

POPULAR INVOLVEMENT IN CONSTITUTION-MAKING: THE CASE
OF ZAMBIA

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INTRODUCTION

The Republic of Zambia, formerly the British Protectorate of Northern Rhodesia became an independent state on 24 October 1964¹. The country is as large as France, Switzerland, Australia and Hungary combined with a total area of 290,586 square miles or 750,000 square kilometers. It is a tropical country lying between latitudes 8° 19 and 18° south and longitudes 22° and 33° 33' east. It is entirely landlocked, being bounded on the west by Angola, on the north-west and north by the Democratic Republic of the Congo, on the north-east by Tanzania, on the east by Malawi on the south east by Mozambique, on the south by Zimbabwe and on the South-West by Namibia.

Since the attainment of independence in 1964, the country has undergone three major constitutional reforms, from a liberal much party democracy on the Westminster style through a notorious phase of one party political dictatorship to multi party democracy again². At the time of writing the country is poised at a knife edge. At the heart of the dilemma is the supremely important question of ensuring that this time around, the people of Zambia will themselves craft a constitution for themselves – one that the people will identify as their own, moreover one that will stand the test of time and not susceptible to the vagaries of temporary majorities³.

¹ . See the Zambia Independence Act, 1964 passed by the British Parliament, 13 & 14, Eliz 11 c65. The independence constitution was annexed to the Zambia Independence Order-in-Council, 1964 a statutory instrument promulgated by the imperial government.

² . These phases are known as the First Republic 1964-1972; Second Republic, 1973 – 1991; and Third Republic, 1991 to the Present.

³ . The Citizens Convention, 1995, See also “LAZ demands Constituent Assembly”, The Post Newspapers, 3 January 2003. The same demand continues to resonate to-day.

The question of popular involvement in constitution making in turn raises complex questions. As a constitutional democracy, the National Assembly, elected on the basis of universal adult suffrage in free and fair elections should embody the sovereign will of the people⁴. In normal circumstances, therefore, constitutional reforms and other forms of law reform are dominated by the legislature. In the past the conventional wisdom has been for the government to appoint a Constitutional Review Commission to review existing constitutional documents. The terms of reference have always been crafted by the appointing authority, the President. After soliciting the views of the people, through oral and written submission, these commissions then submitted their recommendations to the government⁵. The problem with this process has been precisely that the people had no control over the final product. The government of the day chose and picked what suited them, lending credence to the view that the governments of the day abused their temporary majorities in the National Assembly to push through constitutional reform to suit their own narrow partisan interests. A brief review of Zambia's constitutional history attests to this very sad pattern of constitutional development. But before we deal with the historical context it is instructive to reflect on what is meant by popular involvement? What form should it take? Who should participate and how? What time-lines or frames should it take?

⁴ . cf Sir Ivor Jennings, **The Law and the Constitution London:** Oxford University Press, 1967 at P.15 where the learned author states that Constitution is an embodiment of the people – “an organization of men and women. Its character depends upon the character of the people engaged in governing and being governed ...”

⁵ . Under the Inquiries Act, the Presidents appoints Commissions of Inquiry, gives them their terms of reference. At the end of the inquiry the government chooses and picks as it pleases from the recommendations and publishes these in a White Paper. The people have no say on what ultimately gets into the White Paper. In the premises the whole exercise is nothing but a charade.

In attempting to answer these formidable questions we do well to draw on the emerging jurisprudence from the South African Constitutional Court. In two recent judgments, the Constitutional Court had had occasion to adumbrate on the nature and scope of the duty to facilitate public involvement in the law-making process. In the first of these cases, **Doctors for Life International v The Speaker of the National Assembly and Others**⁶, the Court concluded that the proper approach was as follows:

[T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require parliament to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less. In determining whether parliament has complied with its duty to facilitate public participation in a particular case, the court will consider what parliament has done in that case. The question will be whether what parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation,

⁶ . Case CCT/2/05, heard on 23 August 2005 and judgment delivered on 21 February 2006 (unreported at the time of writing).

the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in the public affairs. In my view, this balance is best struck by this Court considering whether that Parliament does in each case is reasonable⁷.

