

## **BEYOND PARTISANSHIP: APPLICATION OF RAWLS’ VEIL OF IGNORANCE IN THE ZIMBABWEAN CONSTITUTION MAKING PROCESS**

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### **ABSTRACT**

The paper applies Rawls’ thought experiment of the veil of ignorance to argue for an objective, non-partisan and non-evil outcome in the Zimbabwean constitution outreach process. Rawls’ veil of ignorance is particularly useful because it tries to put away prejudices and egoistic tendencies in constitution making. For Zimbabweans, non-partisan thinking assumes political equality between human beings as moral persons who have a conception of justice as fairness. In the current constitutional outreach process, main political parties (ZANU-PF and MDC-T) have bargained and campaigned for favoured positions concerning the sticking points of the constitution. The said political parties have used a calculus of party interests to influence public opinion on controversial issues in the constitution such as, among others, executive powers, land, war veterans, media and citizenship. Rawls’ veil of ignorance entails that Zimbabweans should not be disadvantaged by partisan thinking. It is immoral for political parties to tailor principles so as to fit into their existing power structures. Party inclinations and aspirations should not override the views of the grassroots people. The rival opinion of the two main political parties, the paper argues, creates a slippery slope scenario whereby the media, student unions, trade unions and NGOs have flanked behind either MDC-T or ZANU PF perceptions. From a logical point of view, such thinking has created a false dichotomy thereby silencing and ignoring a wide range of alternative viewpoints which transcend partisan views. Further, the paper argues that the future of Zimbabwe, as enshrined in the proposed constitution, ought not to be sacrificed in the attempt to achieve political domination since the future of Zimbabwe is greater than, and lies beyond party politics.

What is constitutionally desirable for Zimbabweans must be reasonable and just rather than party inclined and manipulated.

**Key words:** Veil of ignorance, constitution, justice, objectivity, impartiality.

## INTRODUCTION

This paper critically analyses the procedural aspects of the Zimbabwean constitution making process from a moral point of view. It does not directly focus on the substantive aspects concerning executive powers, land, war veterans and homosexuality, among others that have dominated media debates. Instead, the paper argues that if a fair and legitimate constitution making process is done, views on what has to be contained in the constitution will be gathered in a democratic and hence representative manner. The constitution is very important for Zimbabweans because it is supposed to pave way for fresh elections and end the political crisis that has resulted in the formation of a transitional government of national unity (GNU) in February 2009. The unstable political situation in the country has led to slow economic growth since no investors are eager to invest in a politically unstable environment. Foreign direct investors are holding on to their funds due to skepticism of the current political situation and they want to be sure of what will transpire after a presidential election in 2011. It can be argued therefore, that even though the constitution is a political aspect, it influences economic development indirectly thereby demonstrating its importance.

The paper begins by providing a theoretical background to the idea of a moral point of view by sketching the contributions of Hume, Kant and Rousseau. It is argued that the objective of any moral viewpoint is to arrive at an impartial judgment that transcends egoistic tendencies. Secondly the paper analyses Rawls' veil of ignorance as an altruistic thought experiment that looks at a group of individuals with a common interest such as constitution making. The significance of Rawls' veil of ignorance is explored and a theoretical defence of that position is given so as to counter possible misconceptions.

Thirdly the paper exposes the actual situation that is obtaining in the constitutional outreach programme and applies Rawls veil of ignorance as a philosophical tool that can be used to overcome the problem of partisan thinking. In this regard, important implications that relate to a constitution making process are drawn.

## **THEORETICAL BACKGROUND**

Philosophy provides analytic tools for clarity in debate. Eriksen (2003:8) maintains that “the task of philosophy is merely to clarify the moral point of view and the criteria for democratic legitimacy through an analysis of the procedural requirements for rational debate.” This means that philosophy helps to make procedural requirements less confused and focused. Capaldi (1989) maintains that philosophical conceptualisations of the idea of a moral point of view can be traced back to Hume's notion of the “judicious spectator”. Hume attempts to explain how moral judgments of approval and disapproval are possible given that people normally are focused on achieving their egoistic interests. He posited that in making moral judgments individuals abstract (in imagination) from selfish particular interests and adopt an impartial point of view from which they assess the effects of others' actions on the interests of everyone affected. Since we all can adopt this perspective in imagination, it accounts for our agreement (when we do) in moral judgments (Rawls 1999; 2003; 2007).

