

**AS TEDIOUS AS A TWICE-TOLD TALE: THE STRUGGLE FOR A LEGITIMATE AND DEMOCRATIC
CONSTITUTION IN ZAMBIA**

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I. Background:

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 reform the vertical authoritative structures of the State left by colonialism in order to rebuild Zambian political institutions which have been distorted by political manipulation over the years. Considering the importance of this effort, we thought it wise to share our experiences with our compatriots so that together we can achieve what is best for Zambia. We also would like to share our concerns that Article 79 (3) of the current Constitution is virtually impossible to implement. We demonstrate this later in the adoption section of the paper. The impracticability of Article 79 clearly illustrates the need for comparative experience and expertise in constitution making to avoid such unnecessary (and presumably unintended) consequences.

Rebuilding Zambian political institutions means reorienting these institutions to reflect and represent the wishes and needs of the people of Zambia. The constitution of a country is the most important legal document in this endeavor. It must be a liberating document that embodies the wishes and aspirations of the country. It must be a consensus of who the people are and aspire to be. At the beginning of this discussion, we would like to recall the words of Advocate George Bizos on the occasion of his receiving the doctorate degree from the University of Pretoria on December 9, 2011. He recalled: *“the process of drafting the South African Constitution was a long one that involved many people. There were many disputes and negotiations broke down from time to time. Shortly after his release, Nelson Mandela visited the ANC Committee entrusted with drafting a proposed constitution for*

South Africa of which I was a member. He said to us, Draft a constitution that is good for South Africa as a whole and not only for the ANC. And that is what we did." That is the hallmark of greatness and leadership-the ability to see the big picture and transcend short term goals.

In Zambia both the ruling and opposition parties and civil society in their rhetoric 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. There is also a lack of a clear and demonstrated commitment to democratization. This is clearly reflected in the hesitant and disjointed constitution reform processes the country has been engaged in. These problems show that political self-interest, rather than the interest of the people, has stood in the way of a successful constitution making process in Zambia. Commitment to democratization must begin with a democratic constitution making process itself. The approach to the making of a new constitution for Zambia must build on the past and at the same time should not be constrained by it. It must be, transparent, accessible, participatory and be guided by dialogue, debate, consultation and participation within an agreed legally structured and independent legal framework. Additionally, it should be guided by representation in terms of national diversity, inclusivity, gender balance, autonomy, accountability and legitimacy. The process must be empowering to civil society.

A new constitution for Zambia must be visionary and transformative. It must provide important safeguards to ensure ethics and values in leadership, public accountability, responsiveness to the electorate, participation of the people in governance and the genuine devolution of power to local communities. Devolution should not be mistaken for local government or decentralization. As we explain below, devolution is an essential feature of democratization because it decongests centralized power and transfers it constitutionally to local communities that are organized in constitutional units, empowering communities to decide on matters most important to them politically, socially, and economically.

How should Zambia's constitutional history inform the present constitution making exercise? 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, over the years, there have been a number of constitution review commissions in which people's views have been canvassed but have failed to result in a conclusive constitutional product. These efforts include the Chona Commission in 1972, the Mvunga Commission 1991, the Mwanakatwe Commission 1991, and the Mungomba Commission of 2003. All these Commissions represented a top-to-down imposed constitution making processes based on the Inquiries Act, a colonial legacy of constitution making left by the British constitutional lawyer and academic William Ivor Jennings who pioneered post-colonial constitution making in Asia and Africa. The model enables the politicians, as it would the colonial Governor, to choose and determine what recommendations to accept or reject in the making of a constitution. Experience shows that the politicians, time and time again, have cherry picked recommendations that favor them and reject those that favour the democratic interests of the people. The current constitution making process suffers from the same pitfall. Although called a "Technical Committee", it is really a Commission in disguise. It is unclear under what law the Commission has been established. In the absence of specific legislation setting up the process, one would have to assume that it is under the inquiries Act.

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 Commission prepared a draft constitution and recommended that the constitution be adopted by a Constituent Assembly. Notably, the idea of a Constituent Assembly embodies the democratic representation of the people in constitution making. Following the Mungomba Commission, the Mwanawasa Government held the 2008-2010 Constitution Review Conference. (Although faulty in its design, the Constitution Review Conference, unlike the present-day Technical Committee, had a specific law establishing and regulating it for the purpose of making a new constitution.)

However, the Mwanawasa government was bent on controlling the process and ensuring that the outcome was to its liking, and rejected the idea of a constituent assembly and ensured that this did not happen.