The court went on to hold that there are at least two aspects of the duty to facilitate public participation and said:

What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is

⁷ . At paras 145 – 6. See also **Matatiele Municipality and Others v President of the Republic of South Africa. Case CCT73/05 decided on 18 August 2006; Minister of Health and Another No v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae), 2006 (2) SA. 311 (CC) at paras 111 – 3.**

the duty to provide meaningful opportunities for public participation in the law-making process.

The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making⁸.”

Sachs. J. , who agreed with the majority but for different reasons percipiently observed that although regular elections and a multi-party system of democratic government are fundamental to a constitutional democracy they were not exhaustive of it⁹. He went on to articulate a vision of “a permanently engaged citizenry alerted to and involved with all legislative programmes¹⁰. The people have more than the right to vote in periodic elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticize it from the sidelines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical ...¹¹”

⁸ . **Doctors for Life**, Ibid, No.7 at para 129.

⁹ . Sachs, J. in **Doctors For Life** Ibid. No.7 at para 228.

¹⁰ . Sachs, Ibid No.9 at para 230.

¹¹ Sachs, Ibid, No.9 at para 230.

The learned judge further observed that it would be a travesty to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years ...”¹².

Sachs. J. noted with approval that there was a growing trend globally to “see constant public involvement in law-making not only as integrally bound to representative democracy, but as an important contributor to its re-vitalisation. He quoted, with approval, a recent report in Britain concerning what was seen as a growing trend in that country towards disengagement by the public from formal democratic politics. The report observed that public re-engagement with formal democracy was vital to avoid:

“... the weakening of the mandate and legitimacy for elected governments because of plummeting turnouts;

- the further weakening of political equality because whole section of the community feel estranged from politics;
- the weakening of effective recruitment into politics;
- the rise of undemocratic political forces; and
- the rise of what the report calls “quiet authoritarianism” within government¹³.

¹² . Sachs, Ibid, No. p at para 230.

¹³ . Sachs, Ibid, No. 9 at para 230 – 1 quoting from “Power to the People : The report of Power: An Independent inquiry into Britain’s democracy, The centenary project of the Joseph Rountree Charitable Trust (The Power Inquiry, York 2006), executive summary 15). See also The International Covenant on Civil and Political Rights, 1966.

I have quoted at length from these recent developments to show that the Zambian people are not alone in demanding their involvement in crafting their own constitution, a sacred compact, they will call their own, one which articulate their “shared aspirations and the values which will bind them and which will discipline their government and its national institutions”¹⁴.

As said before, in order to appreciate this clamour for popular participation in drafting and adopting a new constitution for Zambia, it is absolutely necessary to interrogate the critical junctures in Zambia’s constitutional development¹⁵. In so doing we will be able to evaluate the involvement of the people in constitution-making. The discussion on this aspect is divided into three epochs:

A The Independence Constitution, 1964

Zambia attained independence under a constitution negotiated by the departing colonial masters, the British government on the one hand and on the other nationalist parties which had been fighting for the country’s independence and a number of traditional rulers. There was no popular involvement in the Lancaster House constitutional talks that ultimately adopted the Constitution. At best the nationalist political parties and the traditional rulers represented the people. The overwhelming desire then was to throw away the yoke of colonialism, hence an imperfect document was accepted to facilitate the transition to independence¹⁶.

¹⁴. Per Late Mahomed, C.J., In **Sv Makwanyane, And Others**, 1995 (3) SA 391 (CC) at para 262.

¹⁵. See also John Mwanakative, “Constitution-making process”, The Post Columns, <http://www.post.co.zm>.

¹⁶. Mubako, S., “The Constitution of the Republic of Zambia” unpublished Mimeo, University of Zambia, 1972 See also no. 1 above.

