THE POLITICS OF CONSTITUTION – MAKING IN ZAMBIA:
WHERE DOES THE CONSTITUENT POWER LIE?*

Melvin L M Mbao γ

ABSTRACT

Politically and constitutionally, Zambia achieved a first in 1964 by becoming the first country in Anglophone Sub-Saharan Africa, to attain independence as a Republic within the British Commonwealth. Since then, the country has undergone four major constitutional changes. It is currently embroiled in yet another attempt at constitutional reform.

This article interrogates these critical turning points in the nation’s constitutional history. It seeks to identify the dominant social and political forces behind each. The paper argues that the people of Zambia should be able to draw on the experience of forty years of nationhood and previous constitutional projects to craft a ‘new’ constitution that will be legitimate, credible and enduring. Reference is made to substantive issues when this is necessary to explain the constitution-making processes under discussion.

INTRODUCTION

The Republic of Zambia, formerly the British Protectorate of Northern Rhodesia, became an independent state on 24 October 1964.1 From 1964 until November 1991, Zambia was governed by the United National Independence Party, the principal party in the struggle for independence, under the leadership of President Kenneth Kaunda.2

1* An earlier version of this paper was read at a conference on ‘Fostering Constitutionalism in Africa’, organized by the African Network of Constitutional Lawyers, 18 – 20 April 2007, Nairobi, Kenya.

γ LLB, (UNZA); M.Phil, PhD (Cantab). I am very grateful to my colleague, Dr Patrick Matibini of the School of Law, University of Zambia for his encouragement and support. I am equally grateful for the comments of the anonymous reviewers. However, I, alone, am responsible for all the sins of omission and commission.


Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi April 2007 by Melvin LM Mbao ruth.gaebbe@nwu.ac.za

The independence constitution provided for a multiparty democracy with an executive President. That constitution was amended in 1969 following a national referendum ‘to end all referenda’. It was finally repealed and replaced by a new constitution in 1973, ushering in what was popularly known as the ‘one-party participatory democracy’ or a one-party state. In 1990, the deteriorating economic situation and increasingly vocal opposition to his government finally forced President Kaunda to concede to demands for the restoration of a multi-party system. A transitional constitution was unveiled, repealing the 1973 constitution and facilitating a return to multi-party democracy. That constitution was radically amended in 1996. As if that was not enough, another constitutional reform project was initiated in 2003. Today, almost 43 years since the attainment of independence, the country is in the throes of yet another constitution-making project.

At the heart of the current debate is the supremely important question of the most appropriate mode or method of adoption of the proposed new constitution. As will become apparent, throughout the history of constitutional reform in Zambia, there has often been tension between the need to encourage consensus and popular involvement on the one hand and the need to ensure that government’s authority is not undermined on the other hand. Over the last several years since the Mun’gomba Constitutional Review Commission reported in 2005, mistrust between the government and citizens over the ground rules of constitutional-making has led to stalemate and political instability. As Simutanyi has aptly observed, past experience has left people unconvincing of the government’s sincerity.

In this article, in interrogating the milestones in Zambia’s constitutional development, we draw on the lessons of history. The USA Philadelphia Model of 1787 teaches that a country’s constitution can be adopted through a constitutional convention which debates and drafts a country’s constitution, followed by adoption and ratification by the legislatures of the states forming the federation. That project has bequeathed a constitution which has endured for over three hundred years. Another example would be the South African Constitution, 1996, which was adopted by a popularly elected Constitutional Assembly after public debate and engagement. That all-embracing process, encapsulating the ‘collective wisdom’ of the overwhelming majority of South African people was consummated by the certification of that Constitution by that country’s Constitutional Court. In the case of Zambia, previous constitutional projects have been dominated by the executive. Successive governments have used the Inquiries Act to appoint Constitutional Review Commissions. The terms of reference were determined by the President, reserving to the government the power to accept and reject any or all recommendations etc made by the Commissions. Although there has been public engagement through the submission of proposals and recommendations by petitioners appearing before the Commissions, many of these submissions have been rejected and in some cases substituted with government’s own views through White Papers. Although it is generally accepted that Zambia is a representative democracy in which elected leaders have a legitimate right to decide on what is good for the people, the selective acceptance of recommendations lends credence to the view that the National Assembly is not the most appropriate body to adopt the new constitution. This paper therefore supports the view that the new constitution should be adopted by a broadly based constituent assembly, followed by...
approval in a national referendum. As the Mun’gomba Constitutional Review Commission has correctly observed:

A constitution is not an ordinary piece of legislation. It is the people’s sovereign and inalienable right to determine the form of governance for their country by giving to themselves a constitution of their own making.\textsuperscript{13}

Popular engagement through a constituent assembly entails that the people themselves make the constitution and give it their seal of approval. For as the late South African Chief Justice Ismail Mahomed pertinently observed:

… all constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people and which discipline its government and its national institutions, the national ethos which defines and regulates that exercise and the moral and ethical direction which that nation has identified for its future.\textsuperscript{14}

It is against this background that we now turn to the history of constitution-making in Zambia with a view to identifying the social and political forces driving each of the constitutional projects. In this way, it is hoped that this paper will make a modest contribution to the on-going debate about constituent power and public engagement in the drafting, debating, adoption and enactment of the new constitution.\textsuperscript{15}

**CONSTITUTIONAL DEVELOPMENT, 1964 TO THE PRESENT**

As indicated above, Zambia has had two major constitutional amendments, adopted two new constitutions and recently the government enacted the National Constitutional Conference Act, 19 of 2007 to facilitate, inter alia, the consideration


\textsuperscript{14} S v Makwanyane and Others 1995 3 SA 391 para 267. On the other hand, Coel Kirkby has argued that ‘popular participation, however, is not necessarily good. There is little empirical evidence linking popular participation to constitutional legitimacy in Africa.’ See C Kirkby ‘Linking popular participation and democratic representation in constitution-making in Eastern and Southern Africa’, paper presented at the IACL Conference, Athens, Greece, July 2007, unpublished at 4.

\textsuperscript{15} See also M Ndulo *Constitution-making in Africa: Assessing both the process and the content* (2001). See also, Simutanyi (n 9 above).
and adoption of a new constitution. In the discussion that follows, we situate this milestone within an historical process whose seeds were planted in 1964.

