

## Why Doesn't African Society Demand better Constitutional controls? – A Case of Zambia

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### Key features of the Political System

Zambia, a landlocked country located in Southern Africa, became independent in 1964. Until 1990, it was *a de facto* single-party state under the presidency of Kenneth Kaunda, who led the campaign for independence. In 1991, Zambia returned to multiparty democracy in response to growing popular demand and external pressure.

Although often referred to as an adaptation of the Westminster model, the Zambian political system is best described as a presidential system. The president, who is both head of state and government, makes critical appointments such as his vice-president, the speaker of the national assembly, cabinet ministers, nominates eight (8) members of parliament, the head of the central bank of Zambia, and persons in charge of important statutory bodies such as the Anti-Corruption Commission and the Electoral Commission. The 150 elected members of the (unicameral) National Assembly are chosen on the basis of the first-past-the-post electoral system. By-elections are obligatory once vacancies arise.

In respect to the judicial system, both common law and customary law are practised in Zambia. Formally, the latter is subordinate to the former, but in practice customary law still has a substantial influence on the day-to-day life of many Zambian citizens.

At the local level, the devolved powers seem to engulf the decentralized ones. It remains to be seen whether decentralization policies truly materialize now that the main opposition party controls most urban city councils.

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## 1. INTRODUCTION

This paper attempts to answer the question: *“Why doesn’t African society demand better constitutional controls?”* On this journey of interrogating the subject several issues would be taken into consideration. These include cultural constraints (including acquiescence in particular political cultures); patronage networks; intimidation in the face of state power; a lack of understanding of the role and potential of constitutionalism in Africa. The author must hasten to state that the paper will draw from and focus on the Zambian experiences and observations.

Why doesn’t African society demand better constitutional controls? In order to answer this question, we must first have to answer a preliminary question: what is a Constitution? A Constitution is “(a) charter of government deriving its whole authority from the governed”<sup>2</sup> which establishes the form of government. It specifies the purpose of the government, the power of each arm of the government, the state-society relationship, the relationship between various government institutions, and the limits of government. The classic liberalism posits that the state and society can be viewed as a big contract. If so, in a liberal democratic country, the constitution is the fundamental part of the social contract; it is a fundamental contract between the state and the society<sup>3</sup>.

This is easily presented in Bo Li’s illustration that: “...we view the constitution as a job description where the people as a whole hire some officials to administer the government for public good, and the constitution is the employment contract and job description. To be sure, many other laws are also job descriptions for the government but the constitution is the highest. It is a guide for legislation and for the interpretation of legislation...”<sup>4</sup>

In other words, a constitution is a set of rules and precedents governing political and administrative conduct. It defines the polity, establishes the rules and limitations of the relationship between the state and its citizens; and they fix and reflect the social contract that underpins the functioning of an organised society<sup>5</sup>.

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<sup>2</sup> Black’s Law Dictionary

<sup>3</sup> Bo Li, What is Constitutionalism? *Perspectives* Vol. 1. No. 6, p.1 [www.oycf.org](http://www.oycf.org)

<sup>4</sup> Ibid p.1

<sup>5</sup> Constitutional Review and Reform: And Adherence to Democratic Principles in Constitutions in Southern African Countries, Open Society Initiative for Southern Africa (OSISA) publication 2007 p.1

It enables society to function properly, to minimise conflicts among its constitutive components and to safeguard citizens' rights. Such a body of rules may be based on tradition or embodied in a formal, codified document that assumes a certain idea of organised power describes the arrangements of public office and delineates the rights and duties of the citizenry as well as the prerogatives of the different organs of Government.

All organs of the State should derive their powers from the Constitution. Any action by any organ of the State that is not in conformity with the Constitution is invalid. The Constitution derives its authority and legitimacy from the people. Thus, the source of State power is the people. In this modern organisation, the people are the masters.

However, systematised comparative knowledge and information on constitutional change are still lacking, particularly with regard to its process dimension and the scope, methods, and effects of participations, as well as the variations of appropriate content that provide defining benchmarks for constitutional standards. In other words, the way a process – at law or in practice – is designed either assures respect for people's views (the source of the content and custodians of a Constitution) or disregards people's input. Therefore, the process largely determines and/or protects the content. These two aspects – process and content – must not be discussed in isolation<sup>6</sup>.