B One Party Participatory Democracy

A significant departure from the independence Constitution was set in motion on 25 February 1972 when the country's founding President, Kenneth Kaunda, announced the decision of his government to appoint a Constitutional Review Commission under the chair of the respected lawyer and Vice-President, Mainza Chona¹⁷.

For the purposes of this paper the manner in which this very important Commission was appointed is very significant. The terms of reference of the Commission were determined by the government. Its mandate was very narrow, namely, to consider changes to the country's constitution and the fundamental structure of government so as to accommodate the introduction of the one party system of government. In other words the Commission was not mandated to consider the desirability or otherwise of the single-party system of government, but rather the form which it should take, in the process the people were denied the opportunity to decide the constitutional destiny of their country. Thus, although the Commission received submissions from the broad masses of population, their contributions were restricted to the form and not the substance of the constitution¹⁸.

Elsewhere, we have pointed out that President Kaunda sought to justify his decision by appealing to the nationalist sentiments of the people, pointing

¹⁷. The Presidential announcement was made on 25 February 1972. The Commission was appointed formally, on 1 March 1972 (The Chona Commission).

¹⁸. See James Craig, "The Second Republic, Transition to a single party system", unpublished mimeo, University of Zambia, 1972; Nwabueze, B.O.; **Presidentialism In Commonwealth Africa**, New York: St Martins Press, 1974.

out that the young nation needed to consolidate nation-building out of the ashes of the colonial order, to build a cohesive, detribalized society under the banner of “One Zambia, One Nation” so as to eradicate ethnic divisions and cleavages; the immaturity and divisiveness of political pluralism with its propensity for personal opposition rather than engagement on policy differences and overriding considerations of national security in the light of wars of national liberations in surrounding neighbouring countries¹⁹.

Critics of that decision have rightly pointed out that in fact Kaunda was prompted by his own narrow survival instincts. His own ruling party was driven by tribal divisions, fueled by his decision to dismiss some ministers from the north who identified themselves with his own Vice President, Simon Kapwepwe. It is also no secret that Kapwepwe harboured his own presidential ambitions. In the end he broke away to form his own political party. It was also common cause that the official opposition party in the National Assembly was on the ascendancy²⁰. So in order to stifle the nascent threat to his political survival, Kaunda misused the Chona Commission to introduce a one-party dictatorship. His government chose and picked what was acceptable of the recommendations of the Chona Commission and discarded the rest. The decision to adopt the one-party system of government was unsuccessfully challenged in the courts²¹. Kaunda was able to use it to stay in power without the sovereign will of the people. Elections under the so-called one-party participatory democracy

¹⁹. Mbao, M “Constitutional Reforms in Zambia: Some Lessons in Constitution-Making and Development”, a paper presented to the Conference on Fostering Constitutionalism in Africa”, Nairobi, Kenya 18 – 20 April 2007.

²⁰. Mubako, S. “Zambia’s Single-Party Constitution: A search for Unity and Development”, Unpublished mimeo, University of Zambia, 1973.

²¹. See **Nkumbula v The Attorney-General**, 1972 ZR 206.

were a meaningless ritual with the ruling party entrenched in the constitution as the sole political party in the country. There was no political opposition, all elected officials, from local councilors to Members of Parliament were obliged to be party members. Parliament itself was reduced to a mere rubber stamp of decisions made by the Party's Central Committee²².

The important lesson to be learned from this saddest period in the country's history is that the political party in office cannot be trusted with constitution-making. By a drop of a pen Kaunda was able to plunge the country into the abyss²³.

C Popular Agitation And Constitutional Reform

The one-party system of government lasted from 1973 to 1991. The collapse of the Soviet Union and the disintegration of Communism in Eastern Europe in 1990-1991 have had tremendous impact in fanning the winds of change in Africa in the early 1990s. Zambia was not to escape the irresistible forces of change, calling for return to multi-party democracy.

Kaunda first attempted to delay the inevitable by calling a national referendum to gauge popular support for the reversion to political pluralism. As in the past he also appointed a Commission to inquire into, determine and recommend a system of political pluralism that would ensure the separation of powers among the major organs of state: the legislature, the executive and the judiciary.