(a) The First Republic, 1964 - 1972

Zambia gained independence under a constitution passed by the British Parliament, pursuant to a negotiated settlement between the departing colonial government on the one hand and, on the other, the nationalist parties, namely the United National Independence Party led by Kenneth Kaunda and the African National Congress led by Harry Nkumbula. As a negotiated instrument, the independence constitution was not perfect. It is axiomatic that there was no direct and active involvement of the public in its crafting; nevertheless it facilitated the transition to independence and statehood. From these inauspicious beginnings, that constitution provided the basic framework of government under a multiparty democracy. Although Kenneth Kaunda’s U.N.I.P held 55 of the seats in the National Assembly, it is generally accepted that there was a relatively functioning liberal democracy under a presidential system. The President was the head of the executive branch and Head of State. He thus combined the executive powers of the head of government and the ceremonial powers of Head of State. There was a popularly elected legislature and an independent judiciary.

In 1968, Kaunda was re-elected unopposed as President. The first major constitutional reform ensued in the following year when the independence constitution was amended to remove entrenched clauses. Under the independence constitution, any bill seeking to amend the constitution had to follow a special

19. As above.
procedure and required a qualified majority. It had to be published in the Government Gazette at least thirty days before its first reading in the National Assembly, and, further, it had to be supported on its second and third readings by the votes of not less than two thirds of all the members. Certain provisions of the Bill of Rights including sections guaranteeing the independence of the judiciary and the constitution’s amendment procedure were specially entrenched. In addition to the special procedures and qualified majority, amendment of these provisions required the support in a national referendum by a majority of all registered voters in parliamentary elections.  

On 17 June 1969, in an overwhelming ‘Yes’ vote (85.02%), Kenneth Kaunda’s government obtained the necessary support to amend the Constitution so as to expunge the referendum clause.  

The indisputable outcome was that the Zambian legislature was now given power to amend the constitution, with a two-thirds majority using the ordinary legislative process prescribed in the 1972 constitution, without reference to a referendum. Thus the Constitution of Zambia (Amendment) Act, 3 of 1969, made the constitution more flexible and in turn granted more power to the legislature. It was under this ‘simplified’ procedure that the independence constitution was repealed and replaced by a one-party state constitution in 1973.

(b) One Party Participatory Democracy, 1973 – 1991

The nation’s founding President, Kenneth Kaunda, and his government initiated fundamental changes in the philosophy and system of government in 1972. On 25 February 1972, Kaunda informed the nation, in a major press conference that he was going to appoint a Commission of Inquiry to consider, inter alia, changes to the country’s constitution and to the fundamental structure of government so as to accommodate the proposed one-party system of government.  

---


22. The Presidential announcement was made on 25 February 1972. See the Times of Zambia 26 February 1972. The Commission was appointed, formally, on 1 March 1972. See Statutory Instrument
Kaunda emphasized that the objective of creating a one-party state was the fundamental need to preserve national unity and to strengthen and accelerate development in freedom and justice.\textsuperscript{23}

The Commission was given very wide terms of reference on the form the one party system was to take, ‘in the context of the philosophy of humanism and participatory democracy’.\textsuperscript{24} In discharging this mandate, the Commissioners were enjoined to pay due regard and adhere to certain principles, including -

(a) the maintenance of the supremacy of the rule of law and independence of the judiciary;
(b) the protection of fundamental rights and freedoms of the individual;
(c) the vesting of supreme power in the people to be exercised directly where possible and indirectly through democratic, representative institutions;
(d) the need for a strong and purposeful government and a united nation in order to achieve its revolution; and
(e) the position of Zambia as part of a continent – wide movement for independence and for the liquidation of imperialism, colonialism, racism and foreign exploitation.\textsuperscript{25}

The last principle has to be seen within the broader imperative of national unity and in the context of the country’s position as a ‘front-line state’ and a hostile regional environment associated with her support to national liberation movements in the region. Zambia supported the forces opposing colonial or white-dominated rule in Southern Africa. The Kaunda government supported the National Union for the Total Independence of Angola (UNITA) during the war of independence and the subsequent civil war in that country; the Zimbabwe African People’s Union (ZAPU) in Southern Rhodesia; the African National Congress (ANC) in their struggle against apartheid in South Africa; and the South West People’s Organisation (SWAPO) in their struggle for independence in Namibia. The minority regimes in Southern

\textsuperscript{23} As above.

\textsuperscript{24} Statutory Instrument 46 of 1972; Mubako (n 20 above) pp 3-4. See also, the third schedule to the Zambia Independence Order-In-Council 1964; Mwanakatwe (n 18 above) pp 84-87; Report of the National Commission on the Establishment of a One Party Participatory Democracy in Zambia (1972).

\textsuperscript{25} As above.
Rhodesia and South Africa retaliated by launching military raids into Zambia, resulting in losses of property and lives.\textsuperscript{26}

Kaunda’s critics on his decision to introduce the one-party system at that time and in that manner point to weightier political motives, in particular ‘the consolidation of political power through the elimination of all political opposition’.\textsuperscript{27} One of the formidable challenges that Kaunda faced in the second decade of his rule was how to deal with deep-seated tribal or ethnic divisions and cleavages within his own ruling party, U.N.I.P. First, two influential politicians who he had earlier dismissed from their ministerial positions levelled charges of corruption and tribalism against other ministers.\textsuperscript{28} The resultant rumpus culminated in the resignation of the country’s and UNIP’s Vice President, Simon Kapwepwe, and his followers, who formed a new political party, the United Progressive Party (the UPP). In the wake of these developments, the remaining UNIP faithfuls not only demanded the banning of the new party, the UPP, but also called for the immediate introduction of the One-Party System.\textsuperscript{29}

Kapwepwe’s challenges to Kaunda’s political dominancy were further underlined by his election to the National Assembly, from a constituency in UNIP’s political heartland of the Copperbelt.\textsuperscript{30} Kapwepwe’s emergence in the opposition ranks, with the possibility of his UPP claiming the support of two to three provinces in the Copperbelt, Northern and Luapula Provinces, the traditional support base of UNIP, coupled with Nkumbula’s dominance in the Western and Southern Provinces, meant that for the first time since independence Kaunda faced the possibility of losing power.\textsuperscript{31} Political instability in the country was further accentuated by political