To address the question posed at the outset, the author will present a historical perspective of constitutional development followed in Zambia to address constitutional shortcomings in an attempt to answer the theme why African society does not demand better constitutional controls.

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<sup>6</sup> Simon Mwale, Constitutional Review: The Zambian Search for an ideal Constitution, a Jesuit Centre for Theological Reflection Policy Brief, 2005

## 2. CONSTITUTIONALISM AND CONSTITUTIONAL DEVELOPMENT – A SITUATIONAL ANALYSIS OF ZAMBIA

### 2.1. Constitutional Background

Zambia, like many African countries, has experienced constitutional instability since independence. This instability is primarily reflected in the many Constitutions (four) that the country has had in the last forty-four years of independence with the fifth one currently under review<sup>7</sup>. These are the Independence Constitution of 1964, the One-Party Constitution of 1973 (headed by Mr. Mainza Chona, SC) , the Reintroduction of Multiparty System Constitution of 1991 (headed by Professor Patrick Mvunga) and 1996 Constitution (header by Mr. John Mwanakatwe, SC)..

This is an “appalling” record by any standards as a Constitution must be durable enough to stand the test of time. Some scholars have observed that on average a constitution in Africa lasts ten (10) years. According to Anyangwe, a Professor of Constitutional Law at the University of Zambia, there is presently no African country which is using a constitution that is over 20 years old. This is largely due to manipulation of constitutions to suit the interests of a particular regime.

Since the Constitution is the supreme law of the land from which the government derives its power, this should not change with ascendancy of each regime; Constitution embodies the values and aspirations of the people and should therefore endure over generations.

This endurance is exemplified by the Constitution of the United States of America. Since 1787, the USA has had one Constitution. Similarly, other older democracies have had the same Constitution for decades. These Constitutions have remained the same despite changes of government or leaders. The major consequence of constitutional instability is that it creates legal and economic uncertainties and partly accounts for the neglect of the rule of law and low economic investments in Zambia.

The major reason for constitutional instability in Zambia, as elsewhere in Africa, is that the Constitutions that have been enacted so far have lacked legitimacy and moral authority. The legitimacy of a Constitution is concerned with how to make

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<sup>7</sup> Was headed by Mr. Wila Mung'omba

it command loyalty, obedience and confidence of the people<sup>8</sup>. A notable constitutional scholar, Professor Nwabueze, said:

“It cannot be disputed that a major cause of the collapse of constitutional Government in many of the new states was the general lack of respect the Constitution among the populace and even among the politicians themselves. The state itself is an alien, if also a beneficial creation; its existence is characterised by a certain artificiality in the eyes of the people and it is remote from their lives and thought<sup>9</sup>

To be legitimate, a Constitution should be generally understood by the people and be acceptable to them. It cannot hope to command the loyalty, respect and confidence of the people if they neither understand it nor accept it. In order to achieve the necessary understanding and acceptance, a Constitution needs to be put through a process of popularisation, with a view to generating public interest in it and an attitude that everybody has a stake in it and that it is the common property of all. In other words, apart from being based on state governance models, these constitutions are not rooted in indigenous institutions and value systems. Hence, ordinary people do not understand them. The normative framework is foreign and is rooted in English culture for the Zambian Constitution! To understand the current constitutions, Africans would have to transform into, or conform to, English or French culture! Black Englishmen/women or Frenchmen/women! Further, the aspect of the complexity of having a ‘national’ value system in a country like Zambia which has many ethnic groups (For instance Zambia has Seventy Three (73) ethnic groups). Needless to say, people must be made to identify themselves with the Constitution. A Constitution would, in the absence of this sense of identification, of attachment and involvement, always remain a remote, artificial object, with no more real existence than the paper on which it is written<sup>10</sup>.

