

AMIDST CONVERSATIONS WITH THE DEAF: THE STRUGGLE FOR A LEGITIMATE AND DEMOCRATIC CONSTITUTION IN ZAMBIA

Muna Ndulo (Cornell University)

And

Chaloka Beyani (London School of Economics and Political Science)

I. Background:

Zambia has been engaged in several efforts to try and develop a new constitution in the context of both demands for a more democratic constitution and the need to rebuild Zambian political institutions which have been distorted by political manipulation over the years. The constitution of a country is the most important legal document. It must be a liberating document that embodies the wishes and aspirations of the country. It must be a consensus of who the people are and aspire to be. At the beginning of this discussion, we would like to recall the words of Advocate George Bizos on the occasion of his receiving the doctorate degree from the University of Pretoria on December 9, 2011. He recalled: *“the process of drafting the South African Constitution was a long one that involved many people. There were many disputes and negotiations broke down from time to time. Shortly after his release, Nelson Mandela visited the ANC Committee entrusted with drafting a proposed constitution for South Africa of which I was a member. He said to us, Draft a constitution that is good for South Africa as a whole and not the only for the ANC. And that is what we did.”* That is the hallmark of greatness and leadership-the ability to see the big picture and transcend short term goals. In Zambia both the ruling and opposition parties and civil society broadly agree on the need for a new constitution. They, however, differ on the process to be employed in developing a new constitution and on the content of the constitution. The approach to the making of a new constitution for Zambia must build on the past and at the same time should not be constrained by it. It must be participatory and

be guided by dialogue, debate, consultation and participation. Additionally, it should be guided by diversity, inclusivity, autonomy, accountability and legitimacy. The process must be empowering to civil society.

A new constitution for Zambia must provide important safeguards to ensure public accountability, responsiveness to the electorate, participation of the people in governance and the genuine devolution of power to local communities. Zambia has had several constitutions: the 1964 Independence Constitution, the 1973 Constitution and 1991 constitution. There have also been several major constitutional amendments in particular the 1969 and 1996 amendments. In addition, there have been a number of constitution review commissions including: the Chona Commission in 1972; the Mvunga Commission 1991; the Mwanakatwe Commission 1991; and the Mungomba Commission of 2003. Following the Mungomba Commission, the Mwanawasa Government held the 2008 -2010 Constitution Review Conference. The Mungomba Commission was a result of civil society organizations demands for a comprehensive review of the 1996 constitution. President Mwanawasa appointed the Commission in 2003. It prepared a draft constitution and recommended that the constitution be adopted by a constituent Assembly. The Mwanawasa government bent on controlling the process and ensuring that the outcome was to its liking, opposed the constituent assembly idea and ensured that this did not happen.

In 2007 following a meeting of all political parties represented in Parliament, it was resolved that instead of a constituent Assembly, a National Constitutional Conference be convened to deliberate on and adopt the Mungomba draft constitution. The process was boycotted by a number of political parties (including the current governing party, churches and civil society. In August of 2010 the National Constitutional Conference presented its final report. The draft constitution that came out of the process sought to amend parts of the

constitution while leaving intact the Bill of Rights section of the constitution in order to avoid a referendum which is required to amend chapter three of the current constitution. Unsure of support in a referendum, the draft failed to gain the necessary parliamentary majority required to amend the constitution. Of all the previous drafts, the most progressive draft, and one that appears to have the most support, is that which resulted from the Mungomba Commission. It should, therefore, form the basis of any future constitution of Zambia.

The process announced in November 2011.

