

## Review of the Draft Constitution for the Republic of Zambia

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1. Zambia is in the process of negotiating a new constitution. The exercise is being spearheaded by a Technical Committee of Experts appointed by the Government of the Republic of Zambia and is in response to demands for a more democratic political system in the country. At the core of the demands is a call for the development of viable institutions of state that promote participation of the people in governance, transparency, and accountability. Criticisms about excessive concentration of power in the executive helped to place constitutional and institutional reforms on the national agenda. A key issue, therefore, in this constitution reform project is the demand for constitutional governance with restraint on presidential powers. The current constitution is perceived to create an “imperial presidency”—one that subordinates all institutions of state to itself. Awareness of this problem turned a spotlight on provisions in the current draft constitution that deal with presidential powers. Experience worldwide has shown that a presidential system is likely to lead to dictatorship and pose a danger for political freedom unless there is an effective system of checks and balances, undisputed rule of law, constitutionalism, free and critical public opinion, and a fair and democratic electoral system. It is against the background of these key conditions for development of a democratic state that this review undertakes to evaluate the Draft Constitution issued by the Technical Committee for public comment. The review looks at both the general and contextual issues involved in constitution-making and additionally makes specific comments on the constitutional draft.

### General Comments

2. *“The issue in Africa...is not whether constitutions matter, but what it will take to develop a vibrant tradition of constitutionalism and a process of constitutional government”* (Olowu, paper submitted to the Committee of Experts, Kenya Constitutional Process, 2010). This statement by a colleague in constitutional development work, Dele Olowu, identifies the key issue in Africa. Exceptions are countries such as Namibia, Kenya, and South Africa, which have already developed democratic constitutions. The late Professor Okoth Ogendo also made an important observation in this regard; he reminds us that “constitution-making must not be undertaken merely to achieve some short-term or sectarian goal; a broad and long-range view is necessary.” Constitution makers, he says, must understand that what determines the durability and sustainability of a constitution is not its intrinsic quality but the extent to which it is an accurate—or at any rate ideologically relevant—approximation or interpretation of a people’s history and is accepted as the preeminent societal norm and broad summary of social consent (Okoth-Ogendo, 2000).
3. My first observation is that the draft constitution is too long—it is at least three times the length of the present constitution. Some of the provisions, such as those on labor and industrial relations, pensions and retirement, environmental protection, natural resources, and consumer rights, do not belong in a constitution but are better dealt with in ordinary legislation. Scientific knowledge on these issues is constantly changing, and it is therefore unwise to freeze them into a constitution. The rights to a clean environment, to work, to health, and so forth are constitutional matters, but the details on how these rights will be protected belong to ordinary legislation. Good precedents for reference here would be the articulation of these rights in both the South African and Kenyan constitutions.

4. The constitution contains what are termed “national values”; it does not specify whether the national values, principles, and bases of state policy will be justiciable or not. The current Zambian constitution clearly states that similar provisions are not justiciable.
5. The draft constitution retains dictatorial presidential powers as contained in the 1996 constitution and as a matter of fact expands on them. Examples of expanded powers are those allowing the president to unilaterally divide and create provinces/districts or alter their boundaries. This appears to be an attempt to respond to the current controversy over the recent creation of provinces and districts. Additionally, the President continues to be involved in the appointment of virtually all important posts and is granted power to unilaterally establish and abolish public offices at his or her caprice. In most democracies, this power cannot be unilaterally exercised by the President. At the bare minimum such actions would require strict and effective Parliamentary approval.
6. There are some improvements in the draft. I would include the following as positive measures: dual citizenship; expansion of the bill of rights to include social, economic, and cultural rights; gender equality; subjecting customary law to human rights; setting election dates; dropping of the parentage clause in qualifications for presidential elections; and electing presidents with the majority of 50 percent-plus-one votes.

### **The Preamble**

7. The preamble declares Zambia a Christian nation but also interestingly guarantees a person’s freedom of religion. This is clearly contradictory. To compound the confusion, in the preamble Zambia is declared a “multi-religious state,” again contradicting the declaration of the state as a Christian nation. In addition, Article 4 (2) declares Zambia a “multi-religious and multi-party democratic state.” Declaring Zambia a Christian state also contradicts Zambia’s treaty obligations under the International Covenant for Civil and Political Rights, the Universal Declaration of Human Rights, and the African Charter on People’s and Human Rights. All these instruments, to which Zambia is a party, guarantee freedom of religion. Further, the declaration in question contravenes a *jus cogens norm*. Freedom of religion is recognized as a “*jus cogens norm*” (General Comment 24, Human Rights Committee). Declaring Zambia a Christian state promotes the pernicious idea that non-Christians are in some way second-class citizens. It is also contrary to best practices in constitution-making. Not a single commonwealth or African country has declared itself a Christian state. In any event, declaring a nation a Christian state does not make it one. This approach is no different from that of states fighting to declare themselves Islamic at the expense of Christian and other religions. I would like here to echo the words of acclaimed Algerian anthropologist Mahfound Bennoune, he stated:” Because of my own experience with fundamentalists, I believe the separation of church and state represents major progress in human history. It is the only way you can promote tolerance, coexistence and democracy within a state...”
8. The declaration of Zambia as a Christian nation is from the 1996 constitution. However, unlike the 1996 constitution, in this draft “Christianity” is sneaked into the main body of the constitution, even into the bill of rights. For example the draft constitution now states that propaganda against Christianity is not protected speech. This is a clear attempt to undermine freedom of speech. The question is, how do you reconcile these ideas with the existence in the country of religious groups such as Hindu and Islam, to name a few, whose teachings are different from those of Christianity?

