



# CONSTITUTION MAKING IN ZAMBIA

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## POLICY BRIEF

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### KEY FINDINGS

- Zambia has engaged in several constitution making processes since independence in 1964 without success.
- Previous processes have been executive driven and determined by narrow, short-term political interests.
- There is still need for constitutional reforms in order to reform the authoritative vertical state structure that predisposes the state to authoritarian rule.

### POLICY IMPLICATIONS

- The process for constitutional reform must be well designed in order to succeed and avoid pitfalls of the past. It must be democratic, inclusive, representative and be insulated from political interference by an Act of parliament.
- The process should be led by recognized experts in constitutional law.
- The Kenyan 2008-2010 constitution making process offers an ideal model that Zambia could adopt and contextualize in order to draft a legitimate constitution.

## 1. BACKGROUND

Since independence in 1964, Zambia has engaged in several efforts to develop a new constitution to replace the one bequeathed to the country at independence. This has been in the context of both the demand for a more democratic constitution and the need to reform the vertical authoritative structures of the State left by colonialism and to reform political institutions that have been distorted by political manipulation over the years. This short brief discusses the challenges in, and approaches to, constitution making.

In our analysis, we rely on best practices from countries that have successfully developed democratic constitutions, specifically from processes in Namibia, South Africa, and Kenya. Rebuilding Zambian political institutions entails reorienting the institutions to reflect and represent the wishes and needs of the Zambian people. 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, 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 his receiving the doctorate degree from the University of Pretoria in 2011. He recalled:

The process of drafting the South African Constitution was a long one that involved many people. 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.

That is the hallmark of greatness and leadership- the ability to see the big picture and transcend short-term goals. This quotation captures the task before Zambians, as they seek to develop a constitution that is good for all Zambians. In Zambia, the ruling, and opposition parties and civil society all agree on the need for a new constitution or at least to changes to the current 2016 constitution. They, however, are not in agreement on the process in developing a new constitution and on the content of the constitution. The executive has lacked a clear and demonstrated commitment to democratization as was reflected in the disjointed constitution reform processes undertaken while in power.

One such example was the attempt to amend the current 2016 constitution with Bill 10, a Bill which concealed an attempt to constitutionalize dictatorship, concentrate more powers in the presidency and entrench regionalism. 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 but not be constrained by it. It must be, transparent, accessible, participatory, and guided by dialogue, debate, consultation, and public 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.

A new constitution for Zambia must be visionary and transformative. It must provide important safeguards to ensure ethics and values in leadership, public accountability, and responsiveness to the electorate, participation of the people in governance and the genuine devolution of power to local communities. As we explain below, devolution is an essential feature of democratization because it diffuses 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.

## 2. ZAMBIA'S CONSTITUTIONAL HISTORY AND THE DEVELOPMENT OF A NEW CONSTITUTION

How should Zambia's constitutional history inform the proposed constitution making exercise? Zambia has had multiple constitutions: the 1964 Independence Constitution (Lancaster model), the 1973 Constitution; 1991 Constitution; and 2016 Constitution. There have also been several major constitutional amendments, in particular the 1969 amendments to the 1964 constitution and the 1996 amendments to the 1991 constitution. 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 in 1991; the Mwanakatwe Commission in 1996; the Mungomba Commission of 2003; the Technical Committee process of 2011; and the Constitutional Conference of 2019. All these processes represented a top-to-down imposed constitution making processes based on the Inquiries Act, a colonial legacy of constitution making designed by the British constitutional lawyer and academic William Ivor Jennings. He pioneered post-colonial constitution making in Asia and Africa. The model enables the politicians, as it did the colonial Governor, to choose and determine what recommendations to accept or reject in the making of a constitution. Experience shows that the politicians, repeatedly, have cherry picked recommendations that favor them and rejected those that favor the democratic interests of the people. The 2011 Zambian constitution making process suffered from the same pitfall. Although led by what was called a "Technical Committee", it was really a Commission in disguise. The Technical Committee was exceptionally low on constitution making expertise.

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. The idea of a Constituent Assembly embodies the democratic representation of the people in constitution making. Constituent Assemblies specially elected to develop a constitution were used in Namibia and South Africa. It should be noted that Constituent Assemblies are not similarly constituted in all countries. In both South Africa and Namibia, the Constituent Assemblies were the joint sittings of both houses of parliament under different rules and presided over by the President of the Assembly and not the Speaker of Parliament. 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 2011 Technical Committee process, had a specific law establishing and regulating it for 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 most opposition parties and, 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 which came out of the process

sought to amend parts of the constitution while leaving intact the Bill of Rights section of the constitution to avoid a referendum, which is required to amend chapter three of the current constitution. The result was that the Bill of Rights was not expanded to include social and economic rights. 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, and one that appears to have had most support, is the Mungomba draft constitution.

## 3. THE PROCESS ANNOUNCED IN NOVEMBER 2011

During the 2011 general elections, all the presidential candidates, promised Zambians a new constitution. When it was announced finally that Zambia was to embark on yet another constitution making exercise to overhaul the country's constitution, it was hoped that the executive had done its homework, learnt 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.