During the 2011 general elections, Zambians were promised a new constitution by all the contenders in the 2011 national elections. When finally it was announced that Zambia was to embark on yet another constitution making exercise to overhaul the country's constitution, it was hoped that the government had done its homework, learned from mistakes of the past, weighed its option, and took a deep breath to ensure that the sensitive process was done in the best way possible for the interests of the nation and the betterment of its people. We are of the view that the option adopted does not reflect deep reflection and completely ignores mistakes of the past. There was no consultation in the setting up of the process with all the stake holders and civil society. In a people driven process, there should be consultation and participation by all stakeholders in all important steps. In people driven process the government should not be the deliverer of the process but a participant. In a contested process, the tension that ensues on ownership of the process usually prolongs the transition and creates a void that is dangerous for the security of the country. The Zambian Government has clearly decided to control the process. Without consulting anyone outside his government, in November 2011 President Sata announced a new process. This was to be spear headed by

an “Expert Committee”, twenty strong, which we contend is but in name a Commission. It has wide powers. It is unclear under what law the Commission has been established. In the absence of specific legislation setting up the process, one would have to assume that it is under the inquiries Act. The Committee is to collect more submissions and envisages provincial and national conventions. It will determine its own time frames and road map. It has a free hand to determine whether the country needs a referendum or not. The president appointed all the members of the Committee without consultation with Parliament or other stake holders, and set the terms of reference for the team again without consultation. The Government is the one to receive the final document and presumably propose the final changes to the constitution. All these are decisions that need the full participation of all stake holders and yet were taken without the participation of the other stakeholders. In constitution making it is crucial that the constitution making body, the terms of reference the time frames are all matters agreed upon by all the stakeholders in the constitution making process. A contentious process cannot produce a durable constitution in the same way in the words of President Mwanawansa “ a rabbit cannot give birth to an elephant.”.

It is our considered view that the current constitution making process is deeply flawed and is unlikely to deliver a constitution that is legitimate and provides a framework for the democratic governance of Zambia. The primary flaws in the process are the following: (a) the process itself is inherently unrepresentative and suffer from a crisis of legitimacy; (b) it is ill designed to build consensus and produce a constitution the country can be proud of; (c) the terms of reference of the committee do not say a word about its philosophical approach to the constitution but its phobia about values, transparency, institutionalization of accountability and policy is clear in the

manner of its appointment; (d) it is not guided by any constitutional principles; (e) the Government gives the impression that it has little understanding of the functions of a constitution as a foundational document for society. It has even less understanding of the dynamics and relationships between, institutions and procedures; (f) It does not possess any idea about the meaning and significance of decentralization. Successive constitution making processes in Zambia have confused decentralization of central government administrative functions from the center (hence provincial ministers appointed from the center) with devolution of governmental power to local communities which is about devolution of governmental power to democratic sub-national entities within a state and involves the creation and sustenance of such entities as semi-autonomous entities with respect to their authority, responsibility, finance and human resources and accountability arrangements.; (I) it is not guided by an understanding of the abundant best practices in Africa and the rest of the world which have informed successful constitution making processes elsewhere e.g. Kenya, South Africa, Uganda, and Namibia to name just a few countries that have recently concluded successful constitution making processes. It further has no timeline for its work thereby making it open to abuse by those who want to exploit the process to advance their accumulation agendas. In constitution making it is unwise to have an open ended process as the Zambian process has demonstrated time and time again.

It is also noticeable that most successful constitution making processes have had a technical committee composed of recognized constitutional experts to advise the constitution making body why certain provisions are required in a constitution. Experts play an important role in constitution making. It is not enough that there are lawyers among members of the Constitutional making body just as it would not be enough to have general practitioners where a

patient requires heart surgery. The experts would give inputs from a comparative constitutional law perspective and comparative politics from a political scientist's perspective. Experts would also give the best practices of different parts of the world and especially from other African countries. A democratic constitution, as Yash Ghai has ably observed: "*serves as an all-time charter of government and not an instrument of power*". This is because it is made to serve all the people of all generations. The Government appears to have completely forgotten that the clamor for a new constitution in Zambia is based on the public's justified unhappiness of the misuse of Presidential power by successive presidents. The people are concerned about concentration of power in the executive, highly centralized system of governance, excessive state control with limited capacity to govern, limited devolution of power to local communities, the prevalence of appointments to the civil service and public sector based on ethnic or geographical considerations, mediocrity in leadership, lack of transparency and endemic corruption. They realize that a country's welfare as a polity is defined by the health of the three arms of government and the caliber of the men and women that run them. They want to put in place a constitution that ensures and guarantees good governance and creates a capable state that is able to deliver services to its people.