### **Supremacy of the Constitution**

9. Article 1 deals with the supremacy of the constitution. It generally reflects best practice. In the interests of reducing the size of what is already a very lengthy document, article 1 (4) could be deleted. It adds nothing to the supremacy of the constitution, which is already well articulated in Articles 1 (1) (2) (3).
10. Article 1 (5) seems misplaced. It should be in the section relating to the judiciary. In any case, would the other courts not have jurisdiction over matters arising under this constitution? Why should they not?

### **Republic of Zambia and Sovereign Authority of the People**

11. Article 7 deals with the applicable law in Zambia and lists a number of sources of Zambian law. It is fine except that it does not mention existing law, e.g. common law, which applies as a result of the English Extent of Application Act. Is the intention to repeal that Act? One approach could be to have a provision that states as follows: “All law in force immediately before the effective date of the new constitution continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”

### **National Values, Principles and Basis of State Policy**

12. Article 9 specifies Christian values. This again is something you would not expect to see in a state that respects religious freedom.
13. Article 10 (4) states that the state shall not compulsorily acquire any investment unless under international customary law and subject to article 44, except that where the investment was made from proceeds of crime or was corruptly acquired no compensation shall be paid by the state. It is not clear whether this means that a court must first have determined that the property was acquired through crime. There has to be a judicial process for determining how property was acquired. Does “corruptly acquired” or “through crime” apply to local investment or to foreign direct investment? If it applies to foreign direct investment, does it apply to corrupt proceeds acquired in Zambia or to proceeds acquired outside of Zambia?

### **Citizenship**

14. In article 12 (3) it is not clear why 1 April 1986 is a defining date.
15. Article 12 (3) is attempting to legislate citizenship in relation to situations where the place of birth is on a ship, but the purpose of this legislation is not clear. The only thing necessary to legislate here is the nationality of a person born on a Zambian registered ship. The nationality of ships is determined by the Law of the Sea, and States have jurisdiction on ships bearing their nationality. There is no dispute on this in international law.
16. Article 15 as currently phrased deals only with a situation where one of the parents is a citizen by descent. What about a citizen by registration? What is the point of discriminating after people have already become citizens? Does article 15 mean that children of a person who acquired citizenship through registration or adoption cannot claim citizenship because they were born outside Zambia?
17. Article 16 (4) is not clear. Does the article mean that once you have been a refugee in Zambia you can never become a citizen? This sounds extremely restrictive.

**Bill of Rights**

18. Article 26 (3) needs clarification. Is it granting license for the courts to develop new rights not expressed in the constitution or in human rights conventions? One might wish to mandate the courts to develop rights jurisprudence in accordance with human rights jurisprudence developed by international courts. Why only the constitutional court? Constitutional issues are going to arise at all levels, for example the right to bail, prohibition of confessions, etc.
19. In Article 28 on protection of life, defining life as beginning at conception by implication prohibits abortion. In terms of issues dealt with in Article 28 (5) (c), these are typically left to the criminal code rather than the constitution. Does the article mean that constitutional challenges would be entertained on the question of extenuating circumstances? Is that a constitutional issue or a factual issue to be determined by any court in the course of hearing charges involving abortion? The same applies to article 28 (6) (a) (b) (c) and (d).
20. Article 35 deals with the right to freedom of religion and grants the right to manifest one's religion in private and in public. It then severely restricts that right by stating that the right does not extend to anti-Christian teachings. This is contradictory and a violation of international law. By definition non-Christian religions are going to teach and engage in anti-Christian practice. Some, like Islam, do not for example recognize Jesus as a savior. The same can be said of Hinduism. Freedom of religion includes the right not to believe and the freedom to teach that God does not exist. It is sufficient to punish conduct which infringes the enjoyment of religious freedoms by others. In any event, what amounts to anti-Christian teaching and practice, and who is the target?
21. Article 35 (5) seems to restrict the freedom to establish education by religious groups to situations where they are providing education only to members of their own community. There is absolutely no reason for this restriction. It flies in the face of current world-wide practice.
22. In article 47, which deals with access to justice, it is provided that a judgment against the state may not be enforced until one year after the delivery of the judgment. No rationale is provided for such a provision, yet there is no precedent for it in any existing constitution in the world. The provision is likely to pose injustice to citizens. Is this effective justice? Would this provision not work against speedy and effective justice? What happens to a judgment of the constitutional court?
23. Article 48 (c) (f) (v) grants the right to be tried within 90 days. This would be good if it were achievable. What happens if there is no trial within 90 days? Does the provision mean that a trial must be concluded within 90 days? It might make more sense to simply provide for a speedy trial.
24. Article 52 grants women the right to reproductive health. By defining life (in the right-to-life provision, article 28) as beginning at conception, the right to reproductive health as understood in human rights jurisprudence might be limited. In the interest of minimizing contradictions, it is best not to have this provision if article 28 is maintained as it is.
25. In article 55 (5) (d) genital mutilation is specifically mentioned, but it would seem that "cultural practices" is inclusive and sufficient. There would appear to be no need to mention genital mutilation. Is this a particular problem in Zambia? The Convention on the Elimination of All Forms of Discrimination uses the term "cultural practices that are harmful to women or undermine the dignity of women."