²². Nwabueze, No. 18.

²³. See also Sikota Wina, AN Open Letter to the Fifth National Convention, held from 14 – 16 March 1990. Lusaka.

To its credit the commission submitted its report and a draft constitution providing for political pluralism. As in the past the government was entitled to choose and pick from the report of the commission and draft constitution²⁴. However that process was unacceptable to the nascent mass democratic movement, the labour movement and other social formations.

As pointed out elsewhere, Kaunda spared the nation further turmoil by agreeing to a simple constitutional amendment to legalise political parties and to adopt a constitution drafted jointly with his government, newly established political parties, organized labour, student formations etc. The so-called mother churches were instrumental in offering their good offices, with a draft constitution adopted at the Cathedral of the Holy Cross in Lusaka. This compromise document was rubber-stamped into law by then National Assembly²⁵.

The 1991 constitutional amendment marked the first attempt at popular involvement in constitution-making. A broad spectrum of the people, though not fully representative of the population, sat down and agreed to a constitutional text²⁶. In the process, Zambia earned the dubious distinction of being the first country in English speaking sub-Saharan Africa to revert to multi-party democracy through a peaceful and participative process. Kaunda also set a precedent when he peacefully handed over power

²⁴. Report of the Mvunga Constitutional Review Commission, Lusaka: Government Printers, 1991. The Commission was appointed on 30 November 1990.

²⁵. Instead of going for a referendum, Kaunda agreed to simply amend the 1972 Constitution by expurgating section 4 (2) thereof which outlawed multipartism. The Constitution of Zambia (Amendment Act) 1991 was signed into law on 24 August 1991.

²⁶. See also Mwanakatave, J.M. Erid of Kaunda Era, Lusaka: A Multimedia Publication, 1994.

following his defeat in 1991 elections²⁷. As observed at the beginning of this paper, the constitutional experiment of 1990 – 1991 elevated Zambia to a role-model. However the goodwill and political capital associated with the gains of 1991 were quickly squandered when Kaunda's successor, Chiluba set in a motion yet another constitutional amendment in 1996 to entrench his own political agenda. He appointed a Constitutional Review Commission whose recommendations his government largely ignored²⁸. Public protests over the manner of adoption and the contents were contemptuously dismissed²⁹. In the end, a very unpopular constitution was imposed on the people for the sole purpose of dealing with his political enemies, perceived or real. One of the most notorious sections of that constitution stripped the nation's founding President of his citizenship³⁰.

So in a short period of ten years, 1991 – 2001, the country was almost back to square one saddled with an unpopular constitution imposed on the people by the ruling political party. President Mwanawasa, Chiluba's successor, appointed yet another Constitutional Review Commission in 2003, along the traditional lines³¹. It produced a voluminous report and a draft constitution. The sticking point over the last two years has been the way forward.

²⁷. See Mbao, M: "The Third Republic and Its 1991 Constitution", in *Democracy in Zambia* (eds) O Sichone and B.C. Chikulo, Harare: Sapes Books, 1996.

²⁸ Mwanakative Constitution Review Commission Report, Lusaka; Government Printer, 1995.

²⁹ Peoples Mulungashi Declaration, 2002; Citizens Convention, Lusaka, 1995. Chiluba said: "the Constitutional amendments when recently came into force and the procedure followed were handled within the context of the provisions of the existing constitution, and everything provided for in the Constitution was more than complied with" as quoted by the Citizen Newspaper, Friday 21 June 1996 at P21.

³⁰. Section 34 (3) thereof required that in order for someone to qualify as a Presidential Candidate, he or she had to be Zambian citizens and that both his parents were Zambians by birth or descent. Kaunda, whose parents came from neighbouring Malawi was thus disqualified from contesting the 1996 elections and was briefly stateless.

³¹. The Mungomba Constitutional Review Commission was appointed in 2003 and finalized its work in 2005. A draft Constitution was attached to its report. It is yet to be enacted into law.