Disappointingly, the option adopted, did not demonstrate deep reflection on past failures and completely ignored mistakes and lessons of the past. It failed to show a clear and unwavering commitment to the promotion of transparency and democratic practices. This is reflected in its failure 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. 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 executive should not be the sole driver of the process but a participant that builds consensus on the establishment, regulatory framework, composition, modality, and period 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 then Zambian Government had clearly decided to control the 2011 process, by using the Inquiries Act, which, as pointed out above, is an unsuitable post-colonial legacy approach. Without consulting anyone outside his government, in November 2011, President Sata announced a new constitution making exercise. This was to be spear headed by an "Expert Committee" ("Technical Committee"), of twenty members, which we contend, was a technical committee in name only and not in reality. It was a commission. It had broad powers. The Committee was to collect more submissions and envisaged provincial and national conventions. A complete waste of time and resources. It determined its own time limits and road map. 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 executive was the one to receive the final document and to propose the final changes to the constitution. All these are decisions that need the full participation of all stakeholders and yet were taken without their consent. In constitution making, it is crucial that the constitution making body, the terms of reference and the timeline for all stages of the process are all matters agreed upon by all the stakeholders in the constitution making process. The result of this long-drawn-out contentious process was the enactment of the 2016 Constitution. The 2016 constitution is deeply flawed. All stakeholders agree that it needs replacement with a democratic constitution that promotes effective separation of powers, good governance, and accountability.

## 4. LESSONS LEARNED FROM PREVIOUS ATTEMPTS AT CONSTITUTION MAKING

A contentious process cannot produce a durable constitution. The success or failure of a constitution making process largely depends on its legitimacy built by consensus, representation, diversity, gender balance, and nature of the legal framework under which it is set. In addition, its composition particularly the personal integrity, expertise and independence of its members, checks and balances, accountability, safeguards against failure, and endorsement by referendum are equally important. 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 previous constitution making processes have been deeply flawed and could not deliver a constitution that is legitimate and provides a framework for the democratic governance of Zambia. The primary flaws in the processes were the following:

- the processes were inherently unrepresentative and suffered from a crisis of legitimacy;
- they were ill designed to build consensus and produce a constitution the country can be proud of;
- the terms of reference of the processes did not say a word about their philosophical approach to the constitution but instead reflected their phobia about values, transparency, institutionalization of accountability and policy in the manner of their appointment;



- the processes were not guided by any agreed constitutional principles or national vision; the Government always gave the impression that it had little understanding of the functions of a constitution as a foundational document for society. It had even less understanding of the dynamics and relationships between, people, institutions, and procedures;
- the Government did 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 with devolution of actual governmental power to local communities. For example, provincial ministers and districts commissioners are appointed by the center instead of being elected by local communities. In other words, devolution of constitutional authority and governmental power to democratic sub-national entities within a state, requires a structure which involves the creation and sustenance of semi- autonomous entities with respect to their authority, responsibility, finance, human resources and accountability arrangements;
- strangely, the processes were 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, and Namibia to name just a few countries;
- further, the processes have had no timeline for their 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 repeatedly, in constitution making, it is unwise to have an open-ended process

## 5. BEST PRACTICES IN CONSTITUTION MAKING

It is noticeable that most successful constitution making processes have been led by a technical committee composed of recognized constitutional experts to advise the constitution making body and provide technical expertise in developing constitutions. Experts play a key role in constitution making. In Kenya, for example, a Committee of Experts led the process and in South Africa, thematic expert committees played a key role in the elaboration of the constitution. 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. Experts would also give the best practices of various 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". The Constitution is made to serve all the people of all generations. Furthermore, experts should help in drafting. Hitherto in Zambia, drafting of the constitution has taken the same approach as drafting ordinary legislation. It has been left to one or two drafting persons in the Ministry of Justice. The result is that there are significant inconsistencies evident in the 2016 Constitution. The constitution is too important a document to be drafted in that way. In both Kenya and South Africa, drafting was a group effort among experts and the technical committee.

It should be remembered that the clamor for a new constitution in Zambia is based on the public's justified unhappiness of the misuse of Presidential power by previous successive presidents and lack of devolution of power to local communities. A similar claim was made in Kenya, where people complained of what they termed 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, lack of transparency in appointments to the civil service and public sector, 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 people that run them. They want to put in place a constitution that ensures and guarantees good governance and creates a capable state that can deliver services to its people.

The Zambian political elites seem to have repeatedly 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 sometimes have diametrically opposed interests in constitution making.

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 the spoils of power and the spoils of office in perpetuity as far as possible. We must decide on the system of government not based on individual interests, but on the principles of democracy, participation, accountability, and efficiency.

Experience elsewhere shows that a good and effective constitution making process takes time and careful planning. For example, a newly elected Narc Government in Kenya in 2002 had promised a new constitution within one hundred 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 safeguards delivered a new constitution in 2010. An overwhelming majority of Kenyans adopted the constitution, which has received worldwide acclaim, in a referendum.