26. Article 56 deals with youth. This is an unusual category. Children are defined by the Child's Convention as anyone under the age of eighteen. In the context of the draft constitution, who are the youth? What category of people is envisaged? It appears to be an unnecessary category.
27. Article 63 (4) and (5) goes into too much detail. All one is talking about is protection of traditional knowledge. The term is wide enough to encompass many of the things that are detailed in article 63 (4) and (5).

### **Limitations on Rights and Freedoms**

28. Constitutional matters are going to arise at various levels in the court system. All courts must be allowed to hear such cases. The constitutional court should have the last say; it cannot operate as a court of first instance. The South African constitutional court sits as the final arbiter in constitutional matters. It is contrasted with the court of appeal, which sits as final court in all other matters. In both the Kenyan and South African judicial systems and indeed in most countries in the world you can raise constitutional matters in all the courts.

### **Enforcement of Bill of Rights**

29. The scheme of the constitution is that any allegation of a violation of human rights goes straight to the constitutional court. This means that there will be no appeal system in human rights violations. Allegations are going to arise in the context of other judicial proceedings. The best practice is to allow the other courts to hear those cases and provide for the constitutional court to be the final court.

### **Human Rights Commission and Gender Equality Commissions**

30. Article 73 talks of the Human Rights Commission being subject to "the constitution and any other law." It is not clear what "any other law" means. The observation applies to article 74 establishing the Gender Commission as well.
31. South Africa in its 1996 constitution was the first country to establish a Gender Commission; however, the South African approach has not been very successful. Thinking on this matter has evolved and the practice now is to establish one Commission which is both a Human Rights and a Gender Commission. Kenya in its 2010 constitution combines the two commissions and establishes the Human Rights and Equality Commission. One of its responsibilities is "to promote gender equality and equality generally and to coordinate and facilitate gender mainstreaming in national development."

### **Representation of the People: Electoral Systems and Process**

32. Article 78(k) (iv) requires Parliament to pass legislation creating special arrangements to enable citizens living outside Zambia to vote. Facilitating the voting of citizens living abroad can be extremely expensive and requires extensive logistics. Most countries do not attempt to do this because of the costs involved. The question for Zambia is whether it can manage and afford financing these logistics. Countries such as South Africa with greater resources than Zambia have found this is not practical and do not guarantee it.
33. Article 75 states that members of Parliament shall be elected by proportional representation based on party lists. And yet article 80 (1) talks about persons standing as independents for election to Parliament. How are independents going to stand in a proportional representation system? A proportional system is based on voting for political parties, who then put up party lists that are used to

allocate seats after the counting of votes, which determines the proportion of votes each party gets. Independent candidates are associated with constituency-based elections.

### **Electoral Commission**

34. One of the keys to guaranteeing an independent Electoral commission is a transparent appointment system. The present draft as structured does not guarantee that. Under article 83 (6), the President shall appoint the members of the electoral commission on the recommendation of a committee established under an Act of Parliament, subject to ratification by the National Assembly. Where the committee referred to in article 83 is appointed by the President, the committee will be composed of people who will implement the President's wishes. It is better to have in place a clear appointment process as well for the purposes of granting tenure and specifying a fixed term for commissioners to serve on the Electoral Commission. It appears that article 83 (6) contradicts article 83 (8).
35. In articles 83 through 85, the Electoral Commission composition should be well spelt out, with the number of appointees to make up the electoral commission clearly stated. The make-up of the members of civil society who are qualified to be appointed to the electoral commission should be clearly stipulated.

### **Political Parties and other Candidates**

36. It is not clear why in article 86 (2) (b) political parties are not allowed to sponsor candidates for provincial assemblies or district councils.
37. Article 88 (b) provides that Parliament shall pass legislation to provide for the registration and de-registration of political parties. This provision must also spell out grounds for de-registration; otherwise the provision could be abused to harass opposition parties.