In 2007, following a meeting of all political parties represented in Parliament, political self-interest prevailed and 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 governing party, churches and civil society) and was therefore not nationally representative. In August of 2010, the National Constitutional Conference presented its final report. Unsure of support in a referendum, 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. It bears noting that, 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 any future constitution of Zambia, whilst projecting a modern, transparent, accountable and democratic country.

The Process Announced in November 2011

During the 2011 general elections, Zambians were promised a new constitution by all the contenders in the 2011 national elections. When finally it was announced that Zambia was to embark on yet another constitution making exercise to overhaul the country's constitution, it was hoped that the government had done its homework, learned from mistakes of the past,

weighed its options, and took a deep breath to ensure that the sensitive process was done in the best way possible for the interests of the nation and the betterment of its people.

We are of the view that the option adopted does not reflect deep reflection and completely ignores mistakes and lessons of the past. It fails to show a clear and unwavering commitment to the promotion of transparency and democratic practices because it fails to embark on an open, democratic, and independently established process. In setting up the process, there was no consultation with all the stakeholders and civil society. However, in a people-driven process, there should be consultation and participation by all stakeholders in all important steps and avenues for the participation of the people. In a people-driven process the government should not be the deliverer of the process but a participant that builds consensus on the establishment, regulatory framework, composition, modality, and time frame of the process. In a contested process, the tension that ensues on ownership of the process usually prolongs the constitution making process and creates a void that is dangerous for the security of the country.

The Zambian Government has clearly decided to control the process, probably by using the Inquiries Act which, as pointed out above, is an unacceptable post-colonial legacy. Without consulting anyone outside his government, in November 2011 President Sata announced a new process. This was to be spear headed by an "Expert Committee" (now a "Technical Committee"), twenty strong, which we contend, as stated already, is but in name a Commission. It has broad powers. The Committee is to collect more submissions and envisages provincial and national conventions. It will determine its own timeframes and road map. It has a free hand to determine whether the country needs a referendum or not. The

President appointed all the members of the Committee without consulting Parliament or other stakeholders, and set the terms of reference for the team -- again without consultation. The Government is the one to receive the final document and presumably propose the final changes to the constitution. All these are decisions that need the full participation of all stakeholders and yet were taken without the participation of the other stakeholders. In constitution making it is crucial that the constitution making body, the terms of reference the time frames are all matters agreed upon by all the stakeholders in the constitution making process.

A contentious process cannot produce a durable constitution in the same way in the words of President Mwanawasa: "A rabbit cannot give birth to an elephant." The success or failure of a constitution making process largely depends on its legitimacy built by consensus, representation, diversity, gender balance, nature of the legal framework under which it is set, its composition particularly the personal integrity, expertise, and independence of its members, checks and balances, accountability, safeguards against failure, and endorsement by referendum. The latter is critical where a process like ours in Zambia has been long drawn and politically divisive so that a new constitution is a rebirth of the country.

It is our considered view that the current constitution making process is deeply flawed and is unlikely 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: (1) the process itself is inherently unrepresentative and suffers from a crisis of legitimacy; (2) it is ill designed to build consensus and produce a constitution the country can be proud of; (3) the terms of reference of the committee do not say a word about its philosophical approach to the

constitution but instead reflect its phobia about values, transparency, institutionalization of accountability and policy in the manner of its appointment; (4) the process is not guided by any agreed constitutional principles or national vision; the impression given is that it is simply about a Technical Committee on Drafting a new constitution. In our collective experience, a lot more than that is involved; (5) the Government gives the impression that it has little understanding of the functions of a constitution as a foundational document for society. It appears to have even less understanding of the dynamics and relationships between, people, institutions and procedures; (6) the Government does not seem to fully comprehend the meaning and significance of devolution. Successive constitution making processes in Zambia have confused devolution of central government administrative functions from the center (for example, provincial ministers appointed from the center) with devolution of actual governmental power to local communities (in other words, devolution of constitutional authority and governmental power to democratic sub-national entities within a state, a structure which involves the creation and sustenance of such entities as semi-autonomous entities with respect to their authority, responsibility, finance and human resources and accountability arrangements); (7) strangely, the current process is not guided by an understanding of the abundant best practices in Africa and the rest of the world which have informed recent successful constitution making processes elsewhere, such as in Kenya, South Africa, Uganda, and Namibia to name just a few countries that have recently concluded successful constitution making processes; (8) further, the process has no timeline for its work, thereby making it open to abuse by those who want to exploit the process to advance their

accumulation agendas. As past Zambian processes have demonstrated time and time again, in constitution making, it is unwise to have an open-ended process.