\textsuperscript{26} Roberts (n 2 above) 7-8. See also, BO Nwabueze \textit{Presidentialism in Commonwealth Africa} (1974).
\textsuperscript{27} Nwabueze (as above). See also, L Zimba ‘The origins and spread of one-party states in common wealth Africa – their impact on personal liberties: a case study of the Zambian model’ in M Ndulo (ed) \textit{Law in Zambia} (1984) and Mwanakatwe (n 19 above) 86-88, 94-95.
\textsuperscript{28} Hon. Justin Chimba and Hon. John Chisata. See also, A Sardanis \textit{Africa Another Side of the Coin} (2003); \textit{Report of the Commission of Enquiry into the allegations made by Justin Chimba and John Chisata} (May, 1972).
\textsuperscript{29} Mubako (n 20 above) pp 2-3; Mwanakatwe (n 18 above) 84-87.
\textsuperscript{30} As above.
\textsuperscript{31} As above. In the December 19, 1968, parliamentary elections, Kaunda’s UNIP had 87 seats, Nkumbula’s ANC had 23 and there was one independent MP.
violence between the supporters of the ruling party, UNIP, and those of the UPP, ultimately leading to the banning of the UPP and the detention of its leaders without trial.\textsuperscript{32} In the final analysis, it can be argued with considerable force, that the critical decision to introduce the one-party state was informed by, among other things, narrow partisan and survival interests.\textsuperscript{33} This argument is fortified by the fact that 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. Moreover, although the Commission toured the whole country, receiving oral and written submissions on the changes the people wanted to see introduced in a one-party state constitution, the Kaunda government had the final say through a White Paper.\textsuperscript{34}

Before we conclude this part of the paper, it is instructive to note that the government’s decision to appoint the Chona Commission as well as its terms of reference were unsuccessfully challenged in the landmark case of \textit{Nkumbula v The Attorney-General}.\textsuperscript{35} Nkumbula, the leader of the opposition party in the National Assembly, the African National Congress, challenged the move towards the one-party system of government, averring that his basic human rights and fundamental freedoms, in particular his freedoms of assembly and association, guaranteed in the independence constitution, would be infringed by the proposed constitutional changes. It was argued further that the Chona Commission was itself \textit{ultra vires} the constitution and the Inquires Act because its terms of reference precluded the Commission from hearing evidence and argument as to the desirability of a single-party system of government.

The High Court and the then Court of Appeal were unanimous in rejecting Nkumbula’s case, holding that his freedoms had in fact not been abridged at the material time since no executive or administrative action had been taken \textit{in relation to him}. The Court of Appeal, quite rightly, observed that it had no power to prevent or

\textsuperscript{32} Mubako (n 20 above) pp 2-3. See also, \textit{In Re Kapwepwe and Kaenga}, 1972 ZR 248.  
\textsuperscript{33} Mubako (n 20 above) pp 2-3; Mwanakatwe (n 18 above) 91-92. See also, M Ndulo ‘Constitution-making in Africa: Assessing both the process and the content’ (2001) \textit{Public Administration and Development} 101-117, at p 106.  
\textsuperscript{34} The Chona Commission (n 11 above); Government White Paper 1 of 1972.  
\textsuperscript{35} 1972 ZR 204; See also the Court of Appeal Judgment No 6 of 1972.
question the validity of a Bill, much less a Bill seeking to amend the constitution before it became law even if it was aimed at removing basic human rights and fundamental freedoms. It was held further that once the government had validly amended the constitution, Nkumbula would have no rights to be infringed save those in the new constitution.36

Following the release of the White Paper, the Constitution of Zambia (Amendment) Bill was passed in the required manner and assented to by President Kaunda. The independence constitution was repealed and replaced by a new constitution, bringing in a paradigmatic shift in the form and substance of government under the system called ‘one-party participatory democracy’.37

Free political activity was severely curtailed; UNIP became the sole political factor in the country. Section 4 (1) of the Constitution of Zambia Act 27 of 1973, proclaimed that ‘there shall be one and only one political party or organization in Zambia, namely the United National Independence Party’. The Constitution went further to centralize and monopolise political power in the hands of UNIP, stating:

Nothing contained in the Constitution shall be so construed as to entitle any person lawfully to form or attempt to form any political party or organization other than the Party or to belong to, assemble or associate with, or express opinion or do any other thing in sympathy with, such political party or organisation.38

Under the one-party system the overarching philosophy became that of the supremacy of the Party ‘as the leading political force …’ in the country.39 Initiation and the formulation of government policy were exclusive functions of the Party’s Central Committee and National Council. The cabinet was an advisory body. The Constitution of the UNIP stated that ‘should any decision of the Central Committee conflict with any decision of the cabinet on any matter of Government or Party

36 Court of Appeal Judgment No. 6 of 1972; 1972 ZR. 204.
39 This was stated in the Preamble to the Constitution of UNIP which constitution was annexed to the Constitution of Zambia Act 27 of 1973.
policies, ‘the decision of the Central Committee shall prevail’. In the circumstances, under the philosophy of supremacy of the Party, ‘[t]he conception therefore is that the party embodies the whole people, and not just a section of it. As the embodiment of the nation, the party is (according to the conception) above the organs of government, since government is only an instrument or agent and not an embodiment, of the people’. In similar vein Mwanakatwe has observed that, ‘[w]hen the One-Party State was established, the supremacy of the party was entrenched in the UNIP Constitution. ‘The intentions of the architects of the UNIP Constitution demonstrated that in the new order of things only UNIP was allowed to call the tune. By implication any other organ in the state was expected to toe the line while the tune was called by UNIP.’ In essence Zambia was to be governed under the ‘benevolent’ dictatorship of Kenneth Kaunda. This is not to downplay the fact that under the one party system there was a marked centralisation of state power in the hands of the President in the mould of African Presidentialism.

REVERSION TO MULTIPARTY DEMOCRACY

The transition to multi-party democracy was the culmination of a number of developments, at home and abroad. The internal factors calling for change may be summarized as follows:

(a) Between 1975 and 1990, Zambia’s economy deteriorated or shrunk by approximately 30 per cent, owing to the collapse of copper prices, the mainstay of the economy.
(b) Several strikes hit the country in 1981. Kaunda responded by arresting and detaining several trade union leaders, including the president of the Zambia Congress of Trade Unions, Frederick Chiluba.\(^46\)

(c) In 1986 and 1987, protests arose again in the main urban areas of Lusaka and the Copperbelt. These were followed by serious food riots in 1990–1991 in which at least thirty people were killed. There was also an attempted military coup that had people dancing in the streets\(^47\), revealing the extent of popular discontentment with Kaunda’s rule.