### **The Executive**

38. The Presidency is by definition a dominant feature of a presidential system of government. However, it is unfortunate that the articles in the draft constitution exemplify the extent to which the president can dominate affairs of the state and government. Adequate checks and balances are an important aspect of a democratic presidential system, yet the collective experience of presidential systems has shown that checks and balances can be ineffective without strong oversight institutions. For example, presidential power to appoint persons to official positions must necessarily be qualified and checked by the National Assembly and other bodies as appropriate. Given the history of abuse of power to create ministries, one would have expected the constitution to set an upper limit for the cabinet. A number of countries have done so; a recent example is Kenya's 2010 Constitution. The United States also has a limit on the number of cabinet posts.
39. Article 91 establishes a procedure whereby in cases where Parliament does not approve of presidential appointments the matter is referred to a constitutional court. It is difficult to see the rationale for this approach. Unless the allegation is that the President has not followed the constitution in making the appointment, this is not a judicial decision. In a case that involves a constitutional matter regarding the appointment, the power of the constitutional court already exists through judicial review. Thus this is a political question that requires political accountability rather than judicial arbitration.
40. In article 91 (5), where Parliament refuses to approve a state of emergency, that refusal is overcome by the passage of seven days. If that is the case where is the check on presidential power? A better approach would be to allow the emergency to lapse if it fails to gain parliamentary approval, as is the

approach in the Kenyan and South African constitutions. Parliament then operates as a meaningful check.

41. The same can be said about article 92 (3) and (4). Ratification by Parliament is supposed to be a check on presidential power, and yet this article allows a Parliamentary decision to be easily overcome by the president simply sending a third name. The structure of the current draft constitution is that the president always wins: this is not how you check presidential power. Careful thought should be given to the way in which the National Assembly will actually vet and approve presidential nominees. Specialized committees of the National Assembly, with assistance from professionals in the nominee's area of specialization, may be needed to create an effective mechanism—as opposed to a rubber-stamping operation—for vetting nominees.
42. A common approach adopted by both the Kenyan and South African Constitutions to check presidential power is the requirement that a decision of the president in the performance of any function under the constitution shall be in writing and shall bear the seal and signature of the president.
43. Article 96 (1) immunizes the president from civil proceedings. It is not clearly drafted. It leaves in doubt whether the provision covers private acts and what the position is when the president leaves office.
44. Generally there is too much emphasis on the president throughout the constitution. The vice-president does virtually nothing.
45. One useful limitation that could be introduced on the powers of anyone who acts as president in the absence of the incumbent is that such a person may not exercise presidential powers relating to making constitutional offices, appointing Ministers, conferring national honors, or exercising the prerogative of mercy.

### **Election of President**

46. Article 97 (1) (c) needs clarification. It does not state how long one ordinarily needs to be a resident of Zambia to qualify for nomination to stand as president. Although the constitution abandons the parentage clause in the present constitution, it still requires presidential candidates to be citizens by birth or descent. Where does this place illegitimate and adopted children?
47. In article 110 (4) it is provided that an Act of Parliament shall provide for the circumstances under which a declaration of war may be made. The decision is made by the president subject to Parliamentary approval. As Parliament reviews the president's decision, why then is article 110 (4) needed? On the other hand, the circumstances under which an emergency can be declared should be in the constitution. Parliament should operate as a check on the exercise of those constitutional powers by the president.

### **Cabinet Ministers and Parliamentary Secretaries**

48. Article 116, dealing with membership of the cabinet, includes provincial ministers as members. In a devolved system of government, provincial ministers should not be part of the central government; that would completely undermine the concept of devolution. The second tier of government is supposed to be a level of checks and balances and cannot act as such when it is part of the central government.

49. In article 120 (7), instead of providing that a minister may attend Parliament where it is necessary for the performance of his or her duties, it should be provided that Parliament can summon a minister to attend Parliament and answer questions about his or her portfolio. That is necessary so that Parliament can exercise effective checks and balances. In jurisdictions where ministers are appointed outside Parliament, as for instance in the U.S., that is the practice.
50. Article 121 allows the president to appoint provincial ministers. This should not be permitted as it completely undermines the concept of devolution; the approach being advocated by the draft constitution is the same as the one prevailing in the 1991 constitution. In a devolved system the subnational levels of government are expected to come up with their own leaders; otherwise what you have is decentralization of the center. That is not devolution of power to the provinces.
51. Article 121 (6) states that the functions of a provincial minister shall be as specified under this constitution and an Act of Parliament. This again undermines devolution. The powers of provincial ministers should be constitutional and be provided for in regional constitutions. You cannot have a national Parliament regulating the powers of constitutional offices in the provinces in a text committed to the promotion of devolution.
52. In article 122 the draft constitution creates a new layer of positions called parliamentary secretary. This appears to be an attempt to have some sort of cabinet in Parliament. Parliamentary secretaries are not running ministries, so how can they be accountable for what is happening in the ministries? The idea of appointing ministers from outside of parliament is to entrench the separation of powers and increase accountability. Ministers should continue to run ministries. Parliament should be able to summon ministers to Parliament if their presence is needed for purposes of accountability. How can parliamentary secretaries oversee the implementation of government policies by a Ministry when they are not in the cabinet? In any case there is a cabinet minister to do that. The Expert Committee would benefit from examining the practice under the Kenyan and American constitutions, both of which provide for the appointment of cabinet ministers from outside Parliament.
53. The parliamentary secretaries would clearly not be members of the cabinet. This would lead to a bloated government, which is contrary to the wishes of the public for a lean government.