The Zambian politicians seem to have hijacked the constitution making process. Rather than ensure that the people are central to the process they have reduced them into mere spectators. This is most unfortunate. The people should have the final say because their support gives legitimacy to a constitution. It must be realized that politicians and the ordinary people often have diametrically opposed interests in constitution making. It must always be remembered that while ordinary people are interested in values, accountability, social justice, transparency, morality, human rights and security politicians are obsessed with power,

domination and a system that allows them to take advantage of what they consider to be the spoils of power and the spoils of office. We must decide on the system of government not on the basis of the ambitions of a few politicians, but on the principles of democracy, participation, accountability and efficiency.

The challenge for Zambia remains how to achieve a stable political and constitutional order that promotes development and good governance and guarantees citizens government under the rule of law regardless of their gender, color, sexual orientation, sex, or ethnic origin. This calls for the development of political, economic, and administrative institutions for the proper governance of the state and empowerment of our people. We would like to remind our politicians that in a developing country like ours with a great diversity of people, the constitution also serves as a social contract among the people, establishing common values and social solidarity. The constitution should seek to provide a vision for us as Zambians and for our people as a nation. Strengthening Zambia's democracy will demand that constitution making be guided by the need to expand the frontiers of democracy and accountability to the people rather than to bend to the passing needs of elite power sharing, which threatens our fragile democracy.

Suggested approach to making a new constitution

Developing an effective procedure to prevent the manipulation of a constitution making process is a considerable challenge-one that would be helped by the enactment of legislation which clearly articulates the principles and mechanisms that govern the process. For example, the 1993-1996 South African constitution making process articulated a set of principles that were to guide the process. Such articulation of principles enhances the process' quality and

increases the possibility of success. The making of a new constitution in Zambia will require a legitimate, transparent, and agreed statutory framework setting out the process, principles, mechanisms, accountability and timelines. Comparable experience shows that the process takes time and careful planning. A newly elected Narc Government in Kenya in 2002 had promised a new constitution within 100 days. This timeline was not met and an ill-conceived process, on which Zambia's previous National Constitutional Conference appears to have been modeled, was initiated and failed to deliver. Devastating political consequences followed as a result in 2007/2008. In the circumstances of that crisis, a well thought out process established after extensive consultations led by an independent Committee of Experts operating under a statutory framework with proper safeguard delivered a new constitution in 2010. The constitution, which has received world-wide acclaim, was adopted in a referendum by an overwhelming majority.

This time round, Zambia is well placed to avoid the type of constitutional crises that have followed ill-conceived constitutional processes: Kenya 2000, and Zimbabwe 2000. They could do this by building on past constitution making processes described above with a well-managed process. The country is also well placed to avoid political confusion and manipulation of the constitution making process as in the case of Zimbabwe at present. There are also important lessons to learn from the failure of the immediate past National Constitutional Conference in Zambia. It is suggested that there should be no more review commissions to collect views of the public. The views of Zambians on the future constitution for Zambia have been adequately canvassed through several previous commissions indicated above. There is no need to go into this again. In light of several previous Commissions already referred to above, what is required now is a Committee of Experts of no more than 9 persons to review the previous constitutional proposals and lead the process of making a new constitution for Zambia. This was recognized in 1991 when a Task Force was appointed to review past constitutional proposals and prepare a new constitution. Unfortunately, the Task Force had no legislative basis and it was discontinued due to political expediency and another Commission was appointed instead. The idea itself was correct, but like the current process lacked a legislative and legitimate base to implement it.

Members of the Committee of Experts should be persons known for their expertise in constitution making. It is desirable that the committee include two non-lawyers preferably political scientists. The committee must be representative in terms of gender and diversity. It would be useful to include 2 non Zambians on the committee. It is always useful to have the expertise of external experts to bring in comparative experience. Kenya, Namibia, and South Africa utilized external experts to work with their own experts. This helps to gain a comparative understanding of constitutional practices and experiences from elsewhere. The Committee should be appointed by the President subject to ratification by Parliament. Prospective Zambian members of the Committee of Experts should be scrutinized and vetted by a Committee of Parliament. The Committee should adopt its own rules of procedure. It should also be able to engage experts on specialized issues that need to be addressed in a constitution. One of the mandates of the Expert Committee should be to look at all past Zambia constitutions. The Committee should identify areas of agreement and disagreement. The working document of the Committee should be the Mungomba draft. The Committee should come out with a draft Constitution of Zambia within a stipulated time frame.