Having tested “peoples power” it is not surprising that Mwanawasa is at loggerheads with the people over the most desirable manner of adopting “the new constitution”. As in the past the government favours the route of using the sitting National Assembly to enact the draft constitution into law. On the other hand, there is a broad spectrum of opinion favouring a people-driven process³². The coalition of forces include the major opposition parties, professional bodies like the Law Association of Zambia, the Economics Association of Zambia, the Labour movement, the “mother” churches, student formations, traditional leaders, non-governmental organizations, community-based organizations etc. The majority of these fall under a loose umbrella group called the Oasis Forum.

There is also the powerful Non-Governmental Organisations Co-ordinating Committee. At the heart of their demands is a people driven process through a widely constituted Constituent Assembly so as to guarantee ownership and legitimacy of the new constitution. What appears to be missing, largely on the party of the Mwanawasa government, is the realization that electoral democracy and popular involvement are mutually reinforcing. For as the South African Constitutional Court has succinctly observed:

General elections, the foundation of representative democracy, would be meaningless without massive participation by the votes. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively

³². See Post Newspapers, Editorial of 21 January 2003, “Mwanawasa sterile Battle Against Corruption”.

involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered³³.

Given Zambia tortured history of political dictatorship, unparalleled corruption and looting of national resources, a country mired in the deprivation of hunger, the prevalence of preventable diseases and the despair of poverty, the case for popular involvement in making the new constitution appears to be unanswerable. The government has no monopoly of political wisdom. It ought to reflect and respect the sovereign will of the people. It is, therefore, necessary that there be broad consensus on the modalities of adopting the new constitution. But the struggle does not stop with the process. The substance of the new constitution should also be agreed to in such a way as to embody the sovereign will and ethos of the people. A

³³. Doctors for life No.1 at paras 115 – 116.

broad range of fundamental issues call for inclusion in the overhauled document, including:

- An effective separation of powers among the legislature, the executive and the judiciary, with in-built checks and balances and ensuring that no one branch of government overwhelms the other two.
- An overhaul of electoral law and processes so as to guarantee that the sovereign will of the people, as expressed in periodic, genuine, open, free and fair elections will produce credible results acceptable to the losing parties, candidates.
- Strengthening the pillars of the national integrity system, the judiciary, the ombudsman, the anti-corruption commission, the legislature, a free and independent press and a vibrant civil society.
- Enshrining economic, social and cultural rights in the Constitution.
- Mainstreaming gender rights in the Constitution.

CONCLUDING REMARKS

The point of departure in this paper has been that no country can afford to trust temporary majority with the Constitution-making process. By drawing on the emerging jurisprudence from South Africa whose own transition to a constitutional democracy was universally praised as a most remarkable example of political rapprochement of the twentieth century, we have been able to show that constitution-making is a painful process which cannot be left to one segment of society. The overwhelming desire is for a document which the people will identify as their own with and not one imposed by the ruling elites. In order to adopt the new constitution through a people driven process, the government and the other forces in the country need to agree on that process first and foremost. Secondly, they need to agree on the preparatory steps and guiding principles. Enabling legislation must be enacted to create the Constituent Assembly. Such legislation must spell out the composition of that body. How are the delegates to be elected / designated? How much time should be devoted to the Constitution-making process? How is the Constituent Assembly to relate with the current National Assembly?

In the end a document drafted and adopted by the Constituent Assembly will still need to be enacted into law. This is the preserve of the National Assembly. All these steps will be tedious and demanding of resources and time. But if the people of Zambia want a Constitution that will stand the rest of time, no expense should be spared in achieving that noble objective. In addition the new constitution should enshrine a set of constitutional values as a ringing rejection of the past and a beacon to a future Zambia anchored

on the values of openness, responsiveness, accountability, equity and inclusiveness, popular participation and fidelity to the rule of law and a supreme constitution.

It is hoped that other countries in the SADC region faced with the supremely important task of constitution-making can learn from Zambia's experience.