It is also noticeable that most successful constitution making processes have had a technical committee composed of recognized constitutional experts to advise the constitution making body why certain provisions are required in a constitution. Experts play an important role in constitution making. In Kenya for example, the process was led by a Committee of Experts. It is not enough that there are lawyers among members of the Constitutional making body just as it would not be enough to have general practitioners where a patient requires heart surgery. 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. Experts should engage national actors in a rigorous dialogue over substantive issues and not merely used in undefined consultative roles. 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 the Constitution is made to serve all the people of all generations.

The Government appears to have 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 and lack of devolution of power to local communities. A similar claim was made in Kenya, where people complained of an 'imperial presidency'. 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. This is critical in the era of globalization.

The Zambian political elites seem to have time and again hijacked the constitution making processes in the country. Rather than ensure that the people are central to the process they have often reduced them into mere spectators. This is most unfortunate. The people should have the final say because their support gives legitimacy to a constitution-it is their constitution enacted in the name of 'We the People'. It must be realized that politicians and the ordinary people often 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, development and security, politicians are obsessed with power, domination and a system that allows them to take advantage of what they consider to be the spoils of power and the spoils of office in perpetuity as far as possible. We must decide on the system of government not on the basis of individual political self-interest, but on the principles of democracy, participation, accountability and efficiency.

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, sex, or ethnic origin. This calls for the development of political, economic, and administrative institutions for the proper governance of the state and empowerment of our people. We 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 which underpins the integrity of the country. 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 than to bend to the passing needs of elite power sharing, which threatens our fragile democracy.

Suggested Approach to Making A New Constitution

Developing an effective procedure to prevent the manipulation of a constitution making process is a considerable challenge-one that would be helped by the enactment of legislation which clearly articulates the principles and mechanisms that govern the process. One of the prominent and mandatory features of an independent body is an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting "pre-emptive obedience". 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. 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.

Experience elsewhere shows that the process takes time and careful planning. For example, 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. As a result, Kenya suffered devastating political consequences in 2007/2008. In the circumstances of that crisis, a well thought out process established after 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, which has received world-wide acclaim, was adopted in a referendum by an overwhelming majority.

This time round, Zambia is well placed to avoid the type of constitutional crises that have followed ill-conceived constitutional processes in Kenya (2000) and Zimbabwe (2000). We could do this by building on past constitution making processes described above with a well-managed process. The country is also well placed to avoid political confusion and manipulation of the constitution making process as in the present case of Zimbabwe. There are also important lessons to learn from the failure of the immediate past National Constitutional Conference in Zambia. 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 9 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, like the current process, lacked a legislative and legitimate base to implement it. This mistake should be avoided this time round.

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. Kenya, Namibia, and South Africa utilized external experts to work with their own experts. This helps to gain a comparative understanding of constitutional practices and experiences from elsewhere. 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. This will help build consensus and mark the beginning of a democratic constitution making process as the hall mark of consolidating democracy in Zambia. The Committee should elect own Chairperson (the Constitutional Conference did this) and 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. The Committee should design a draft Constitution of Zambia within a stipulated timeframe.

The draft Constitution should be submitted to a select Committee of Members of Parliament for reaction and representation. The idea of a Parliamentary Select committee is to ensure parliamentary participation in the process and to build consensus all the way to avoid the fate of the past draft constitution in Parliament. In a democracy, ensuring that democratic institutions such as parliament have a role in the constitution making process is vital and also ensures that they are on board the process and do not attempt to derail it at a later stage. It is important however to focus their engagement at the stage of deliberation and development of the final draft rather than the preparation of the initial text. 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. The responsibility for drafting the new constitution should remain that of the Expert Committee. 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, including civil society, 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. 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. This is important because Parliament represents political and electoral constituencies which, if carried on board, the prospect of losing a referendum would be minimized.

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. The following practical steps are suggested as the way forward: (1) the new government should make a clear and public expression of political will and commitment to making a new constitution ; (2) the Government should lead, in collaboration with other stakeholders, the building of political and civil consensus on the desirability of a new constitution making process; (3) and Parliament should prepare and adopt a statutory framework (legislation) to govern the new constitution making process, in the interest of legitimacy, transparency, accountability, and regulation of the process. 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 (i) specify the objectives to be achieved, (ii) establish an independent Committee of Experts as a legal body to spearhead the constitution making process, (iii) provide for the composition and functions of the Committee, (iv) lay down the principles which will govern the making of the new constitution, (v) indicate the method to be used by the Committee, (vi) specify the timelines in which key stages of the process must be

accomplished, and (vii) narrate the roles of the Parliamentary Select Committee and the Parliament.

