TREASON, FREE SPEECH, LEGITIMACY AND THE PROCESS OF
DEVELOPING A CONSTITUTION,

By

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It is most unfortunate that the new constitution for Zambia is being developed amidst acrimony and dissension about the process. Several stakeholders are unhappy about the process and therefore boycotting it. The problems that have emerged can be laid squarely at the door step of the Government. Since the attempt to draft a new constitution began after the 1991 elections, the MMD government has attempted to control the process in order to ensure that the outcome is to their taste. The government has shown great determination and resourcefulness in manipulating the process. It has deployed all sorts of tactics and arguments including threatening those who criticize the process with charges of treason all in an attempt to ensure that whatever process is adopted is controlled by the government and the outcome of the process is determined by the MMD government. It is quite clear that the government is not willing to dismantle a system that ensures unlimited Presidential powers that was carefully assembled during the one party era and from which all renting seeking politicians benefit a great deal and will fight to preserve. The efforts have included constitutional commissions and civil service committees to implement
constitutional reforms. All of which measures have been clear disguises designed to find ways of maintaining the status quo or reinforcing the existing political order while appearing to be in favor of constitutional reform.

More recently the government has resorted to threatening stake holders who are protesting and campaigning against the government’s latest effort at manipulating the process -the National Constitutional Conference- with arrest for treason. The President argues that those protesting the NCC are violating Section 45 of Chapter 87 of the Laws of Zambia which states that “a person is guilty of treason and could face imprisonment for up to 20 years for preparing to carry out by unlawful means alterations to the existing law.” The President’s understanding of the law is wrong. His legal advisers should take responsibility and apologize for such an erroneous interpretation of the law. The operative words in section 45 are “by unlawful means.” That is using methods prohibited by law. I must say when I read the Presidents’ statement I chuckled at the thought of Bishop Terence Mpundu engaging in acts prohibited by law. Even funnier was the idea of Bishop Mpundu receiving lone tutorial in law from the head of state and the possibility of him taking an examination. The President needs to be reminded that our constitution with all its defects guarantees the rights of free speech and assembly. It is legitimate to protest the existence on any law. In democracies around the world people run on tickets with a promise to get rid of certain laws and campaign for that. There would be no legal basis on which to prosecute individuals who are exercising their constitutional right of free speech. Treason is concerned with trying to overthrow a government by unlawful means. Advocating for the defeat of a government which one perceives as incompetent is not treason neither is it treason to campaign for the repeal of an unjust law. It is instead a democratic right to do so. It is a constitutional right of a citizen to voice his opposition or support of government policies or actions. It is not treason to show that a
government is wrong, that a government has been misled, or mistaken on any measure it proposes to take, to point out errors or defects in the government or constitution or laws of Zambia with a view to remedying such errors. To persuade Zambians to attempt to procure by lawful means the alteration of any law is not treason. For example the world over people have campaigned by protests, sit in and all forms of civil disobedience for the abolition of the death penalty just as Zambians campaigned for the end of the one party system of government in 1991 (which was entrenched in the constitution) and were not by any stretch of imagination committing treason. The laws of treason and sedition must not be stretched beyond their function of protecting public order. They are not designed to be used to undermine democracy but to strengthen it.

There is much that is wrong with the proposed National Constitutional Conference and that is the reason why people are opposed to it. It is not fully representative and therefore not inclusive. Many stake holders are unhappy and are not participating in it. However, much a deal on the constitution may seem necessary to those political parties that are participating in the NCC the fact is that there are important constituencies that are not participating in the process. A constitution developed under such circumstances will lack democratic legitimacy. Further, it is not clear as to whether the NCC is to consider the adoption of a whole constitution or is restricted to adopting amendments to the current constitution. What is the logic of leaving such an important issue to ambiguity and interpretation? This is despite the fact that the cry of Zambian for years now has been for a democratic constitution that advances good governance and gives them effective mechanisms for ensuring transparency, and accountable. Views have been expressed that there should be no social and economic rights in the new constitution as the country is not ready for them. This erroneous approach completely ignores the fact that Zambia already subscribes to social and economic rights. Zambia is a party to the International Covenant on Social, Cultural
and Economic Rights, and to the African Charter of Peoples and Human Rights both of which contain extensive social and economic rights. The African Commission on Human and Peoples Rights had ruled in a case brought against Nigeria that these rights are binding on states and therefore enforceable. The inclusion of social and economic rights in the Zambian constitution would only be an act of domesticating what Zambia is already bound to.

What is needed now is for the government to show magnanimity and engage those who are opposed to the NCC in its current form. One stake holder staying out of the process is one too many. The NCC is not fully representative and it needs to be representative of all stakeholders in the country. Without inclusive representation it will lack legitimacy. Thobo Mbeki, then ANC Secretary for International Affairs, writing several years ago saw clearly the merits of an inclusive constitution-making process. “Free and popular participation is vital to the making of a constitution that has legitimacy in the eyes of the people: he argued in a 1990 newspaper article that legitimacy is central to the exercise of democracy and to stability.” The Zambia Government must realize that the process of adopting a constitution is as important as its substance. The process must be legitimate and, in order for it to be legitimate, it must be inclusive. It should represent the interests of all the people in the country, and the people must be made to feel that they own the process. A constitution should be the product of the integration of ideas from all the major stakeholders in a country, including all political parties both within and outside parliament, organized civil society, and individuals in the society. Constitution-making structures must be open to the views and opinions of all stake-holders who must be given a meaningful opportunity to make their views known. If a constitution is to represent the aspirations and dreams of all the people, deliberate steps must be taken to ensure that all stake holders become part and parcel of the constitution making process.

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A constitution that is perceived as imposed on a segment of the population or as adopted through the manipulation of the process by some of the stake-holders is unlikely to gain sufficient popularity or legitimacy to endure the test of time. The process of constitution making cannot and should not be determined solely by the government in power but by all stake-holders. It is imperative that a broad spectrum of people have an opportunity to discuss and voice their opinions as to the appropriate form of the constitutional arrangements that should govern the country.

In Zambia the biggest challenge is how to do this effectively and prevent the manipulation of the system by a government determined to determine the outcome of the process. The South African experience teaches us that, in order to meet the challenge there is need to ensure that the widest possible segment of the population is engaged in the process and to make the widest possible consultations meaningful. The method of consultation must be inclusive and must include meaningful and open discussions without threats and intimidation from the government of the day. After all we are developing a national constitution which unlike a party constitution should be the autobiography of the people of Zambia.