution passed at the Livingstone summit in 2011, stating that a SADC team would be attached to work with the Joint Monitoring and

Implementation Committee (JOMIC), was finally put into place. Ambassador Katye from Tanzania and Colly Muunya a diplomat from Zambia, were assigned the task.

SADC's commitment to ensuring that the regional body remain in control of the Zimbabwe facilitation was set out very clearly from the beginning of the process, with Thabo Mbeki stating that the role of international players would be to 'support' and not 'direct' the process. This aspiration did not always translate into smooth relations between the EU, US and SADC, with the ongoing debate over the efficacy of sanctions continuing to aggravate the facilitation process. However notwithstanding such tensions and the difficulties they created for SADC, the latter's credibility was heavily at stake in this process. With Mugabe and his party attempting to draw a line in the sand over the constitutional draft and in the process openly flouting the modality set out in the GPA, it was clear that SADC was once again faced with a severe test of its standing as a mediation body.

The lead player in the SADC facilitation, South Africa, also found herself in the midst of its own major challenges, with the ruling ANC facing many questions over its leadership and authority in the face of the Marikana mine killings. The moral and political authority of the ANC had been severely bruised and this was not lost on Mugabe and his party. Against the background of a problematic history of relations between Zanu PF and the ANC, the former at critical points in the SADC facilitation, questioned the authority of President Zuma and his team. Yet South Africa remained the lead player in the mediation process and SADC retained the primary guarantor of the process. Moreover this factor was the major obstacle to Zanu PF's repeated attempts to scuttle the GPA and move towards an early election under conditions favourable to the Mugabe regime.

A Critique of the COPAC-led Constitution Making Process

A wit once commented that a camel was a horse designed by a committee. Very rarely are designs of anything useful the result of compromises and especially compromises where the parties involved in design have radically different ideas. This might be a fair characterization of the constitution produced by the GNU in Zimbabwe. This was perhaps inevitable with the Global Political Agreement as it stood, for this was not a transitional arrangement¹⁸, but a peace agreement to lead to a transition, which it patently has not done.

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

It is evident to all that the process leading up to this draft was highly conflictual and acrimonious, which continued right up to the point when the Principals finally agreed on the draft for the new constitution. This is very unsatisfactory. A good constitutional process

¹⁸ Raftopoulos B "An Overview of the Politics of the Global Political Agreement: National Conflict, Regional Agony, International Dilemma." In Raftopoulos B, (ed.) *The Hard Road to Reform: The Global Political Agreement in Zimbabwe*. (2013). Harare: Weaver Press.

would have had the Principals merely rubber stamp the draft; a good constitutional process should also not have required a referendum (as was the case in South Africa); a good constitutional process would have had wide discussion amongst citizens, with all opinions being reflected in the media; and a good constitutional process would have had total agreement about how the process would happen, and would have been as inclusive as possible.

Virtually none of this can be said to have happened in the Zimbabwean constitutional process from 2009 to date. It can be argued that this process could only produce a camel and not a stallion, and some argue, with considerable justification, that a flawed process can only produce a flawed result. Others argue that at least it is an improvement on the current constitution and all its myriad amendments, and there is some justification for this view.

Recommendations

In the face of the constitution making process in Zimbabwe from 2009 to 2013 there is need for future incidences of a similar nature to be avoided. First, there are benefits in separating the termination of violent conflict and the signing of a peace agreement from the process of drafting the constitution. The Zimbabwean case dating back to 1979 and into the immediate past constitution making process shows that, when these two processes are collapsed into one, long-term concerns of institution building may be compromised. Also, in such cases, public participation is usually minimal.

Second, it is beneficial for purposes of conflict resolution to broaden the number of groups participating in the constitution-making process. Exclusion of key actors from the drafting process may undermine the legitimacy of the final outcome. When dominant groups are excluded, the constitution adopted has dim prospects of enduring. Experience demonstrates that, for purposes of conflict resolution, an initial or interim power-sharing agreement guaranteeing representation to the main parties is beneficial. Ideally, such an agreement should develop into an arrangement, which relies on democratic mechanisms to resolve inter-group disputes rather than on fixed guarantees to each party.

Third, a process of negotiations among stakeholders on key constitutional principles is crucial. Extended deliberation and consultation among key groups clarifies the commitment of the participants to the constitution-making process and lays the groundwork for a political culture of multiparty consultation and cooperation.

Fourth, the participation of the public in the drafting of the constitution is a crucial component of the process. It adds indispensable legitimacy to the final document adopted. It also assists the definition of a national identity and the articulation of common popular aspirations for the future.

Conclusion

The COPAC led process has clearly shown the folly of constitution writing under power sharing arrangements. In short, COPAC succeeded most in affording constitution-making a negative image. A laughing stock perhaps! Zimbabweans in general are no more informed about constitutionality after the COPAC process than they were before the GPA. To be fair, Zimbabweans have become cynical about constitution-making. The whole process has

merely saved to show that that in a transitional period, people driven constitution making is at the least too ambitious and at the worst totally unfeasible. It has been fraught with weaknesses and has produced an imperfect constitution in which the aspirations of the people are not reflected. As a result chances are high that the constitution will not be durable. It is fairly good as a starting point, but a new process might have to begin if the country is to have a people centred, people driven democratic constitution.

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