The manner in which a Constitution is adopted has major implications on its legitimacy. A prerequisite for the legitimacy of the Constitution is that people should be involved in the process of its making. Its form and contents should be subject to continuous public discussion up to the time of its final enactment. It is only then a Constitution would have reality for, and becomes the property of, the

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<sup>8</sup> B. O. Nwabueze, *Constitutionalism in Emergent States* (London. C. Hurst & Company, 1973), p. 24.

<sup>9</sup> Nwabueze, p.24

<sup>10</sup> *Ibid*, pp. 24 – 25

people whose affairs it is to govern; only then would there be hope to win their confidence, respect and loyalty.

Despite the fact that a wide section of society in Zambia had been calling for a more people driven approach to the constitution making process, successive governments continued to use the device of a Constitution Review Commission when changing the Constitution. Using the Inquiries Act<sup>11</sup>, the President would appoint a Commission which would then traverse the country to collect submissions and upon completion of this exercise; a report would be compiled and handed over to the President for adoption. The President and Cabinet then decided which submissions to take forward for enactment by Parliament.

This is no longer the case, as a new law in the name of the National Constitutional Conference (NCC)<sup>12</sup>, was passed in 2007. This is an alternative law to the Inquiries Act, which is intended to give an opportunity to a wide range of people to participate in the making of a new Constitution. The NCC was established as a body to examine; debate and adopt the draft Constitution as presented by the Constitution Review Commission in 2005.

Zambia's long-running process of constitutional reforms is scheduled to conclude in late 2009 or early 2010, when the NCC completes its review of the proposals contained in the Mung'omba Constitution Review Commission (CRC) draft Constitution, itself the result of a lengthy national consultation in 2003-5<sup>13</sup>. The NCC should confirm key measures designed to entrench democracy, reduce presidential powers, strengthen parliamentary scrutiny and generally improve human rights.

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<sup>11</sup> Cap. 41, Laws of Zambia. Section 2 of the Act provides that President "may issue a commission appointing one or more commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare"

<sup>12</sup> National Constitutional Conference Act No. 19 of 2007

<sup>13</sup> On 17th April, 2003, by Statutory Instrument No. 40 of 2003, President Mr. Levy Patrick Mwanawasa, SC, in exercise of the powers under the Inquiries Act, Cap. 41, appointed a Commission, chaired by Mr. Wila D. Mung'omba, to review the Constitution of Zambia. Government of the Republic of Zambia, Constitution Review Commission December 2005

### 3. CONSTITUTIONAL LIMITATIONS IN ZAMBIA

The inadequacies in the constitutional making process have been the major cause of the poor participation of the majority of Zambians thus making it almost impossible for them to demand better constitutional controls. There are several noteworthy flaws that have accompanied a “government-driven process” rather than a “people-driven process”. These include:

#### 3.1. Imposed Constitutions

As in most Southern African countries independence constitutions were fundamentally flawed in both process and content, having been imposed by the former colonial governments, resulting in an ongoing process of constitutional reform which continues today<sup>14</sup>. For instance, Zambia’s Independence Constitution and subsequent ones have been heavily based on the British legal system which is alien to the majority of the people and to the Zambian traditional institutions such as chiefdoms. Examples abound. In 1972, the then President Kaunda imposed the one-party system of government on the people, after the Chona CRC which purportedly went around and collected views of the people and these views were not all for the one-party system but the party in power still overlooked this opposition to a one-party system. For instance Harry Mwaanga Nkumbula, leader of the opposition, African National Congress and others opposed the decision. Nkumbula went as far as moving both the High Court and the Court of Appeal to stop the introduction of the one-party system. The courts did not help and Kaunda was unmoved. The decision was implemented and the system was in place until it became redundant. Similarly, in 1996 the then President Fredrick Chiluba amended the 1991 Constitution despite widespread opposition. The High Court and the Supreme Court were moved to compel Chiluba’s government to go by the recommendations of the Mwanakatwe Commission. The courts proved impotent to contain his determination to implement his wishes<sup>15</sup>. Furthermore, civil society at the time mounted a vigorous campaign against government’s efforts to control the constitution-making process. They went as far as creating a parallel constitution-making process. When the government produced the White Paper<sup>16</sup>, civil society came up with the “Green Paper”. These efforts came to nothing. Chiluba had his way. Despite retrogressive laws such as the Inquiries Act, Chiluba had his way,

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<sup>14</sup> Constitutional Review and Reform, OSISA 2007, p.5

<sup>15</sup> John Sangwa, “*Why the Constitutional Conference Must Be Supported*”, article in the Post Newspaper of August 2007

<sup>16</sup> Response to the draft Constitution which become the amended Constitution

because of effective representation in parliament where partisan interests took precedence over everything else.