Methodology to be Employed by the Committee of Experts:

As explained above, following consultations on these proposals, a draft statute should be prepared with objectives, principles, structures, method, and timelines for preparing a new constitution. We set forth below proposed structures, method and timelines

The Committee of Experts should 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 of Experts should 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. A draft of the proposals made by the Committee of Experts 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 of Experts. During this period, the Committee of Experts should encourage seminars and workshops to improve people's understanding of the draft constitution. The Committee of Experts would have a further two months to incorporate the views of the public into a draft constitution. Thereafter, the draft constitution will be presented to the Parliamentary Select Committee on the Constitution. That Parliamentary Select Committee would have three weeks in which to consider the draft constitution and refer it back to the Committee of Experts. 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 a referendum.

The Attorney General should 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 Committee of Experts' completion of the draft constitution. The Electoral Commission should conduct the referendum and decide on the

symbols for the 'yes' and 'no' campaigns. The Committee of Experts would lead the conduct of civic education in the period leading to the referendum and will be assisted by the Electoral Commission. If passed by the referendum, the proposed constitution would be submitted to Parliament for enactment and be published as the Constitution of Zambia, and then promulgated by the President within two weeks of being passed. If not passed by the referendum, the Committee of Experts and the Parliamentary Select Committee will convene a meeting led by the Committee of Experts Chairperson within two weeks after the referendum to consider the way forward in making a new constitution for the country. It warrants emphasizing that referenda are the preferred method for the adoption of constitutions. This procedure is important in constitution making. The supreme law of the land should not be adopted using the same procedures as those that are available for ordinary legislation. A successful constitution is one which obtains legitimization by popular will. Popular democracy demands the institutionalization of a culture of consultation and reciprocal control with regard to law-making and the use of power and privileges. The adoption of a constitution through a referendum is one of the most transparent ways of furthering the culture of consultation in a democracy.

In terms of the final adoption of the constitution, we try to recommend a procedure which would satisfy Article 79(3) of the constitution. However, we wish to point out that the wording of the current Article 79(3) is impossible to satisfy. The current Constitution states that “ *A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment **by not less than fifty percent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections.***” (Emphasis added.) This is at best an incredibly onerous requirement. Given that all Zambians are entitled to vote at age 18, it requires the country to determine the number of **all** 18 years olds. In other words, the referendum vote requires 50% of those entitled to be registered to vote – as opposed to those registered as voters. It is not even clear as to who keeps that kind of statistic. From our experience, the normal approach is to require 50% of registered voters.

Where are the people in this process?

We stated at the outset that the process must secure the informed and active participation of the public. We do this first by recommending that whatever process is adopted to develop the new constitution must be agreed upon by all stakeholders. This means that the process must be broadly inclusive. The members of the Committee of Expert's appointments would be ratified by the people's representative in Parliament. The process will be secured by an Act of Parliament. The Committee of Experts will draw on all the constitution making processes in the history of Zambia which have collected views of the public. The Committee of Experts will engage the Select Committee of the National Assembly in a discussion on the draft constitution. The draft constitution will be put in the public domain for comment and the Committee of Experts will draft the final draft after public comments. The Committee of Experts will encourage the holding of workshops on the various themes of the constitution throughout the country. This will be opportunities for public engagement. And finally the constitution will be adopted by a national referendum as required by the current constitution.

Conclusion

There can be no doubt that the country needs a comprehensive, fundamental and inclusive constitution making process. The process of making a constitution is as important as the substance. The process must be legitimate, and, in order for it to be legitimate it must be inclusive and transparent. 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 and end product. A constitution should be the product of the integration of all 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. The process must be transparent, that is, it must be undertaken in full view of the country and the international community. A constitution that is perceived as imposed on a large 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 of the day but by all stakeholders.

Recent events in North Africa have emphasized the key issues of accountability, participation and transparency in government. Let us remind ourselves what it is that Zambians want. We want a constitution that lays a solid foundation of the respect for fundamental human rights, social economic rights, diversity, and the rule of law in a modern Zambia with modern institutions. We want complete equality between women and men in all legal, political, and social arrangements. The time for immunizing customary law against human rights belongs to the last century. We want a constitution that sets up practical and effective institutions within which to conduct the business of governance and which fosters an environment where peace and development can flourish and the rule of law is observed, the exercise of governmental authority is conducted in a predictable, responsible and legally regulated way and where governmental power is accountable to the people and public appointments are transparent and verified.