### **Legislature**

54. Article 125 states that Parliament consists of the president and the National Assembly. How is this reconciled with the doctrine of separation of powers? The fact that the president assents to legislation after it has been passed by Parliament does not mean he or she is part of Parliament. A similar provision in the Kenya constitution reads: "There is established a Parliament of Kenya which shall consist of the National Assembly and the Senate." In Zambia there is no Senate, so Parliament will be the National Assembly.
55. Reading article 138 one gets the impression that there is confusion in the draft with respect to how proportional representation works. The draft sometimes seems to suggest that members of Parliament would be standing as individuals while at the same time talking about party lists. For example, both articles 139 (3) and 140 (1) talk about independent members of Parliament. How is that possible in a proportional representation system? A good example of the proportional representation model is nearby South Africa. Were the Committee of Experts to study the example of South Africa (and other such systems) they would discover that there are no independents in South African national elections.
56. The draft abolishes one-member constituencies and creates a two hundred-member National Assembly to be elected on party lists under proportional representation. This seems to be a departure

from previous consensus. The Electoral Reforms Technical Committee did a detailed study on this matter and recommended combining proportional representation with the existing one-member constituencies. The provisions on proportional representation are drafted in ambiguous terms and not easily understandable, for example the provision for election to National Assembly on the basis of party lists while at the same time allowing for independent candidates. It is not clear how this would work in practice.

57. Article 142 provides for the appointment of a parliamentary secretary to be leader of Government Business in the House; it seems to me that here the draft constitution is creating another vice-president or super minister. How can the parliamentary secretary be leader of the house when he or she is junior to a minister and vice-president? It is best here to look at practices in other jurisdictions. How could such a parliamentary secretary give effective leadership in Parliament and lead the house on government policy when he or she is not a member of the Cabinet?
58. In article 152 (4) the president is given power to dissolve Parliament. Why would the president have this power? Without safeguards, this power can be used to manipulate parliament. The grounds stated in the article 152 (4) can easily be abused. How do we determine that “the executive cannot effectively govern the republic” and thereby grant the president authority to dissolve Parliament? Best practice in constitution-making does not grant such powers to the president; neither the South African nor 2010 Kenyan constitutions do this; the same holds true for the American Constitution. Under the South African constitution, after an election, the first sitting of the National Assembly must take place at the time and on a date determined by the President of the Constitutional Court, but no more than fourteen days after declaration of the election result. Once the first sitting has taken place, the National Assembly determines the time and duration of its other sittings and its recess periods. The absence of such a power in the president underscores the separation of powers. Effective democracies have at their core a strong Parliament. This is absolutely a must if there is to be an effective system of checks and balances.
59. Article 158 talks about the passing of a vote of no confidence in a provincial minister. In a devolved system of government this should not happen. The appropriate place to pass a vote of no confidence in a provincial minister is in the provincial assembly. This provision and others show that the draft does not fully understand or embrace devolution.
60. In article 160 the draft grants a citizen the right to petition Parliament to enact, amend, or repeal any legislation. How is this different from a citizen approaching a Member of Parliament to introduce a bill? The petition will be directed to whom? Citizens can always work through their Members of Parliament to ask them to move bills to change legislation or enact new legislation.
61. Perhaps the greatest weakness of the section on the legislature is that it fails to provide any mechanism to ensure accountability of the executive to the legislature. The South African constitution is unique in Africa in that it requires the National Assembly to provide for mechanisms to “ensure that all executive organs of the state in the national sphere of government are accountable to it: and to maintain oversight of (a) the exercise of national executive authority, including the implementation of legislation.”
62. The importance of a legislature that can act independently of the President to ensure accountability of the President needs no special emphasis, unless parliament is in fact independent of the President, Parliament’s sovereignty simply means the sovereignty of the executive. To secure liberties in an open, plural, and democratic society there ought to be an effective parliament which would not only

be a focal point of policy, but one that is expected to play a crucial role in the checking and balancing of other powers. No constitution, however strongly entrenched, can be a guarantee against the temptations of power on the part of the executive unless there is an independent legislature to act as a counter poise against such temptation, and unless there is a strong national ethic against executive pretensions, the guaranteeing of rights of individuals is not worth the paper it is written on