An important external factor was the dramatic collapse of communism in Eastern Europe and the former Soviet Union and the new ‘winds of change’ then sweeping across Africa. In the wake of these pressing factors, Kenneth Kaunda accepted the need for reform. He promised a referendum on multi-party democracy. On the other hand, the mass democratic movement, spearheaded by the labour movement, university and college students, civil society, the church and professional bodies such as the Law Association of Zambia and the Economics Association of Zambia, called for a simple amendment to the 1973 constitution by the deletion of Article 4 of that Constitution which declared Zambia a one-party state.\(^48\)

In November 1990, President Kaunda appointed a Constitutional Review Commission under the Chairmanship of the respected lawyer and academic, Professor Patrick Mvunga, to enquire, determine and recommend a system of political pluralism that would ensure the separation of the powers of the legislature, the executive and the judiciary so as to enhance the role of these organs and to look into the composition and functions of the various organs of the state and recommend modalities of their operation.\(^49\) Shortly thereafter Kaunda reached a compromise agreement with the nascent opposition and a constitutional amendment was passed, expunging Article 4

\(^{46}\) As above.
\(^{47}\) As above.
\(^{48}\) Mwanakatwe (n 18 above) pp 205-207.
\(^{49}\) The Mvunga Commission was appointed on 30 November 1990.
from the Constitution and thus paving the way for the formation of political parties.\textsuperscript{50}

In the meantime the Mvunga Commission held public hearings in most of the country’s major centres. Some of the petitioners who appeared before that Commission submitted that the method of adoption of the constitution should be considered as an important factor in determining its legitimacy. They, therefore, submitted that the constitution should be debated and adopted by a Constituent Assembly or a National Convention\textsuperscript{51}.

In its report, the Commission concluded that ‘there was no need for a Constituent Assembly since there was in place a legitimate and lawfully constituted National Assembly’\textsuperscript{52}. The Commission therefore recommended that the constitution should be adopted and enacted by Parliament\textsuperscript{53}. On its part, the Kaunda administration did not accept most of the Commission’s recommendations. The emerging opposition forces, particularly the newly formed Movement for Multi-Party Democracy and the labour movement did not accept the draft constitution appended to the Commission’s report.\textsuperscript{54} To his credit, Kenneth Kaunda was prepared to accept a compromise constitutional text agreed to at an Inter-Party dialogue between the ruling UNIP and the MMD. These talks were brokered by the ‘mother churches’ under the Chairmanship of the Anglican Church’s Bishop Stephen Mumba. These talks were assisted by an Inter-Party Group of Experts, formed on 25 July 1991.\textsuperscript{55}

The document agreed to at the Inter-Party talks was eventually enacted into law as the Constitution of Zambia Act which came into force on 30 August 1991. That constitution was perceived as a transitional document, to meet the immediate pressures of the time. As Simutanyi correctly observes, ‘It did not reflect popular aspirations … an undertaking was made to have it reviewed once the MMD came to

\textsuperscript{50} Mwanakatwe (n 19 above).
\textsuperscript{51} Mvunga Commission Report (n 11 above). These submissions were reiterated in the \textit{Mun’gomba Constitutional Review Commission Report} (n 13 above) 493.
\textsuperscript{52} Mvunga Commission Report (n 11 above); \textit{Mun’gomba Commission Report} (n 13 above) p 493.
\textsuperscript{53} Mvunga Commission Report (n 11 above).
\textsuperscript{54} Mwanakatwe (n 18 above) p 221.
\textsuperscript{55} As above.
power’. The point to note here is that the drafting and adoption of this transitional constitution was not a preserve of the government of the day through a National Assembly dominated by that government. This is not to downplay the fact that there was little popular participation beyond the ‘bipartisan consensus’ between UNIP and MMD.

In the presidential and parliamentary elections that followed, the former trade union leader and presidential candidate for the main opposition party, the Movement for Multiparty Democracy (MMD), Frederick Chiluba, won 76% of the presidential vote. The MMD won 125 of the 150 seats in the National Assembly, with Kaunda’s UNIP taking the remaining 25 seats. President Kaunda conceded defeat and Chiluba became Zambia’s second president. This peaceful transfer of power led to Zambia being ‘heralded as a model for democracy in Africa’.

On coming to power Chiluba promised democratic, transparent and accountable governance among other things. These issues were not adequately addressed in the 1991 Constitution. Thus among the political reforms promised in the MMD election manifesto was a review of the 1991 Constitution.

In 1993, the Chiluba government appointed the Mwanakatwe Constitutional Review Commission, under the Chairmanship of the respected lawyer and veteran cabinet minister during the first and second republics John Mwanakatwe, SC. The Commission was given very broad terms of reference, including -

(a) ‘to ensure that Zambia was governed in a manner that promoted the democratic principles of fair and regular elections, transparency and accountability and that would guard against the re-emergence of a dictatorial form of government;’

As above.
Simutanyi (n 9 above) 9.
African Elections Database; see also History of Zambia.
The Mwanakatwe Constitutional Review Commission was appointed on 22 November 1993. the period immediately following the attainment of independence, 1964-1972 is called the first republic while the period of one-party rule, 1973-1991 is usually referred to as the second republic.
(b) ‘to provide for appropriate arrangements for the entrenchment and protection of human rights, the rule of law and good governance …, the competence, impartiality and independence of the judiciary; and

(c) to review the 1991 constitution’.\(^61\)

The Commission was further requested to recommend whether the Constitution should be adopted by the National Assembly or by a Constituent Assembly, by a national referendum or by any other method and a suitable method for amending any part thereof.\(^62\)

The Mwanakatwe Commission canvassed the views of a very broad spectrum of public opinion in the country. Some of the Commissioners travelled to several countries to study their constitutional models. For the purposes of this paper, it is important to note that petitioners to the Mwanakatwe Commission ‘overwhelmingly submitted that the Constitution should be adopted through a Constituent Assembly and a national referendum’.\(^63\) They argued that adoption of the constitution by the then legislature ‘would be risky because parliament was dominated by one party’\(^64\).