Later, philosophers posited similar perspectives for moral reasoning designed to yield impartial judgments once individuals abstract from their selfish aims and interests and assess situations from an impartial point of view. But rather than being mainly explanatory like Hume's, the role of these impartial perspectives is to serve as a basis from which to assess and justify moral rules or principles. Kant's categorical imperative procedure (Timmons, 2002) Adam Smith's impartial spectator (Buchan, 2006), and Rousseau's general will (Gourevitch, 1997) are key examples of accounts of a moral point of view.

The moral point of view appears to be significant part of an account of practical reasoning. For instance, Kant's categorical imperative is envisioned as a point of view

any reasonable person can adopt in deliberating about what he/she ought morally to do (Timmons, 2002). When joined with the common assumption that the totality of moral reasons is final and/or override non-moral reasons, the moral point of view might be regarded as the most fundamental perspective that we can adopt in practical reasoning about what we ought to do.

Rawls's idea of the veil of ignorance (as captured in the idea of original position), as initially conceived, is his account of the moral point of view with regard to matters of justice. Richardson and Weithman (1999) argue that the original position is a hypothetical perspective that we can adopt in our moral reasoning about the most basic principles of social and political justice. What primarily distinguishes Rawls's impartial perspective from its antecedents (in Hume, Smith, Kant, and Rousseau) is that, rather than representing the judgment of one person, it is conceived socially, as a general agreement by (representatives of all adult) members of an ongoing society. The point of view of justice is then represented as a general social “contract” or agreement. In other words, Rawls offers a macro rather than a micro moral reasoning theory. Accordingly, Rawls account is significant since it involves the moral reasoning of the society at large.

### **UNDERSTANDING RAWLS' VEIL OF IGNORANCE**

In his *Theory of Justice* (1971), Rawls gives the idea of a veil of ignorance which can be conceptualized as a mental device to enable individuals to come up with a standard of justice whilst remaining ignorant of their exact position in or specific role to their society. Rawls's social contract contends that rational individuals would agree to if they were each placed behind a veil of ignorance;

The veil permits them to know ‘the general facts of human society’ such as political affairs and the principles of economic theory... whatever general facts affect the choice of the principles of justice’. It prevents them from knowing any particular facts about themselves: ‘no one knows his place in society, his class position or social status...his fortune in the distribution of natural assets and abilities, his intelligence and strength... his conception of the good...his aversion to risk or liability to optimism or pessimism. (Rawls, 1971:137)

From Rawls' understanding of the veil of ignorance, several significant implications can be drawn. *Firstly* Rawls requires suspension of prejudice so as to achieve impartiality of judgment (Freeman, 2003). This entails abstraction from self-interestedness to focus on an altruistic concern. However, this does not entail utilitarianism but a suspension of calculation meant to take advantage. This view matches with Hume, Adam Smith and Kant's conceptions of the moral point of view. The persons in the original position have rationality despite being under the veil of ignorance. This means that they possess a fair idea of the outcome but they suspend taking advantage of the outcome thereby simultaneously disadvantaging others. *Secondly* the parties are assumed to exercise rationality. This means that "while they know that they have some rational plan of life, they do not know the details of this plan, the particular ends and interests it is calculated to promote" (Rawls, 1971:142). *Thirdly* the parties have to exercise justice (Freeman, 2006). Rawls' conception of justice is in the context of procedural justice. Perfect procedural justice involves two aspects firstly, an independent criterion for what constitutes a fair or just outcome of the procedure, and secondly, a procedure that guarantees that the fair outcome will be achieved. Imperfect procedural justice shares the first characteristic of perfect procedural justice; there is an independent criterion for a fair outcome but there is no method that guarantees that the fair outcome will be achieved. Pure procedural justice describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself (Freeman, 2007). To demonstrate pure procedural justice in concrete terms, Rawls imagines a situation where a number of men (and women) are to share a cake. The simplest procedure is that the persons involved will agree that one man should cut the cake. The person cutting the cake will divide it into a number of equal pieces such that even if he/she is the last to pick a piece of cake, the person will be assured of the largest possible share. This ensures transparency in the process. *Fourthly* Rawls argues that the veil of ignorance ensures political objectivity. For Rawls, political objectivity does not entail universality of moral principles (in the Kantian sense) but acceptance by rational persons including the skeptic and the relativist. *Fifthly*, Rawls argues that the veil of ignorance facilitates political constructivism whereby it plays a role as a procedure of construction. *Sixthly* the veil of

ignorance via the original position facilitates a balancing effect which he calls reflective equilibrium by coming up with a consistent set of principles (in Rawls' case the liberty principle and the difference principle).