## **Judiciary**

63. The draft advocates the creation of a separate constitutional court with its own judges. This might end up being an overload of the judicial system. Constitutional courts have their roots in civil law. In the Kenyan constitutional process, the first draft contained a proposal for a constitutional court, but this was rejected because it was felt that a separate constitutional court would make the judiciary bulky. (the proposal also appears to have been rejected in the ongoing Zimbabwe process). It would seem to me that what the country needs is a division in the Supreme Court constituted to have a larger bench whenever the hearing of a constitutional matter arises. Constitutional law is a basic foundation course for all law students, but a mere postgraduate education in constitutional law is not the only yardstick for measuring a person's knowledge of the subject. Furthermore, there are other problems associated with vesting jurisdiction to special courts only over constitutional matters. Constitutional law cannot be treated as a hermitically contained body impervious to effects from other branches of law. Being the fundamental law of the land, constitutional law is in constant interaction with other law streams. For instance, the right to a fair trial in a criminal proceeding is a constitutional matter rather than a criminal law question. There is no neat division between constitutional and other legal issues, and lawyers will always find a constitutional issue inextricably interlinked with banking, commercial law, company law, and customary law disputes.
64. The adoption of a constitutional court would be an attempt to copy the South African model and civil law jurisdictions. To date only South Africa in the Commonwealth has a separate constitutional court. All common law countries worldwide have only the Supreme Court as the highest judicial authority to interpret the constitution. The country with the most constitutional law cases in the world—the United States—does not have a constitutional court. In the draft the constitutional court is created lower than the Supreme Court in hierarchy, but with original and final say on constitutional matters. There is great potential for conflict between the two courts. In the context of Zambia it is unlikely that a constitutional court will have a sufficient case load to justify a full time bench. Furthermore, two parallel courts at an apex can convolute the country's legal system. Hence the more amicable solution for reforming the country's constitutional jurisprudence is a bench of judges who can sit in a group within the Supreme Court, or larger benches to hear issues that emanate substantially from the constitutional text and require interpretation. This would avoid jurisdictional overlapping and turf issues between the Supreme Court and the Constitutional Court.
65. Articles 162 (3) and 175 (2): what happens when there are conflicting decisions from the Supreme Court and the Constitutional Court? What if the Supreme Court refuses to certify a constitutional question to the Constitutional Court? What if the Constitutional Court gives a decision and the Supreme Court fails to apply it? Also, should there not be a cap on the number of judges appointed to the Supreme Court?
66. Article 163 is badly worded. It deals with matters that are often matters of evidence rules or ordinary legislation, for example, how to deal with the production of documents in a court of law. This is not a constitutional matter.

67. Article 164 of the draft states that the “Judiciary shall in the exercise of its judicial and administrative functions and management of its financial affairs be subject only to this constitution and any other law.” What does “any other law” mean? This is a constant feature in this draft. It seems a very dangerous provision. Does “any other law” refer to implementing legislation only?
68. The provisions contained in article 166 make the Chief Justice’s office appear to be like that of a chief prefect. The article appears to create a supervisor/worker relationship between the Chief Justice and other judges. Judges are independent and ought to be independent. The independence of a judge includes non-interference from other judges, including the Chief Justice. All the sections giving the Chief Justice power over other judges are unacceptable and undermine the independence of the judiciary. How, for example, does a Chief Justice ensure that a judge performs the functions of office without fear or favor or bias? How does a Chief Justice ensure that a judge gives precedence to the judicial function over any other activity? The same objections apply with respect to provisions relating to the president of the Constitutional Court. A fundamental aspect of the independence of the judiciary is that a judge should execute judicial functions without interference from other judges.
69. The appointment of judges should not be in consultation with the Judicial Service Commission but be strictly on the recommendation of the Judicial Service Commission. To remove executive influence in appointments of judges, in most countries the president has to act on the recommendation of the Judicial Service Commission. The president should not have any discretion in the matter. That is the approach adopted in most recent constitutions, e.g. the 2010 Kenya Constitution.
70. Article 179 is illogical. The Chief Justice is a member not of the Court of Appeal but of the High Court.
71. Article 188 provides that a judge may be removed by the Judicial Complaints Commission. It is unusual to have the same type of procedure for dealing with complaints against the judiciary as for a serious matter such as removal, which impacts on the independence of the judiciary. The removal of a judge in any jurisdiction is a serious matter and requires a judicial tribunal to decide the appropriate action.
72. The Judicial Service Commission is established by article 194. Its composition is too large, and many of its members are from positions appointed by the president. This makes it more likely than not that the commissioners will carry out the president’s wishes. The number of non-lawyers is fairly large. It is provided that female judges elect a female representative; this is unnecessary. You can achieve female representation by requiring that a certain number of the members of the commission be women. A smaller, demonstrably independent, Judicial Service Commission is what is needed.
73. The draft in article 19 (2) states that the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority in the performance of its functions under the constitution. And yet independence is not secured by the manner of appointment of commissioners, who are in any event dominated by government functionaries.

## **Devolution**

74. Article 197 starts on a bad footing by stating that the state shall be devolved from the national level to the local level while retaining, at the national level, the Executive authority, as provided for under this constitution. Clearly what is being implemented is decentralization of the center. Devolution is about

devolving constitutional authority to subnational centers. Executive authority of the provincial government must reside in the provincial government.