The draft Constitution should be submitted to a select Committee of Members of Parliament for reaction. The idea of a Parliamentary Select committee is to ensure parliamentary participation in the process. In a democracy, ensuring that democratic institutions such as parliament have a role in the constitution making process is vital and also ensures that they are on board the process and do not attempt to derail it at a later stage. It is important however to focus their engagement at the stage of deliberation and development of the final draft rather than the preparation of the initial text. The Parliamentary Select Committee should not be too large. It should be representative of all political parties in proportion to their representation in Parliament. The Committee of Experts should dialogue with the Parliamentary Committee on the draft. After the dialogue with the Parliamentary Committee, the Committee of Experts should come up with a draft which takes into account the dialogue with the Parliamentary select committee. The responsibility for drafting the new constitution should remain that of the Expert Committee. After the Parliamentary Select Committee's reaction to the preliminary draft constitution, the Committee of Experts should

come out with a final draft to be submitted to the public for public comment. The public review should be well structured and of limited duration. It should last no more than one month. Public participation at this stage increases the public's understanding of the process. After the public review, the Committee of Experts should come out with a final draft Constitution to be presented to Parliament for Enactment. Subsequent to the enactment, the constitution should be submitted to a referendum for adoption.

To avoid a prolonged process, the process must be subject to reasonable time frames which should be clearly stipulated and made known. The process and the time frames must be enacted into law. The following practical steps are suggested as the way forward: A clear and public expression of political will and commitment to making a new constitution should be made by the new Government; Steps should be taken to begin to build political and civil consensus on the desirability of a new constitution making process; Preparation and adoption by Parliament a statutory framework (legislation) to govern the new constitution making process. This is for reasons of legitimacy, transparency, accountability, and regulation of the process. The statutory framework or Act must be designed in such a way as to guarantee success of the constitution making process. To this end, it should specify the objectives to be achieved, establish an independent Committee of Experts as a legal body to spearhead the constitution making process, provide for the composition and functions of the Committee, lay down the principles which will govern the making of the new constitution, indicate the method to be used by the Committee, specify the timelines in which key stages of the process must be accomplished, and narrate the roles of the Parliamentary Select Committee, and the Parliament.

Methodology to be Employed by the Committee:

Following consultations on these proposals, a draft statute should be prepared with objectives, principles, structures, method, and timelines. The proposed structures, method and timelines are as follows: The Committee of Experts will review past constitutional proposals made by the Mvunga, Mwanakatwe, and Mungomba Commissions as well as the National

Constitutional Conference and identify areas of consensus and areas of no consensus. The Committee will then make proposals on how to resolve issues of no consensus and apply international best practice to resolve these issues. The timeline for this would be three months. A draft of the proposals made by the Committee would be released to the public, with formal and simplified versions distributed in all the Districts. The public would then have one month in which to comment on the draft proposals made by the Committee and to send their views to the Committee. During this period the Expert Committee should encourage seminars and workshops to improve people's understanding of the draft constitution. The Committee would have a further two months to incorporate the views of the public into a draft constitution. Thereafter, the draft constitution will be presented to the Parliamentary Select Committee on the Constitution. That Parliamentary Committee would have 3 weeks in which to consider the draft constitution and refer it back to the Committee. Within one month of receiving the views of the Parliamentary Select Committee, the Committee of Experts will finalize a draft constitution which will be presented to Parliament for enactment. Parliament will have 28 days in which to enact the constitution. Any amendments to the draft constitution proposed by Parliament will require an affirmative vote of 65% of the Members of Parliament present and voting in Parliament. The same vote will be required to be met if the draft constitution were to be rejected by Parliament. The new constitution will stand enacted if the dissenting vote in Parliament failed to reach the 65% threshold. In the event that the draft constitution is rejected by Parliament, the latter will present to the Committee of Experts one week after the expiry of 28 days the reasons for rejecting the draft constitution. Committee of Experts will within two weeks of receiving the reasons from Parliament convene a meeting with the Parliamentary Select Committee to consider those reasons and revise the draft constitution accordingly and refer it to Parliament for enactment. Parliament shall enact the draft constitution as presented within a week of receiving it.