In light of continued occurrences and actions by the ruling elite, John Sangwa argues that, "...in the history of constitution-making there is no such a thing as a "people driven constitution-making" exercise. It is utopia. The people collectively cannot drive the constitution-making exercise"<sup>17</sup>. He further argues that the decision to embark on constitution-making is invariably a political decision, which can only be made by those who control the institutions of government. Once the decision is made the next thing is to enact the necessary legislation to guide the implementation of that decision.

### **3.2. Political Will and Participation by the People**

Political will by the country's leadership is essential in ensuring that the constitution-making process is credible and its final product is "owned" by its people. The examples of Eritrea and Kenya illustrate how a solid process reached an obstacle when it came to political leadership and adoption of a constitution<sup>18</sup>. Although, in Zambia there has been an attempt to introduce a more inclusive and popular body, the NCC, a number of key stakeholders like the three main Church mother bodies<sup>19</sup>, the largest opposition party<sup>20</sup> and some trade unions have boycotted participation in the NCC. Some schools of thought argue that a body such as the NCC should ideally be regulated by statute and not the legislature, as there may be vested interests held by the incumbents to secure positions. Further, it is not sufficient to have a chair if other members owe loyalty to the ruling elite. The consequence would be lack of progress, suspicion, and an inability to work effectively<sup>21</sup>. Without a participatory people-driven process, constitution-driven process, constitution-making or constitutional reform is doomed to failure. The role of a vibrant and active civil society cannot be over estimated in the process of constitution-making.

### **3.3. Language or Medium of Communication**

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<sup>17</sup> Sangwa, The Post

<sup>18</sup> OSISA, p.25

<sup>19</sup> Zambia Episcopal Conference (Catholic), Council of Churches in Zambia (Protestants) and the Evangelical Fellowship of Zambia (Charismatic)

<sup>20</sup> Patriotic Front

<sup>21</sup> Constitutional Review and Reform, OSISA 2007, p. 28

The Constitution is couched in a language that almost all Zambians have to learn as a second language. Invariably, the first challenge people face is that of understanding not only the text but various interpretations by different legal minds. In other words, most Zambians do not know what is contained in the current Constitution (not even the draft Constitution), neither in full text nor abbreviated summary, in official language (English) or in simplified vernacular translation (which are non-existent). Worst still, it is even more difficult to get a copy of the full text from a bookstore and from the Government Printers<sup>22</sup> which is only located in the capital Lusaka. Hence, people's interest and contributions are always very limited.

### **3.4. The Politics of Mistrust**

The search for a Constitution that would stand the test of time and one that would be generally accepted has been engaged in for a long time now; since the 1990s. The major problem has been a lack of legitimacy. It is a well publicised argument that the *Inquires Act* that has provided for the establishment of Constitution Review Commissions (CRC) since independence gave too much power to the President and his Cabinet to either reject or accept the recommendations. In all these CRCs, many otherwise progressive recommendations were rejected with seemingly unpopular articles being drafted into existing constitutions. This trend has caused a loss of public credibility and legitimacy in Zambia's Constitutional Reform efforts. The point is that while it is accepted that law development, including constitutional development is progressive and necessarily incremental, perceived government manipulation of previous constitutional review outcomes have entrenched the position that Zambia needs to repeal rather than simply amend its constitution. This was most evident with the Mwanakatwe Commission (1996) where eighty percent (80%) of the recommendations were rejected by the then President Chiluba.

