

The Constitutional-Making Debate and the Way Forward

By

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Permit me to contribute to the debate on the way forward in Zambia's adoption of a new . President Mwanawansa has taken the position that the current Constitution of Zambia prescribes a rigid way of constitution making and that his proposed road map is the only legal way to go about making the new constitution. He has cited Article 79 and 62 to support his argument. The President's view is that the country would require a census and two referenda before a Constituent Assembly is put in place and the constitution adopted. He has advised the OASIS Forum to seek judicial interpretation of the matter from the Court. The OASIS Forum has, in my view, wisely declined to seek judicial intervention. Respectfully, I would like to differ with President Mwanawansa's legal analysis and conclusions. Not only is his proposed road map not the only way forward, it is also not the best avenue to adopt the constitution.

Seeking judicial intervention or interpretation in this matter is unnecessary. Should any person or persons bring this matter to the Courts, the Courts would be well advised to decline to hear the matter. The Courts would be in the right to decline to hear this matter on the grounds that the matter raised is a political question and not a legal one. Zambia can have a new constitution without following the Government Road map, and without violating Article 79 and Article 62. Article 79 and Article 62 do not

prescribe the way to reach agreement on a new constitution. *They provide the way to enact amendments to the constitution and in the case of the latter vest legislative power in Parliament.* Article 79 provide for a way to amend the Zambian constitution. While amending a constitution could include replacing the entire constitution, it can also entail only an amendment and not a replacement. No constitution any where in the world provides a particular mode of making a constitution. *Constitutions are made with permanency in mind.* Typically what is envisaged is that amendments might be necessary. At independence, constitutions were negotiated between liberation movements and the departing colonial power. In the period 1970 -1980s, Africa moved to one party state system of government and during this era constitutions were imposed by ruling parties or military regimes. In the post 1980s period, with the triumph of democracy world wide, undemocratic methods of adopting constitutions has become unacceptable. Modern approaches to constitution-making call for structures that maximize the participation of all stake holders in the country in the process. It is my view that Articles 62 and 79 can be complied with were the country to follow the OASIS Forum Road map.

South Africa in 1993 introduced a new constitution under circumstances where the constitution being replaced had similar provisions to Articles 62 and 79 save for the part on the referendum. Likewise, Zimbabwe in 1999 sought to introduce a constitution under similar circumstances. In the end, the draft Zimbabwe constitution did not become law because it was defeated at the referendum. I was privileged to participate in both processes. In the case of the South Africa process as an Advisor to the United Nations

and in the Zimbabwe case as a Consultant sent to Zimbabwe by International Institute for Democracy and Electoral Assistance (IDEA).

The problem in Zambia arises because two erroneous assumptions are being made. The first wrong assumption is the misconception that a Constituent Assembly has one meaning. The second erroneous assumption is that made by the Constitutional Review Commission that a Constitutional Assembly has to enact a constitution. This led the Constitutional Review Commission to make a mistake and state that the Constituent Assembly should adopt a legally binding constitution. This is not necessary and goes against Article 62. It would need an amendment to Article 62. A Constituent Assembly need not be elected. The critical factor is that its members should represent a genuine cross section of society. The approach used in South Africa in 1993 was to get a representative forum which was called the Multi-Party Negotiating Forum. It represented all political structures in the country. Similarly, when Uganda adopted its 1995 Constitution it did not elect the Constituent Assembly. The key issue is to assemble all stake holders in the country so that the Constituent Assembly is wholly representative.. The fundamental core in assembling a Constituent Assembly is *inclusivity*. The process should not be manipulated by the government in power. Zambia could structure a Constituent Assembly along the lines recommended by the Mwanakatwe Review Commission or the Mungomba Commission. All that is needed is to pass legislation which creates a Constituent Assembly. The legislation would further deal with such issues as who is going to be represented in the Constituent Assembly, its structure and its terms of reference. It is important to pass legislation to create the Assembly so that it has the necessary budget authorization and is given a structure and duties relating to the

modalities of its work are spelt out. In order to comply with Article 62 which gives legislative power to Parliament, Zambians should not give the Assembly power to adopt a legally binding constitution. It cannot do that and it is unnecessary. The Constituent Assembly should be used to adopt the constitution. *The sole purpose of the Constitutional Assembly should be to serve as a forum to elaborate and agree on the text of a new constitution.* This is the forum where consensus and agreement will be reached. There should also be an agreement between political parties that once the constitution is adopted by the Constituent Assembly it will be supported by all of them. It should then be introduced by the Government without amendment in parliament.

One of the reasons the 2000 Zimbabwe process failed was that between the adoption of the draft constitution by the Constitution Review Commission and the referendum President Mugabe altered several important provisions in the draft constitution. In order to comply with Article 79 the Constitution adopted by the Constituent Assembly would, *before* its first reading in parliament, be put to a referendum because the new constitution would involve amending Chapter 3 of the current constitution. Chapter 3 deals with human rights and fundamental freedoms and it can only be amended with a referendum. It will also reinforce the point that sovereignty lies in the people. After its adoption by the referendum it will be introduced into parliament for a second reading. In order for it to become law, it has to be adopted by two thirds majority of Parliament. If this procedure is followed, Articles 62 and 79 would have been complied with. In my view, Article 79 does not impede adoption of the constitution in the mode suggested by the OASIS Forum. It is being used as political gimmick to delay the adoption of a constitution. The country will be better served if

those who wish to comment on the matter and are not lawyers seek the counsel of constitutional lawyers.

It could be argued that the South African constitution of 1996 was adopted by an elected Constituent Assembly. This is certainly true, but this was provided for in the Constitution of 1993 (see Article 73). The South Africans did not, however, conduct an election specially called to elect members of the Constituent Assembly. They made it clear in the 1994 election that the Parliament and Senate elected in the 1994 elections would serve as the Constituent Assembly. The 1993 Constitution of South Africa provided in Article 68 that “the National Assembly and the Senate, sitting jointly shall be the Constituent Assembly.” South Africans did not go out and arrange an election specifically to elect a Constituent Assembly.

The proposed Government Road map in Zambia will lead to a huge expenditure of resources that would be better spent on development and will create an unmanageable process resulting in chaos within the constitution making process. It is difficult to find a country that has developed its constitution in the manner the government now proposes to create.

The Government must envision a bigger picture in this debate and cease its insistence that this is the only way forward. If legality is the issue, why should the government insist on its way when others have demonstrated a faster, cheaper, and legal way of making the constitution. Should the government insist regardless of legal

analysis, they show the real reasons behind their objections to the alternative modes of adopting the constitution.

The report of the Constitutional Review Commission and its recommendations already delineate in clear and concise terms the contours of the existing consensus, the lack of it, and the options on which negotiations must help to resolve the unresolved issues. Ultimately, it is the shared vision of Zambia and the negotiating statesmanship within the Constitutional Assembly which will facilitate the writing of the final version of the constitution. It would be a source of pride for Zambia for President Mwanawansa to leave office at the end of his second term with the legacy of a democratic and durable constitution. Constitution making is both a defining moment and a decisive moment in any country. It is a challenge and an opportunity for statesmen in the political spectrum. When India launched its constitutional-making exercise in the wake of the advent of independence, Jawaharlal Nehru described it as India's tryst with destiny. It is truly so with every country. The idea of people is at the heart and soul of the constitution. That is what a democratic society and social democracy is all about. The Government is called upon to spearhead a constitution framework of liberty and restraint, so that the constitution may at once prove to be the anchor, the compass and the steering wheel for the ship of our country, Zambia.