The Mwanakatwe Commission went further to recommend the composition of the Constituent Assembly, that is, all MPs, one representative from each district, representatives from political parties not represented in parliament, civil society organisations, academia, civil and professional associations, traditional rulers, women’s organisations, churches and other religious organisations\(^65\). According to the Commission this recommendation ‘on the mode of adoption was to address ‘the views of the people and the need for legitimacy and durability of the Constitution’\(^66\).


\(^{64}\) Mwanakatwe Report (n 11 above) cited in Mun’gomba Report (n 51 above) 494.

\(^{65}\) As above.

\(^{66}\) As above.
The Chiluba government rejected most of the Commission’s recommendations. On the question of the most appropriate mode of adoption of the Constitution the Chiluba government made the following observations regarding what it perceived to be ‘legal and practical limitations’ in the recommendations. They are reproduced verbatim hereunder for the sake of completeness:

(a) ‘The provisions of Article 62 in the present Constitution make it inconsistent for Parliament to abdicate its vested power to legislature in favour of any subordinate body such as the Constituent Assembly in these circumstances. The concept of Parliamentary Sovereignty and its legitimacy in a democracy makes it a betrayal of confidence of the electorate for Parliament to abdicate its authority to legislate;

(b) Article 79 in the existing Constitution is unambiguous in its provisions on the procedures for the alteration, amendment, re-enactment, modification or replacement or suspension of any of the provisions or parts of a provision of the Constitution. It is not constitutionally permissible to adopt a procedure other than the procedure provided for in the existing Constitution, prior to the amendment of Article 79;

(c) As the genesis of the extra-constitutional amendment efforts, the Statutory Instrument under the Inquiries Act proposed for the establishment of the ‘Preliminary Constituent Assembly’ would expressly offend the provisions of Article 79 in the existing Constitution and thus become void for inconsistency with the provisions of Article 79. (see also Article 80 (3) of the present Constitution;

(d) The Preliminary Constituency Assembly would not engage in any ‘inquiry’, within the meaning of the word in the Inquiries Act. The Statutory Instrument and consequently the Preliminary Constituent Assembly would be unlawful as being outside the enabling Act;

(e) The true import of Article 79 in the existing Constitution as to its legal, logistical, financial and material imperatives in unfortunately glossed over. To amend or remove Article 79, it is necessary to:

- Conduct a national census to determine the number of people ‘entitled to be registered as voters for the purposes of Presidential and Parliamentary elections’ i.e. all persons of or above the age of eighteen (18);
- The above is necessary in order to determine accurately the numerical threshold constituting the fifty per cent (50%) plus one required to pass the amendment, removal or replacement of Article 79 at the National Referendum;

The time necessary to put together the logistical and financial requirements to undertake (the Referendum) above is, by many years, outside the time framework the Commission envisages; and

The possibility of failure to meet the stringent requirements of amending or replacing Article 79 of the existing Constitution, far outweigh the possibility of success.

In arriving at the above decisions, Government wishes to emphasise that a Constituent Assembly is transitional measure to be used where a Parliament is not universally constituted by the majority of citizens as was the case in Namibia and South Africa. The issue of a Constituent Assembly does not therefore arise in the Zambian situation where a Parliament is constituted through universal adult suffrage.’

By invoking the legislative omni-competence of Parliament as enacted in Article 62 and constitutional amendment procedure in Article 79 of the 1991 Constitution, the Constitution (Amendment) Act was passed in Parliament on 22 May 1996 after its second reading when 121 MMD members voted for it, 2 National Party MPs voted against while 22 UNIP MPs walked out in protest. On 28 May 1996, President Chiluba assented to the amendment and the Constitution of Zambia (Amendment) Bill 18 of 1996 became law.69

The Amendment Act introduced three key changes:

(a) First, it revised the Preamble to the Constitution so as to provide for the declaration of Zambia as a Christian nation.

(b) Secondly it added provisions relating to qualifications for presidential candidates based on origin or birth of the candidate’s parents. This radical amendment was contained in Article 34 (3) which required, inter alia, that aspirants for the presidency be Zambia citizens born to parents who were Zambians by birth or descent and not be a tribal chief. These requirements appeared to be precisely tailored to disqualify specific opposition leaders from running for president, in particular former President Kenneth Kaunda, 68

68. These ‘constraints’ have been reproduced verbatim in the Mun’gomba Commission Report (n 19 above) 494.

69. It is now cited as the Constitution of Zambia (Amendment) Act 18 of 1996. See also, Human Rights Watch Report (n 43 above) 11.
partially of Malawian heritage, and UNIP’s Vice-Presidential candidate, Chief Inyambo Yeta, a tribal chief.\textsuperscript{70}

(c) Thirdly, it provided that no person who had twice been elected president should be eligible for election to that post (again targeted at Kenneth Kaunda who had announced his return to politics and his intention to contest presidential elections in 1996).\textsuperscript{71} It should be noted here that under Article 35(2) of the 1991 constitution no person who held office as President for two terms of five years each was eligible for re-election to that office. Subsection 3 made it clear that the period of two terms of five years should be computed from the commencement of that constitution (30 August 1991). Quite clearly that did not cover the period served by Kaunda between 1964-1991. The 1996 Constitution Amendment removed the reference to the commencement date by simply stating that ‘no person who has twice been elected as president shall be eligible for re-election to that office. (See article 35(2) of the 1996 Constitution.)

Opposition political parties, civic associations, human rights NGOs and women’s groups vigorously opposed the MMD government’s decision to reject the Mwanakatwe Commission’s proposal to establish a constituent assembly to adopt the new Constitution followed by its approval in a referendum. Instead, the government insisted that the amendment was non-negotiable with President Chiluba emphasizing that

\[\text{…. the constitutional amendments which recently came into force and the procedures followed were handled within the context of the provisions of the existing constitution, and everything provided for in the constitution was more than complied with.}\textsuperscript{72}\]

This uncompromising attitude on the part of the government resulted in a further deterioration in the relations with opposition parties, the church, NGOs and other parts of civil society.\textsuperscript{73} The opposition parties and others opposing government


\textsuperscript{71}. Human Rights Watch Report (n 43 above) p 2. See also, Chitala v The Attorney General 1996-97 ZR 89.