As earlier indicated, Zambia has so far undertaken four Constitution Reviews beginning with the Chona Commission of 1973, the Mvunga Commission of 1991, the Mwanakatwe Commission of 1996 and the Mung'omba Constitution Review Commission appointed in 2003. In all these efforts, the question of constitutional legitimacy has been a critical issue. Despite the passing of the NCC Act in 2007 and the commencement of its sittings to deliberate and adopt the draft Constitution, a number of civil society organisations remain sceptical that

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<sup>22</sup> The main printer, distributor and seller official government statures, laws, publications and documentaries

the NCC will deliver a Constitution that will stand the test of time and which would be embraced by the majority of the Zambian citizenry. They seem to agree with a liberal political discourse on constitutionalism which includes a process for “developing, presenting, adopting and utilising a political compact that defines not only the power relations between political communities and constituencies, but also the rights and obligations of citizens in any society”<sup>23</sup>.

### **3.5. Constitutional Review Bodies – People’s Perceptions**

Both the Mung’omba CRC<sup>24</sup> and NCC have been perceived by certain sections of society to be a reflection of the will of the ruling party<sup>25</sup>. Further, parliament in its current form (composition) is equally not trusted by the people. This is based on historical experiences, the mistrust of politicians in this process is well-founded and their desire to manipulate the process cannot be understated. However, the NCC provides some safeguards within the Act to ensure that the Conference delivers on its mandate. To borrow Sangwa’s words, “...should there be a failure by the NCC; it will be attributed solely to human beings and not the law. The law is as good as the people”<sup>26</sup>.

### **3.6. Timeframe**

In most African countries the timeframe has been one of the most criticised aspects of the constitution making process, with many observers saying this impugned upon the quality of the content. Contrast this to the situation in Zambia where the government was on record that the process should be opened and could not be rushed. This prolonged approach has been criticised as it is seen as government delaying introducing a constitution that is not in its interest. Furthermore, the frequency of the constitution making process has eroded the sanctity of the constitution and diminished public interest.

### **3.7. Civic Education**

The role of an open and free media is critical in the educational aspect of the constitution making process. In an ideal situation, people need to be trained in

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<sup>23</sup> Ihonvbere Julius O. 2000. “How to make an Undemocratic Constitution: The Nigerian example”. *Third World Quarterly* 21/2. p. 343

<sup>24</sup> And subsequent ones

<sup>25</sup> Movement for Multiparty Democracy (MMD)

<sup>26</sup> John Sangwa, “Why the Constitutional Conference Must Be Supported”, article in the Post Newspaper of August 2007

and knowledgeable about the process and constitutional issues should be deployed throughout the country to conduct information-sharing sessions and to solicit submissions from the public. A holistic approach to information-sharing and education with impartial and accurate content should be disseminated through the usage of the media (electronic and print), workshops, drama, advertisements, public meetings and websites. However, in Zambia, practise is that the commission of inquiry collects submissions both oral and written from different parts of country. In the report of the Mung'omba CRC, it was acknowledged, although the Commission had no mandate to conduct educational programmes, it nevertheless appreciated the need for education and, in response, sent advance parties with terms of reference translated into local languages wherever sittings were taking place. In addition publication of its sittings was done in both electronic and print media well in advance<sup>27</sup>. This arose out of complaints by petitioners that they were not adequately prepared to contribute to the exercise because they had little or no knowledge of the Constitution and the terms of reference of the CRC. There were repeated calls for wide dissemination of the Constitution in local languages and in simplified form. There were also calls that, in future, the constitution-review process should be preceded by an extensive education programme.

#### 4. CONCLUSION

Embarking upon a constitutional review process does not automatically imply that a country is investing in a democracy-building or consolidation process. Only when the powers-that-be realise that they are a creation of the supreme law of the land and are mere keepers of the social contract (the Constitution) on behalf of the people will they ensure that the process and content is as transparent and inclusive as possible. The challenge in every constitution-making exercise is to develop consensus. Government must find a mechanism which will secure the participation of the highest number of people possible. There is a moral demand that people's in-put to both content and process issues must not be a monopoly of a few. Surely, a durable and functional Constitution is one that enjoys internal legitimacy; that is, inclusive of and owned by people who are the custodians of the Constitution. Only then are we likely to see an increased demand for constitutional controls by the general public.

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<sup>27</sup> Republic of Zambia, Report of the Constitution Review Commission, December 2005, p.1