

APPROACHES TO DEVELOPING A NEW CONSTITUTION FOR ZAMBIA

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I. Background:

1. 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. Both the ruling party 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. 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 devolution of power to local communities.
2. 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.
3. 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. The Mungomba commission prepared a draft constitution and recommended that the constitution be adopted by a constituent Assembly. The Mwanawasa government was opposed to the constituent

assembly idea and sought to ensure that this did not happen. This was largely because the Mwanawasa government sought to control the constitution process to ensure that the outcome was to its liking.

4. 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).
5. 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. The draft failed to gain the necessary parliamentary majority required to amend the constitution.
6. 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 the future constitution of Zambia. The approach to the making of a new constitution for Zambia must build on the past. 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.
7. It must be realized that developing an effective procedure to prevent the manipulation of a constitution making process is a considerable challenge-one that would be helped by clearly articulating 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.

8. 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 will take much longer than 90 days. 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 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 was adopted in a referendum by an overwhelming majority.

9. This time round, Zambia is well placed to avoid the type of constitutional crises that happened in Kenya in 2007/2008 by building on past constitution making processes described above with a well-managed process that should start within 90 days of the tenure of the new Government. 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.

II. Suggested Steps:

- a. 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 7 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 it lacked a legislative and legitimate base to implement it.

- b. 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. This will help to gain a comparative understanding of constitutional practices and experiences from elsewhere. Persons who have participated in previous constitution making exercises should not be members of the Committee of Experts. 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.
- c. 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. As earlier pointed out this appears to be a draft that is generally accepted in Zambia as forming a good basis for a future constitution of Zambia. The Committee should come out with a draft Constitution of Zambia within a stipulated time frame.

- d. The draft Constitution should be submitted to a select Committee of Members of Parliament for reaction. 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. All the time remembering that the basis of discussion should be the Mungomba draft. The responsibility for drafting the new constitution should remain that of the Expert Committee. The idea of a Parliamentary Select committee is to ensure parliamentary participation in the process.
- e. 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.
- f. 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.
- g. 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.

III. Steps to be Taken to Implement the Process:

The following practical steps are suggested as the way forward:

- a. A clear and public expression of political will and commitment to making a new constitution should be made by the new Government, with process earmarked to begin within 90 days of the Government being in office;
- b. Steps should be taken within 90 days to begin to build political and civil consensus on the desirability of a new constitution making process;
- c. Preparation and adoption by Parliament within 90 days of a statutory framework (legislation) to govern the new constitution making process. This is for reasons of legitimacy, transparency, accountability, and regulation of the process; and
- d. 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.

IV. 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:

- a. 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.

- b. 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.
- c. 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.
- d. 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.

- e. 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.
- f. 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.
- g. 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.