## 6. RECOMMENDATIONS

At this moment, Zambia has an opportunity to avoid the type of constitutional crises that have followed ill-conceived constitutional processes in Kenya (2000), Zimbabwe (2000), and Zambia (2016). We could do this by building on past constitution making processes described above with a well- managed process. There are also important lessons to learn from the failure of the immediate past 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 constitutional arrangements for Zambia have been adequately canvassed through previous commissions indicated above. Their reports are readily available. There is no need to go into this again. Considering the previous Commissions already referred to above, what is required now is a Committee of Experts of no more than nine 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 it lacked a legislative and legitimate base to implement it. This mistake should not be repeated in this new process.

Members of the Committee of Experts should be persons known for their expertise in constitution making. The committee must be representative in terms of gender and diversity. It would be useful to include two to three non-Zambians (external experts) 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 collaborate with their own experts in their constitution making processes. 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. This will help build consensus and mark the beginning of a democratic constitution making process as the hallmark of consolidating democracy in Zambia. A chairperson and a deputy who should be of a different gender should lead the Committee. It should 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 constitutions. The Committee should identify areas of agreement and disagreement. The working document of the Committee should be the 2016 constitution. The Committee of experts should elaborate a draft constitution of Zambia.

The draft constitution should be submitted to a select committee of members of parliament for reaction and representation. The Committee of Experts should lead the presentation to the select Committee. 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 ensures that they approve the process and will 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 produce a draft that considers the dialogue with the Parliamentary Select Committee. The responsibility for drafting the new constitution should remain that of the Committee of Experts. 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. For example, the Kenyan public comment stage lasted one month.



Public participation at this stage increases the public's understanding of the process. After the public review, the Committee of Experts should deliver a final draft constitution to be presented to Parliament for Enactment. Subsequent, to the enactment, the constitution should be subjected to a referendum for adoption. This is important because Parliament represents political and electoral constituencies that, if carried on board, the prospect of losing a referendum would be minimized. Ideally a referendum should be a celebration of the new constitution rather than a time to discuss the contents of a constitution.

To avoid a prolonged process, the process must be subject to a reasonable time line that should be clearly stipulated and made known. The process and the time lines must be enacted into law.

The following practical steps are suggested as the way forward: First, the government should make a clear and public expression of political will and commitment to making a new constitution; Second, 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; and Third, Parliament should prepare and adopt a statutory framework (legislation) to govern the new constitution making process. This is 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 ;

- specify the objectives to be achieved,
- establish an independent Committee of Experts as a legal body to spearhead the constitution making process,
- provide for the composition and functions of the Committee,
- lay down the principles which will govern the making of the new constitution,
- indicate the method to be used by the Committee,
- specify the timelines in which key stages of the process must be accomplished, and
- narrate the roles of the Parliamentary Select Committee and that of Parliament.

7. 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, Mungomba Commissions as well as the National Constitutional Conferences, and the Expert Commission of 2011, and identify areas of consensus and areas of disagreement.
- The Committee of Experts should then make proposals on how to resolve issues of disagreements 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 of Experts 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 should have a further two months to incorporate the views of the public into a draft constitution.
- Thereafter, the draft constitution should 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 that will be presented to a referendum.
- The Attorney General should publish copies of the proposed constitution for distribution throughout the country and the Electoral Commission and the Committee of Experts should conduct civic education on the proposed constitution until the referendum is held.
- 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 should be assisted by the Electoral Commission. If passed by the referendum, the proposed constitution should 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 should 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. 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 that obtains legitimization by popular will. Popular democracy demands the institutionalization of a culture of consultation and reciprocal control about 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.

8. THE PROBLEM PRESENTED BY ARTICLE 79 (3) OF THE CURRENT CONSTITUTION.

In reference to the final adoption of the constitution, We wish to point out that the wording of the current Article 79(3) is unrealistic. 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 Zambians are entitled to vote at age 18, it requires the country to determine the number of persons aged 18 years and above. In other words, the referendum vote requires 50% of those entitled to be registered to vote - as opposed to those registered as voters. From experience, the typical approach in various constitutions in the world, is to require 50% of registered voters. This issue will have to be resolved.

9. WHERE ARE THE PEOPLE IN THIS PROCESS?

As stated at the outset the process must secure the informed and active participation of the public. We do this first by recommending that all stakeholders must agree upon whatever process is adopted to develop the new constitution. This means that the process must be broadly inclusive. The people’s representatives in Parliament would ratify the members of the Committee of Expert’s appointments. An Act of Parliament will secure the process. The Committee of Experts will draw on all the constitution-making processes in the history of Zambia that 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. These will be opportunities for public engagement. 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 developing a constitution is as important as the substance. The process must be legitimate, and, 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 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 stakeholders is unlikely to gain sufficient popularity or legitimacy to endure the test of time. The process of constitution making cannot and should not be seen to be determined solely by the government of the day but by all stakeholders.

Let us remind ourselves as to what it is that Zambians want. They 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. They want complete equality between women and men in all legal, political, and social arrangements. They 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.





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