75. The draft constitution without any explanation completely fails to address the Barotse issue and thereby misses an opportunity to offer a possible solution to the issue. Examined carefully, the Barotse issue, is about devolution of power to the regions and marginalization. These could be dealt with within the context of devolution of power to all provinces in the country. In other African states where similar problems have arisen effective devolution has proved an adequate response to perceived and real marginalization by sections of the country
76. The draft seems to confuse decentralization (administration outside the headquarters) and devolution, which refers to semi-autonomous systems of government. Devolution involves the creation and sustenance of a system of local authorities that are semi-autonomous with respect to their authority, responsibility, finance, and human resources and accountability arrangements. These are constant elements of the legal construct of devolution in all industrialized and developing countries irrespective of their political or economic systems.
77. The draft states that this constitution creates a devolved system of governance within a unitary state. A closer look at the provisions shows that it does not at all advance democracy or devolution but simply adds a massive bureaucracy. In devolution the two-tier system of government needs to be codified. The constitution has to protect regions from encroachment from the center. In this draft the provincial minister, who will be head of the provincial assembly, will be a presidential appointee. Members of the provincial assembly can only be elected from predetermined categories, so there is no free and open participation. Provincial assemblies will not pass any laws but simply make recommendations, even on local matters, to the central government. Moreover, elected local governments will run parallel to provincial assemblies. Presidents can create new provinces and districts with great ease. The drafters seem not to fully understand the concepts of devolution and the unitary state.
78. Several of the sections in this part of the constitution recite devolution language, e.g. giving power to local communities, giving autonomy, equitable distribution of resources, etc., without actually doing so. The provisions are not structured to grant these powers.
79. In article 199 it is stated that “where there is a conflict between national and provincial legislation in respect of matters within the concurrent jurisdiction of both levels of government, national legislation prevails over provincial legislation.” The draft does provide the necessary conditions for that to happen; in fact the conditions provided in article 197 (5) (a) (b) (c) are so broad it is difficult to imagine a situation that would not be covered. The approach in most jurisdictions that practice effective devolution is to have national legislation prevail, but to apply the constitutionality test and other strict criteria. To resolve conflicts, article 199 (3) suggests that in some situations provincial legislation prevails. It is not clear whether this means that in such a situation one province could end up with different legislation from other provinces since in that province alone the national legislation would not apply.
80. Article 200 is a strange article. If provincial legislation is unconstitutional, does it not follow that it is then invalid? Why then would the National Parliament have to take measures to repeal the legislation? How do you repeal legislation passed by another legislature? Even more confusing is why a provincial assembly would appeal to the speaker of the national assembly to resolve its dispute with a province. The approach in devolution is that power is constitutionally given to the province and a dispute between the center and provinces must be resolved through the courts. The courts in their

decisions must strictly implement the constitution. The approach of the draft as it currently stands can be exploited by the national government to interfere in the affairs of provincial governments.

81. Article 201 (2) gives the president by statutory order power to create and alter boundaries, provide for mergers of provinces, and divide provinces. This completely undermines the provinces. There is abundant constitutional law literature that demonstrates how the power to change boundaries can be used to change election results, etc. In the American system this is called gerrymandering. The way provinces are created ought to be a matter determined by the constitution. It should never be a power that resides in the president alone.
82. If there were any doubt that the draft fails to implement devolution, this is put to rest by article 202 (1), which provides that the president shall appoint provincial ministers. This makes it clear that provincial ministers under these circumstances would simply be appendages of the central government. As appointees of the president they are answerable to none other than the president. The provincial ministers should be elected by the provinces and accountable and responsible to the provinces.
83. Article 203 dealing with membership in provincial assemblies is likewise not in accordance with devolution. Members of regional assemblies ought to be elected by the region in a separate election. No one should have dual membership in both national and regional assemblies. As currently structured, membership in provincial assemblies represents interest groups—not the local people. The executive authority of the provincial government should be exercised by a provincial cabinet. This cabinet should: 1) implement provincial legislation; 2) implement national legislation within the province; and 3) manage and coordinate the functions of the provincial administration.
84. In terms of functions of the provincial assemblies as established in article 204, it is clear that the assemblies created are decentralizations of power from the center, not devolution. In devolution the center gives the resources to provinces. Provinces must manage and establish budgets themselves. They must raise revenue.
85. The powers contained in article 206 should be left to provincial assemblies. Once you have given the provinces constitutional power to make decisions, you cannot then decide for them. This completely undermines devolution.
86. Articles 207 and 208 deal with officers of the provincial assembly. In a devolved system of government these are matters that should be contained in regional constitutions. The regional constitution has to stick to the powers granted to it by the national constitution.
87. There is no significant revenue-raising measure given to the provinces. There is also no equalization fund to allocate funds to provinces with consideration given to their varied states of development. In a devolved system of governance, provinces are supposed to be the focus that will deliver good roads, clean water, health facilities, electricity and indeed ensure high level agricultural production. They cannot do this without a sound financial base.
88. Since provinces are governments in their own right, it would be assumed that they should have the power to negotiate contracts with governmental and non-governmental agencies. It is important that local governments are specifically empowered to negotiate contracts for their local jurisdictions. Without this power, they might not be able to reach effective agreements to work with civic organizations, business enterprises, or donor agencies with whom they might want to run joint enterprises or undertake programs of co-production or partnership.