### **POSSIBLE MISCONCEPTIONS SURROUNDING THE VEIL**

The notion of veil of ignorance raises several possible misconceptions which have to be guarded against. *Firstly* it may be seen as excluding relevant information. However Rawls argues that the veil of ignorance is not a historical state but a form of moral reasoning that is aimed at guaranteeing fairness. Rawls (1971:138) maintains that “the evaluation of principles must proceed according to their general consequences of their public recognition and universal application, it being assumed that they will be compiled with by everyone.” *Secondly* the veil of ignorance must not be conceived as involving a gathering of actual or possible persons but simply an analytic tool of moral reasoning. *Thirdly*, it may be objected that the condition of the veil of ignorance is irrational since ignorance literally entails absence of rationality. It simply means that the parties have no basis for bargaining in the ordinary sense since they have no assurance of what is (or what is not) of their advantage. Hence, Rawls (1971:141) maintains, “If the original position and the veil of ignorance have to yield agreements, the parties must be fairly situated and treated equally as moral persons.” This entails that a public basis for social cooperation is obtained. Looked at individually, each of the above misconceptions may lead to a fallacy of missing the point.

### **SITUATION IN ZIMBABWE’S CONSTITUTION MAKING**

Before the commencement of the outreach programme, the main political parties in Zimbabwe, Zanu PF (Zimbabwe African National Union-Patriotic Front) and MDC-T (Movement for Democratic Change- Morgan Tsvangirai Faction) allegedly went around the country providing their supporters with “suitable” answers for the constitution talking points. Some of the controversial issues include executive powers, land, media, war veterans and citizenship. There are also allegations that the party selected people who would make contributions at these meetings while strongly warning everyone to remain silent.

*The Herald* (21 July 2010) features an interview with Lovemore Madhuku, National Constitutional Assembly chairperson where Madhuku argues that the process of constitutional outreach is flawed because it is left to politicians. For Madhuku, no constitution-making process is left to politicians. A constitution is about the people. It must be people-driven. Madhuku laments a scenario where each political party is telling people what to say and he asks whether that can be called a constitution. Madhuku argues that his National Constitutional Assembly is totally opposed to that process. For him, constitution needs an independent commission or body comprising stakeholders from civil society. The current arrangement is that the ruling parties are running the affairs of the committee. They are telling people what to say. As a result Madhuku describes the whole process as chaotic and a waste of time.

The constitutional outreach program, meant to gather people's views on the new constitution, has exposed the deep political polarization and intolerance that still exists between ZANU PF and MDC-T supporters. Since the programme started, tension, friction and shouting matches have characterized most of the meetings. Even signaling one's intention to contribute a view by raising a hand, has now been politicized by the participants. When MDC-T supporters want to contribute to debate, they raise their hands as any other person would do. And here lies the problem. An open palm is a gesture linked to the MDC party symbol. In retaliation, ZANU PF supporters have resorted to raising their hand with fists clenched. Evidence from *The Standard* clearly shows that there is still much animosity between supporters of ZANU PF and the MDC-T. Such incidents, and many others being observed at the meetings, are clear indicators of the dark cloud of political polarization and intolerance characterizing the political terrain in the country.

The hard-line positions taken by Zanu PF and the larger formation of the Movement for Democratic Change (MDC) on presidential term limits and the retention of the Prime Minister's post may prove to be a difficult task for the troubled constitution-making process. Analysts warned the issue of presidential term limits may come back to haunt the latest attempt to produce a new constitution because of the serious tug of war between

ZANU PF and MDC-T. Zanu PF calls for presidential terms to be limited to two but with a little provision for this to only apply after the new constitution is adopted.

*The Standard* (June 20 - 26, 2010) focuses on the chaos and corruption dogging the constitution process, as well as Zanu PF's crass efforts to control the debate. It concludes: "It seems that Zanu PF's aim in coaching people on how to respond to questions is so that a constitution is produced that promotes their agenda of enabling President Mugabe not only to stand in future elections but also ensure he has another two terms in office. This means the constitution that they would rather see written is not for the general good but to serve the interests of one individual and a handful of his hangers-on who stand to benefit from his politics of patronage."