\textsuperscript{72}. As quoted by the Citizen Newspaper Friday 21 June 1996 21.

policies were not seen as people holding different opinions but as enemies of the state.\textsuperscript{74} On 28 October 1997 an attempt to overthrow the Chiluba government was crushed by loyal soldiers. A number of prominent opposition leaders were arrested including Kenneth Kaunda and Dean Mungomba, a losing presidential candidate in the 1996 elections for the Zambia Democratic Congress (ZDC).\textsuperscript{75}

Prior to the 2001 presidential and parliamentary elections, Chiluba tried to amend the constitution so as to allow him to run for a third term. However, he failed to secure enough support within his own party (the MMD). There was also massive opposition to the ‘third term’ idea from ordinary Zambians. In the end, he stepped down after serving two terms.\textsuperscript{76}

President Mwanawasa, who succeeded Chiluba in hotly contested elections, promised, inter alia, to re-establish a government of laws, not of men, and to review the constitution. In 2003 Mwanawasa appointed the Mun’gomba Constitutional Review Commission, again using the Inquiries Act, with the broad mandate of collecting views from the general public within Zambia and from Zambians living abroad on what type of Constitution Zambia should enact and recommending a constitution that would exalt and effectively entrench and promote legal and constitutional protection of fundamental human rights and freedoms and stand the test of time.\textsuperscript{77}

Because of the centrality of the Commission’s mandate and recommendations to the existing impasse on the process of adopting the Commission’s proposed constitution it is imperative to recap or reiterate some of the key terms of reference for the Commission:-

\textsuperscript{74} Following the so-called Black Mamba saga, opposition UNIP leaders were arrested and committed to the Lusaka High Court for trial, charged with high treason and murder.
\textsuperscript{75} Human Rights Watch (n 43 above) pp 3-4; Sardanis (n 28 above).
\textsuperscript{76} Human Rights Watch Report (n 43 above) pp 2-4.
Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi April 2007 by Melvin LM Mbao ruth.gaeebee@nwu.ac.za

- Recommending a constitution that should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time.
- Examining and recommending on the desirability of the death penalty.
- Recommending a system of government that will promote democratic governance and guard against the emergence of a dictatorial form of government
- Reviewing the election system to ensure fairness in the conduct of presidential, parliamentary and local government elections.
- Recommending provisions to ensure the competence, impartiality and independence of the Judiciary, and access of the public to justice.
- Examining and recommending the composition and functions of the organs of government with the view to maximising on checks and balances and securing, as much as possible, their independence.
- Examining and recommending effective methods to ensure grassroots participation in the political process of the country, including the type of provincial and district administration.
- Examining the local government system and recommending how a democratic system of local government as specified in the Constitution may be realised; and
- Examining and recommending on issues of gender equality.
- Also key among the terms of reference were those enjoining the Commission to recommend suitable methods of amending and adopting the Constitution.78

From August 2003 to September 2004, the Commission conducted public hearings in all parliamentary constituencies in the country. It received both oral and written submissions from Zambians, including those living abroad. There were massive turnouts at all sittings. In addition special sittings were organized for other stakeholders, including the Judiciary, the National Assembly, the Anti-Corruption Commission, the Human Rights Commission, the Zambia Congress of Trade Union, the Federation of Free Trade Unions, the churches, political parties, the Law Association of Zambia and members of the defence and security forces. Furthermore, the Commission carried out comparative study tours to South Africa, Uganda, Kenya,

Ethiopia, Nigeria, Sweden, Denmark, Norway and India in order to draw inspirations from these countries.  

An overwhelming number of petitioners submitted that the Constitution should be adopted by a Constituent Assembly, a Constitutional Conference or a body with broad representation. The reasons advanced for a Constituent Assembly or other popular body were, inter alia, that Parliament was not representative enough of all the various social interests in the country; and that the formulation of a new Constitution should be more inclusive, broad based, gender representative and encourage the participation of citizens in order to give the constitution-making process legitimacy. The Commission recommended that the constitution should be adopted by a Constituent Assembly followed by a national referendum. It went further to recommend that the Constituent Assembly should be composed of:-

- 2 representatives from each district, one man and one woman, making a total of 148.
- All Members of Parliament (150).
- One representative from each of the registered political parties represented in the National Assembly.
- 3 representatives of the Law Association of Zambia.
- 2 representatives of the Economics Association of Zambia.
- 4 representatives of the Local Government Association of Zambia.
- 3 representatives of the Zambia Congress of Trade Unions.
- 2 representatives of the Zambia Federation of Free Trade Unions.
- 2 representatives of the Zambian Federation of Employers.
- 2 representatives of the Zambian Association of Chambers of Commerce and Industry.
- 3 representatives elected from women’s organisations.
- 10 representatives from eminent persons appointed by the President, including Past Presidents and Chairpersons of previous Constitutional Review Commissions.

81. 3,119 submissions were received on this subject, with an overwhelming demand for adoption.
Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi April 2007 by Melvin LM Mbao ruth.gaebee@nwu.ac.za

- 8 representatives from religious organizations (2 from the Council of Churches of Zambia, 2 from the Zambia Episcopal Conference, 2 from the Evangelical Fellowship of Zambia and 2 from the Independent Churches of Zambia).
- 4 representatives from the Media Association of Zambia.
- 6 representatives from student unions.
- 2 representatives from Youth Organisations.
- 4 representatives from organizations representing people with disabilities.
- 1 representative of the Islamic Association of Zambia.
- 1 representative of the Hindu Association of Zambia.
- 4 representatives from NGOs not provided for.
- 10 representatives from Defence and Security Services and the Public Service Commission.
- 2 representatives of the Zambia Institute of Chartered Accountants.
- 2 representatives of the Medical Council of Zambia.
- 18 randomly selected petitioners to the Constitutional Review Commission.\(^2\)

The Commission was unanimous in these recommendations. Equally it was emphatic that the adoption of the Constitution through the National Assembly undermined the sovereign will of the people in constitution-making. It noted that its visit to all the 150 parliamentary constituencies was applauded by many people because they saw in that exercise an opportunity to express their views on the subject.\(^3\)

The main thrust of the Commission’s recommendation was that the people should define the Constitution-making process and that the Constitution should be a product of the sovereign will of the people. It should be made and amended through a popular mandate and not through the Inquiries Act and that in order for the Constitution to stand the test of time it ought to be a product of the will of the people expressed directly by the people. The Constitution adopted by the Constituent Assembly and

\(^2\) The Commission was unanimous in this recommendation, emphasizing that the Constitution-making process should be broad-based, inclusive and representative in order to give the constitution the necessary legitimacy. See Report of the Mun’gomba Commission (n 51 above) 500-501.

