THE STRUGGLE FOR A LEGITIMATE AND DEMOCRATIC CONSTITUTIONAL ORDER IN ZAMBIA

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In 2007 Zambia embarked on its third attempt to develop a democratic and legitimate constitution since multiparty politics were introduced in 1991. The process has been boycotted by several political parties, NGOs, Churches and other stakeholders. The current constitution making process is deeply flawed and will fail 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 is dominated by politicians, (b) it is ill designed to build consensus and produce a constitution the country can be proud of; (c) the constitutional conference or the legislation creating it 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 its decisions; (d) it is not guided by any constitutional principles; (e) It is not clear what attention the conference gives to the drafting itself, an essential component of preparing the constitution and (f) the Constitution Conference gives the impression that it has little understanding of the functions of a constitution. Its slash and burn policy on the Mungomba draft appears to be uninformed by an understanding of what must be in the constitution and what maybe relegated to legislation. It has even less understanding of the dynamics and relationships between, institutions and procedures; (g) it has shown disdain for the views of the public. (h) It does not posses any idea about the meaning and significance of decentralization. It confuses decentralization of the center with devolution of power to local communities; (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 and Namibia to name just a few countries. It further has no timeline for its work thereby making it open to abuse by those who want to exploit the process to make money, advance their accumulation agenda, or see payments in the form of sitting fees as an economic stimulus in these economic hard time. Already the process has lasted three years. In contrast both the Kenyan and South African process had very strict timelines and each lasted two years. In constitution making it is unwise to have an open ended process as the Zambian process has demonstrated.

The National Constitution Conference is described in legislation setting it up as a forum for the examination, debate adoption of proposals to alter the Mugomba Draft constitution. The members of the Conference are appointed by the Secretary to the Cabinet. Who has in his own way and consistent with limited space to act independently
in a system heavy on patronage tried to be inclusive. The question remains why take this approach. Organizations should have been allowed to pick who ever they thought would represent them well. The approach here shows little schooling in principles and effectiveness of representation. Instead it encourages patronage. In what is clearly a poorly drafted provision, article 13 the National Constitutional Conference Act gives wide ranging functions, including the following: adopting the draft constitution, submitting the adopted draft to Parliament or for submission to a referendum if any provisions amend a part III of the existing constitution. In another equally badly drafted provision Article 13 (4) requires the Constitutional Conference to be accountable to the people of Zambia and in (4) (d) to ensure that the final outcome of the adoption process faithfully reflects the wishes of the people of Zambia. The legislation does not even attempt to provide any monitoring or control mechanism to ensure that these outcomes are achieved making the provisions empty rhetoric. The Mugomba Commission consulted widely through out the country and then come National Conference to mutilate the Mungomba draft without a clear understanding of constitution making. It is also noticeable that most successful constitution making processes have a technical committee composed of constitutional experts to advice the constitution making body why certain provisions are required in a constitution. The Zambian process can be likened to building a house without an architect and engineer who can inform you when your proposals might lead to a house that is likely to collapse. The process of adopting a constitution is as important as its substance. Experts play an important role in constitution making. It is not enough that there are lawyers among members of the Constitutional conference just as it would not be enough to have general practitioners where a patient requires heart
surgery. You would need a surgeon in such a situation. The two groups have difference expertise and experiences. Although it is important that a constitution making process be a local product experts encourage and enhance the local process by ensuring the observance of international standards as reflected in international human rights instruments most of which Zambia have been ratified by Zambia. They ensure that standards are well articulated. Embarrassing situations like where in discussions on social and economic rights the Deputy Minister of Justice is quoted as referring to social economic rights as “I think this utopian”: Obviously completely ignorant about the fact that Zambia is a party to the International Covenant of Social and Economic Rights and the African Charter on Peoples and Human Rights both of which contain social economic rights. Experts would present best practices and counter misleading information such as the statement made by Minister of Information that the Kenya crisis after the 2007 elections was because of the fifty plus one majority. This was ignorance or a clear fabrication. Were it a deliberate fabrication novelist George Orwell might well have had Zambian politicians in mind when he observed: “political language is designed to make lies sound truthful and to give an appearance of solidarity to pure wind.” 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. Moreover it is important that a constitution is justiciable and viable and that it does not conflict with Zambia’s international obligations freely acceded to by Zambia.

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 Constitutional Conference has 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.

Comparative constitution law and constitutional design literature show that it is
unwise for citizens to entrust constitutional making to the legislature of the day as
members of the legislature have vested interests in the existing status arrangements which
they invariably wish to protect and defend in the new constitution and will oppose any
change which has the potential to hurt those vested interests. The Zambian politicians
have hijacked what was once upon a time intended to be a peoples process by
constituting themselves into a body that serves as a vehicle for the mutilation of the
Mugomba draft, ironically a draft that was subject to extensive public participation and
was a product of a much more inclusive and consultative process than the constitutional
conference. Rather consider the people as central to the process they have reduced the
people 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 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 security politicians are obsessed with the structure of the executive. This is because the politicians see the constitution as an instrument of power and domination. 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.

Politicians therefore need to be checked as they have a conflict of interest and cannot be trusted to protect the nation good. The draft that is emerging offends the conception of a constitution in a democracy. It appears to be based on the view that a constitution is an instrument or weapon of power to be used by the politicians of the day to meet their ambitions. This explains decisions like the rejection of the right to freedom of information on some incomprehensible security reasons. And yet the right to freedom of information is today widely recognized by both developing and developed states as an important right in the pursuant of transparency and accountability. Another example of politicians using the constitution as a weapon of power is the adoption of a degree requirement for all persons wishing to stand for the presidency. I have nowhere else yet to see it in any other constitution other than the Zambian draft.

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. Except by a miracle, this is unlikely to happen with the current constitution making process. In conclusion, I 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. This is not going to happen as along as we continue with this process. 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 that to bend to the passing needs of elite power sharing, which is accelerating the fragility of African democracies. In the end if whether Zambia long search for a democratic constitutional order is successfully will depend on leadership. Zambia needs leadership that has a big picture and has a vision to transform Zambia into an inclusive, fair and democratic state and sees the constitution as a transformative document for the achievement of those goals.