The Constitution Parliamentary Committee (Copac) has expressed concern over lack of adequate publicity of the ongoing constitution outreach exercise, saying it is likely to impact negatively on the outcome. In an interview Copac co-chairperson Mr Douglas Mwonzora acknowledged they were facing challenges of lack of funding to advertise and raise awareness on the constitution-making process through the media. "The outreach programme is not receiving the publicity that we hoped it would get. We were aiming at achieving the widest possible participation of the public," said Mr Mwonzora. He said they were depending on giving a seven-day notice to districts prior to their visits in a bid to ensure the meetings are attended. "To be honest the programme has not received satisfactory publicity and this is mainly attributed to Copac's lack of funds. "We don't have the necessary funds for us to flight advertisements in the local media. The little we got from donors is meant to cover other pending costs," said Mr Mwonzora.

Reports continue to emerge from Zimbabwe's constitutional revision outreach process that alleged state security forces are intimidating members of the public and monopolizing meetings intended to solicit comment from Zimbabweans as to what they would like to see in the country's new basic document, especially in Mashonaland West province. Sources in the provincial capital of Chinhoyi said state agents on motorbikes and in vehicles without number plates are going from meeting to meeting, dominating



discussions and taking notes of comments by members of the public. Co-Chairman Douglas Mwonzora of the parliamentary select committee in charge of constitutional revision says his panel has noted the complaints and has been investigating.

## **APPLYING RAWLS' VEIL OF IGNORANCE TO THE ZIMBABWEAN CONSTITUTIONAL OUTREACH**

The significance of Rawls' veil of ignorance is that it supplies principles that may be useful for the procedure of constitution making that exclude, among other vices, greediness, egoism, intolerance and violence. Hart (2003:4) asserts, "How a constitution is made, as well as what it says, matters." I am interested in *how* part of Hart's point. The constitution making procedure must be fair for the outcome to be fair and useful for future generations. Emotional tensions based on ideological differences should be buried among the parties so that the process is fair. When differences are buried constitution making becomes part of peace making especially in divided societies like Zimbabwe which went through election violence especially in the June 2008 presidential runup. It becomes a forum of reconciling party based divisions, negotiating conflict and redressing grievances (Hart, 2003).

In the application of the veil of ignorance to the Zimbabwe constitution making process, Rawls thought experiment has important implications on reasonableness. In choosing what is ideal, we should not put egoistic interests but put inclinations and biases at the service of reason. The ideal of public reason merely requires participants in social dialogue about matters of justice to listen to and reasonably evaluate others' claims about justice so long as these claims are voiced in terms they understand and are supported with reasons they can accept on the basis of their own moral views. Rawls (1993:249) maintains that we should not readily accuse one another of self or group interests, prejudice or bias and of such deeply entrenched errors as ideological blindness and delusion. The said accusations by implication arouse resentment and hostility thereby blocking away reasonable agreement. In addition, party interests, as in the case of Zimbabwe, create a false dichotomy in which biases of dominant political parties silence

and bury alternative viewpoints. It does not go beyond this to require that members of dominant group seek out experiences, which can help them understand the standpoints of the subordinate and the marginalized. Nor does the ideal of public reason require dominant group members to examine their moral views self-critically to uncover any signs of ideological determination. By failing to point out the limitations and distortions of the epistemic viewpoint of dominant group members, the ideal of public reason masks and reinforces the privileges of dominant groups rather than uncovering and undermining them. While reasonableness is being exercised, it has to be noted that deep differences of opinion is a normal state of public culture within a democratic society. However, if these differences arise, must not be due to party influences but due to different conceptions of what may be morally acceptable in a democratic society. It is therefore unreasonable to allow political parties to dominate in the constitution making process.

Application of Rawls' veil of ignorance would mean that political parties would allow people to speak out what they think and this may not be necessarily what the dominant parties hold. The constitution must be based on what is morally desirable and not on what parties view as politically expedient. Tolerance will be upheld thereby putting away hidden political motives in the process. Calculations on likely election results and resultant political positions could be avoided by exploring Rawls' veil of ignorance. Tolerance would therefore ensure fair political procedure (Brooke, 2005) instead of taking advantage of a rival political party.