\(^3\) As above 494-500.
Draft paper presented at African Network of Constitutional Law conference on
Fostering Constitutionalism in Africa Nairobi April 2007
by Melvin LM Mbao ruth.gaebee@nwu.ac.za

approved by the people in a national referendum would then be enacted into law by Parliament. 84

Finally the Commission recommended the enactment of an Act of Parliament laying down the processes and procedures, allocating the necessary resources as well as stating the composition and functions of the Constituent Assembly. 85 The motivation for these recommendations is not clear from the report but it can be surmised that the Commission could have drawn inspiration from other countries, especially Kenya where the deliberations of the Constitutional Conference proved inconclusive, with President Mwai Kibaki ultimately by – passing that Conference and pushing his own draft Constitution through parliament. 86

It is also instructive to point out that the Mun’gomba Commission recommended that the Constitution should ‘explicitly reflect in the Preamble as well as in the operative part that the people shall adopt, enact and give to themselves the Constitution’. 87

The Mun’gomba Commission submitted its final report in December 2005. However, between 2005 and 2007 there was a stalemate in the constitution-making process, chiefly because of disagreements between the Mwanawasa government on the one hand and the opposition political parties and civil society formations on the other. As pointed out in the introduction, at the heart of the dilemma has been the need to ensure that this time around the constitution-making process was people-driven and not dominating by the executive.

The Mwanawasa government had earlier sent conflicting signals. Initially the government had favoured the adoption of the proposed constitution by Parliament,

84. As above 500-501.
85. As above 501. It is important to note that the Commission recommended that the result of the Constituent Assembly should be final and legally binding, subject to the outcome of the national referendum and implemented by a resolution of the Constituent Assembly.
86. See Coel Kirkby (n 14 above) 20.
87. Report of the Mun’gomba Commission (n 51 above) 76. The Commission here noted the example of the case of Uganda Constitution which expressly states in the Preamble that the adoption and enactment of the constitution shall be done a Constituent Assembly specifically created for the purpose of adopting and enacting the Constitution.
citing technical, logistical and legal obstacles in following the process recommended by the Mun’gomba Commission. Chief among the government’s concerns were the costs and time constraints associated with preparations for a national referendum to decide on whether or not the constitution should be adopted by a Constituent Assembly followed by approval of a text in a national referendum and subsequent enactment by Parliament. But even as the government was grudgingly accepting the idea of a referendum, President Mwanawasa ‘told the nation that … he would vote against a Constituent Assembly’. Without reaching broad consensus with the other stakeholders, the government released a roadmap, spanning a period of almost five years over which all the necessary preparatory administrative, technical and legal process would be completed, culminating in the National Assembly enacting a constitutional document adopted by a Constituent Assembly. On the other hand, civil society groupings under the broad umbrella of the Oasis Forum were adamant that a new constitution could be adopted by a Constituent Assembly followed by approval in a national referendum in a comparatively shorter period. For ease of reference and for the sake of completeness the two sets of roadmaps are reproduced here under.

### CONSTITUTION MAKING PROCESS

#### SUMMARY OF REVISED ROADMAP AS PROPOSED BY THE OASIS FORUM

<table>
<thead>
<tr>
<th>STEP</th>
<th>ACTION</th>
<th>PERIOD</th>
</tr>
</thead>
</table>
| 1 | Enactment of Constituent Assembly Act  
Process includes preparations of bill, presentation to National Assembly and assent by President | 12 Weeks |
| 2 | Issuance of Statutory Instrument setting up the Constituent Assembly Secretariat and appointment of Staff | 8 Weeks |
| 3 | Nomination and appointment of members of Constituent Assembly as per Mung’omba recommendations  
* Note: Step 1, 2 & 3 can be simultaneous | 4 Weeks |

#### GOVERNMENT ROADMAP

<table>
<thead>
<tr>
<th>STEP</th>
<th>ACTION</th>
<th>PERIOD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Work of the Constitution Review Process Implementation Committee – the Committee should Constitution Review Process on behalf of Government. It is proposed that the Secretariat is established</td>
<td>87 Weeks</td>
</tr>
<tr>
<td>2</td>
<td>Cabinet decision on Roadmap – a Cabinet decision will be Required to approve the report of the Committee</td>
<td>4 Weeks</td>
</tr>
<tr>
<td>3</td>
<td>Issuance of Statutory Instrument Initiating the Referendum – Arising from the decision by Cabinet, the President shall issue a Statutory order by way of a Statutory Instrument to initiate Referendum</td>
<td>1 Week</td>
</tr>
</tbody>
</table>

---

88. Simutanyi (n 9 above) 11.
### Run Concurrently

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
<th>Time Frame</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Issuance of Statutory Instrument by the President establishing Constituent Assembly in accordance with provisions of Constituent Assembly Act</td>
<td>1 Week</td>
<td>Determining the number of persons entitled to register as voters for the referendum is required to be undertaken</td>
</tr>
<tr>
<td>5</td>
<td>Constituent Assembly to hold sessions and thereafter adopt the new Constitution</td>
<td>24 Weeks</td>
<td>Process of conducting a Referendum – the Referendum is necessary to amend Article 79 of the Constitution</td>
</tr>
<tr>
<td>6</td>
<td>Dissolution of Constituent Assembly in accordance with provisions of Constituent Assembly Act</td>
<td>1 Week</td>
<td>Amendment of Article 79 and Constituent Assembly Bills – in order to establish a Constituent Assembly, Cabinet is required to make a decision on the Bill for the Amendment of Article 79 and the Bill for the establishment of the Constituent Assembly</td>
</tr>
<tr>
<td>7</td>
<td>Issuance of Statutory Instruments by the President Initiating the National Referendum</td>
<td>1 Week</td>
<td>Gazette Notice for Amending Article 79 and Draft Constituent Assembly Bill – a Gazette notice to inform the public of the Bill Amending Article 79 of the Constituent and another for the establishment of the Constituent Assembly</td>
</tr>
<tr>
<td>8</td>
<td>Process of conducting a Referendum (includes notices, registration of voters and actual referendum)</td>
<td>16 Weeks</td>
<td>Enactment of Article 79 and Constituent Assembly Bills – following Steps (6) and (7), Parliament is expected to enact the amendment to Article 79 and Constituent Assembly Bills</td>
</tr>
<tr>
<td>9</td>
<td>National Assembly to formally enact the New Constitution of Zambia as approved by the people</td>
<td>4 Weeks</td>
<td>The Issuance of a Statutory Instrument to setting up the Constituent Assembly Secretariat – the Ministry of Justice is required to issue a Statutory Instrument setting up the Constituent Assembly Secretariat</td>
</tr>
<tr>
<td>10</td>
<td>President to assent the New Constitution of Zambia</td>
<td>14 Weeks</td>
<td>Appointment of Constituent Assembly secretariat Support Staff Cabinet is expected to second staff to the Secretariat of the Constituent Assembly</td>
</tr>
<tr>
<td></td>
<td>Total Time</td>
<td>71 Weeks</td>
<td>Secretariat’s work – the Secretariat commences its work which is Categorized as Pre-Constituent Assembly Sessions</td>
</tr>
</tbody>
</table>