The Attorney General will publish copies of the proposed constitution for distribution throughout the country and the Electoral Commissions and the Committee of Experts will conduct civic education on the proposed constitution until the referendum. The referendum should be held within two months of the enactment by Parliament of the proposed

constitution. The Electoral Commission will conduct the referendum and decide on the symbols for the 'yes' and 'no' campaigns. The Committee of Experts will lead the conduct of civic education in the period leading to the referendum and will be assisted by the Electoral Commission. If passed by the referendum, the proposed constitution will be published as the Constitution of Zambia and will be promulgated by the President within two weeks of being adopted by referendum. If not passed by the referendum, the Committee of Experts, and the Parliamentary Select Committee, will convene a meeting chaired by the Committee of Experts within two weeks after the referendum to consider the way forward in making a new constitution for the country.

In terms of the final adoption of the constitution, The Current constitution is very clear on this subject. A bill for the alteration of Part III of the constitution or of article 79 shall not be passed unless before the first reading of the bill has been put to a national referendum where it needs no less than 50% of persons entitled to be registered as voters for purposes of Presidential and parliamentary elections. This procedure is important in constitution making. The supreme law of the land should not be adopted using the same procedures as those that are available for ordinary legislation. A successful constitution is one which obtains legitimization by popular will. Popular democracy demands the institutionalization of a culture of consultation and reciprocal control within regard to law-making and the use of power and privileges. The adoption of a constitution through a referendum is one of the most transparent ways of furthering the culture of consultation in a democracy.

Where are the people in this process?

We stated at the outset that the process must secure the informed and active participation of the public. We do this first by recommending that what- ever process is adopted to develop the new constitution must be agreed upon by all stakeholders. This means that the process must be broadly inclusive. The members of the Committee of Expert's appointments would be ratified by the people's representative in Parliament. The process will be secured by an Act of Parliament. The Committee of experts will draw on all the Constitution Making processes in the history of Zambia which have collected views of the public. The Committee of experts will

engage the Select Committee of the National Assembly in a discussion on the draft constitution. The draft constitution will be put in the public domain for comment and the Committee of Experts will draft the final draft after public comments. The Committee of Experts will encourage the holding of workshops on the various themes of the constitution throughout the country. This will be opportunities for public engagement. And finally the constitution will be adopted by a national referendum as required by the current constitution.

Conclusion

The process of making a constitution is as important as the substance. The process must be legitimate, and, in order for it to be legitimate it must be inclusive. It should represent the interests of all the people in the country, and the people must be made to feel that they own the process and end product. A constitution should be the product of the integration of all ideas from all the major stakeholders in a country, including all political parties both within and outside parliament, organized civil society, and individuals in the society. The process must be transparent, that is, it must be undertaken in full view of the country and the international community. A constitution that is perceived as imposed on a large segment of the population or as adopted through the manipulation of the process by some of the stake-holders is unlikely to gain sufficient popularity or legitimacy to endure the test of time. The process of constitution making cannot and should not be determined solely by the government of the day but by all stake holders. Recent events in North Africa have emphasized the key issues of accountability, participation and transparency in government. Let us remind ourselves what it is that Zambians want. They want a constitution that lays a solid foundation of the respect for fundamental human rights, social economic rights, diversity, and the rule of law. They want a constitution that sets up practical and effective institutions within which to conduct the business of governance and which fosters an environment where peace and development can flourish and the rule of law is observed, the exercise of governmental authority is conducted in a predictable, responsible and legally regulated way and where governmental power is accountable to the people.