Mabvuto (2007), basing on the constitution making process of Malawi, argues that that the constitution must provide common framework within which people of diverse or diametrically opposed views and beliefs are enjoined to interact without resorting to the force of arms. The political violence experienced in some areas in Zimbabwe such as Masvingo and Manicaland provinces (*The Standard* 18-24 July 2010) are a result of hostility created by political parties. Such rivalry could have been avoided if parties follow clear steps of tolerance.

Rawls' veil of ignorance is an attempt to arrive at morally objective principles of justice. In the context of constitution making, this would translate to an open-minded approach in the settling of political differences (Kukathas, 2003). If moral objectivity is exercised, prejudices would be put aside and political parties would find it easier to implement the outcome. Cohen (2003: 275) argues that "...moral consensus increases social trust and harmony, supports social peace, reduces the complexity of decision making, encourages a willingness to cooperate and so reduces the cost of monitoring and enforcement...and reduces alienation from public choices because citizens embrace the norms and ideals that guide those choices." If consensus is allowed to come from the public by way of finding out the genuine concerns and dominant views, it would be easier for the final product to be trusted. Mistrust is a result of political party domination. The veil of ignorance would put away selfish motives and party interests and allow people to speak out. This would in turn help to support social peace because violence based on party differences would have been avoided.

To a significant extent Rawls' veil of ignorance will help to achieve transparency. This ensures that there are no hidden motives in the process of constitution making. In Zimbabwe, political parties have failed to exercise transparency and have been involved in strategic instead of deliberative politics. Gauthier (1993:315) maintains that deliberative politics connotes a reasoned interchange among persons who recognize each other as equal in authority and entitlement...all remain open to the possibility of persuasion by others. This means that moral ideals are cherished if the process is transparent and if it hinges on public debate. Conversely, if strategic interaction is exercised, there is appeal to self interest through conditional offers of cooperation and forbearance. This involves taking advantage of potential political rivals at the expense of the public. Such actions represent not transparency but a vector sum in the field of political forces.

If Rawls' veil of ignorance is logically carried out, this would mean that political parties shun self-interest and allow public debate to take place. Public debate should be based on genuine principles of democracy and moral ideals from practical experiences elsewhere

(Malawi, South Africa and Kenya). This would ensure public participation in the process. This is consistent with article VI of the Global Political Agreement which states that it is the duty of the Zimbabweans to make a constitution by themselves and for themselves. In addition, the right to participate in constitution making is logically derived from the general meaning of democratic participation in the United Nations Declaration of Human Rights, Article 21 (1-3). Hart (2003:5) contends that participatory constitution making has become one of the criteria of a legitimate process. However, the participation should not involve indoctrination and propaganda to influence public debate but the public should be given constitutional education that is largely free from bias (Martin and Reidy, 2006). If there is no significant public participation, it is likely that the process and the outcome will be rejected.

Furthermore, a fair process would ensure credibility of outcome. If party differences and political party calculations are put aside, a fair process is likely to be achieved and this in turn, gives credibility to the outcome of the process. Assessment of credibility is based on what is accepted as genuine from the point of view of democracy. A constitution making process is credible if it is consistent with the basic principles of justice (Pogge, 1989;2007). If procedural justice is lacking, the process will require revision or revisiting. A credible process will therefore guarantee public acceptance and it will have a futuristic application. Credibility will also ensure cost effectiveness because the outcome is not thrown away. In turn, this avoids additional costs.

## **CONCLUSION**

The paper has argued that John Rawls' veil of ignorance can be used to overcome partisanship in the Zimbabwean constitutional outreach. The Zimbabwean situation has been characterized by political party domination and this has resulted in political parties dominating outreach discussions. Political parties have made their calculations and have taken positions to influence the outcome of the proposed constitution especially in issues to do with executive powers, land, war veterans and citizenship among others. Rawls' veil of ignorance will be useful because it allows both political parties and individuals to be selfless and think of the good of the country since Zimbabwe as a nation is irreducible

to political parties. Rawls' veil of ignorance ensures impartiality and fairness in the choice of principles to be enshrined in the constitution and this occurs when people give their voices in a manner which ensures justice. This implies no individual or group of individuals will take unfair advantage of the process for selfish benefits.

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