89. The issue of revenue collection for local governments does not receive serious attention in the draft. Local authorities ought to be encouraged to raise their own revenues. Local taxes are important not only from a fiduciary viewpoint but also because they help mobilize citizens' interest in the work of local government. Taxes also enhance the demand of the governed for accountability from their governors.

### **Local Government**

90. Article 211 sounds more like a preamble than legislation vesting authority in any entity.

91. In terms of membership of District Councils as provided for in article 214, this might be an opportune time to eliminate the concept of making local Members of Parliament members of District Councils.

### **Public Service Commission**

92. Article 240, which allows the president to constitute public offices for the republic and abolish any office, is a dangerous provision. It provides a route for patronage. At the very least, public offices created should require effective Parliamentary approval. This provision makes the president very powerful. It provides an avenue for undermining the constitution by constitutional means. The objective with regard to the public service appointments should be to remove the public service from political control. It should be to ensure that merit rather than political considerations would serve as the only criterion for appointment and promotion, that dismissals and disciplinary control are not used as instruments of political victimization and thereby jeopardizing the political neutrality of the public service. It is also a part of the general scheme of institutional safeguards against political and tribal appointments. This is particularly important in Zambia where the civil service has been politicized and turned into what I would term a "presidential service". It must be realized that the public service is the bedrock of the government, providing not only expert advice on the basis of which policy is determined but also the machinery for the execution of policy.

93. In order to minimize patronage, many constitutions extend the list of offices that require parliamentary approval for appointments to include: minister, attorney general; solicitor general; secretary to the cabinet; permanent secretaries; high commissioners and ambassadors; and service chiefs.

94. Provisions dealing with commissions fail to structure commissions that are independent. Clear guidelines are needed as to how members of the commissions are appointed. Constitutional provisions should secure their independence and security of tenure.

95. Article 243 (4) on the entry of the *nolle prosequi* ducks the question of what happens when the court does not give the Director of Public Prosecutions leave to enter a *nolle prosequi*.

96. In article 246 the retiring age of a Director of Public Prosecutions is given as 60. Why are there so many different retirement ages for different constitutional office holders: the Chief Justice, Judges, Auditor General, and so forth?

97. Article 249 (1) is extremely problematic. It vests the power to confirm appointments to public office and to exercise discipline on public officials in the president. To avoid politicization of the public service this power should be in the public service commission. What would happen if the president were to disregard the Public Service Commission's recommendations? If Zambia is to develop a professional civil service, the Public Service Commission must be independent and empowered to exercise professional judgment over matters affecting the civil service.

98. According to article 255, the composition of services created under the article is left to be determined by Parliament. This is wrong. If these commissions are meant to be independent, the commissions must be constituted and their powers defined by the constitution; that is, their powers must be constitutional. Otherwise what you have is parliamentary commissions.
99. Article 256 provides for the creation of a) an Anti-Corruption Commission; b) an Anti-Drug Abuse Commission; c) an Anti-Financial and Economic Crimes Commission; and d) a Police and Public Complaints Commission. A separate Commission for Financial and Economic Crimes is unnecessary; the Anti-Corruption Commission should be adequate. Again, the Constitution fails to secure the independence of these commissions, and it is not clear to whom they report.
100. Article 258 (1) provides that in the performance of its functions under the constitution, the commission shall not be subject to the control or direction of any person or authority. This however is not reflected in the provisions that create the commissions. The relevant articles fail to secure the independence of the commissions through mandating a transparent appointment system, guaranteeing secure tenure of commissioners, and ensuring that the commissions do not report only to the president. In fact article 258(4) leaves it to Parliament to enact legislation ensuring that persons appointed to the commission are persons of integrity. The appointments are to be made by the president, subject to ratification by the National Assembly.

### **Defense and National Security**

101. Article 273 deals with defense and security. Once again the constitutional provisions on this matter are weak and lack substance. The question of appointing security and defense chiefs is left to a law to be enacted by Parliament. Here again the issue is how to prevent patronage and politicization of appointments in this sector. The constitution ought to deal with how security and defense chiefs are appointed and put in place measures that ensure security of tenure. I recommend that the Experts' Committee examine the 2010 Kenyan constitution, which includes some innovative provisions that could be helpful in formulating appropriate provisions for Zambia, on this matter.

### **Public Finance and Budget**

102. Article 274 (1) provides that a tax shall not be imposed except by or under an Act of Parliament. Where does this leave the provinces? The article should be structured such that provinces can take tax measures to raise money for local projects.
103. Article 285 sets up a State Audit Commission. Again the provisions setting up the commission shy away from ensuring that the appointment process for members is transparent and guarantees independence of the commission. Article 285 (6) provides that Parliament shall enact legislation to provide for the functioning, appointment of members, tenure of office members, procedures, operations, administration, finances, and financial management of the state audit commission.
104. Article 286 (1) dealing with the Auditor General should set up term limits.
105. Article 291 makes the Governor of the Central Bank also Chair of the Board of Directors for the Bank of Zambia. A better approach would be that, among its many functions, the Board would have oversight of the Governor and the Bank. How could the Board perform oversight functions when the Governor of the Bank is also Chair of the Board?