### Notes on Roadmap as Proposed by the Oasis Forum

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
<th>Time Frame</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Constituent Assembly Elections – the Constituent Assembly Elections will be undertaken</td>
<td>24 Weeks</td>
</tr>
</tbody>
</table>

Total Time: 71 Weeks
<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Step Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Our Roadmap excludes steps 1 and 2 in the government Roadmap because we think that we need only one Secretariat to service the Constituent Assembly</td>
<td>8 Weeks</td>
</tr>
<tr>
<td>2</td>
<td><strong>CENSUS</strong>&lt;br&gt;The last Census was carried out in the 2000. Under the Census and Statistics Act Cap 127 of the Laws of Zambia, a Census is valid for 10 years. Therefore, the statistics are still valid and can be utilized up to the year 2010</td>
<td>8 Weeks</td>
</tr>
<tr>
<td>3</td>
<td><strong>REFERENDUM</strong>&lt;br&gt;On page 805 of the Report of the Mung’omba Review Commission, it is recommended that the current Constitution should be repealed and replaced by the new Constitution adopted by the Constitution Assembly. In other words this means that the existing Constitution is not being amended, so as to invoke the provision of Article 79 which requires a referendum. This will be a completely new Constitution.&lt;br&gt;&lt;br&gt;The only Referendum that will be necessary will be after the Constituent Assembly has adopted the Draft Constitution before its enacted by the National Assembly and assent by the President</td>
<td>Total Time</td>
</tr>
<tr>
<td>4</td>
<td><strong>APPOINTMENT AND NOMINATIONS OF MEMBERS OF CONSTITUENT ASSEMBLY</strong>&lt;br&gt;We are of the view that each organization should nominate their representatives to the Constituent Assembly using their own internal procedures. As for the two representatives from each District, we strongly believe that elections will be unnecessary. Each District already has elected representatives who are the Councillors. Each Council could simply nominate two from among their members being one male and one female, unless where there are no female or male Councillors. In such a case the District will be represented by the same gender.</td>
<td>8 Weeks</td>
</tr>
</tbody>
</table>

Source: These roadmaps were sourced courtesy of Dr Patrick Matibini of the School of Law, University of Zambia, Lusaka on 26 September 2007.
These roadmaps were released early in 2007. For over six months there was little or no movement in the Constitution-making process. However, in July 2007, ‘following a meeting of political parties represented in Parliament under the umbrella of the Zambia Centre for Inter-Party Dialogue, it was resolved that instead of a Constituent Assembly a National Constitutional Conference would adopt … the Constitution’.89

Pursuant to that decision, the National Constitutional Conference Act, 19 of 2007 was enacted and assented to on 31 August 2007. In section 3 of the Act, the National Constitutional Conference is described as ‘a forum for the examination, debate and adoption of proposal to alter the Constitution’. The functions of the Conference have been specifically provided for in section 13. These functions and the options available to the Conference can be paraphrased as follows:

(a) consider and deliberate on the provisions of the Report of the Mun’gomba Constitutional Review Commission (Section 13 (1) (a).

(b) Adopt a draft constitution or part thereof and submit such draft to the Minister for presentation to Parliament for the enactment of those provision of the constitution which do not require a referendum (section 13 (2).

(c) Adopt a draft constitution or a part thereof and then transmit such draft to the Minister for submission to a national referendum if any of its provisions purport to amend the Bill of Rights or the constitutional amendment clause in Article 79 of the current constitution. (sections 13 (1) (c) and 13(2) (b).

(d) Adopt and submit a draft constitution to the Minister for submission to a national referendum ‘if the draft constitution contains any provisions in respect of which there is no agreement among the members of the conference’. Sections 13 (1) (c) and 13(2) (b).

(e) Decide whether the entire draft constitution should be submitted to a national referendum, (section 13 (2) (b).

In discharging their mandate members of the Conference are enjoined to be:

89. Simutanyi (n 9 above) pp 11-12. The Zambia Centre for Inter-Party Dialogue has been established by a trust deed and registered under the Land (Perpetual Succession) Act Cap 186 of the Law of Zambia (see section 2 of the National Constitutional Conference Act 2007).
(a) ‘be accountable to the people of Zambia’ (s.13, (4) (a)
(b) ‘recognise the importance of confidence buildings, engendering trust and developing a national consensus for the adoption process,’ (s.13 (4) (b).
(c) ‘ensure through the observance of the principles referred to in section 14 that the adoption process –
   (i) provides the members with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution as contained in the draft constitution;
   (ii) is, subject to the Act, conducted in an open manner.
   (iii) is guided by the respect for the universal principles of human rights, gender equality and democracy; and
   (iv) ensures that the final outcome of the adoption process faithfully reflects the wishes of the people of Zambia.’

Section 14 enacts what have been referred to as ‘principles for democratic and secure adoption process’. Pursuant to these principles under s 41 ‘the government, the conference, political parties, non-government organisations and the people of Zambia’ are required to -

   (a) recognise the legislative power vested in Parliament …
   (b) avoid discord, violence or threats of violence or other acts of provocation during the debating and adoption process;
   (c) undertake not to deny or interfere with any person’s rights to hold or attend public meetings or assemblies, the right to personal liberty, and the freedom of expression and conscience during the adoption process, except in accordance with the law;
   (d) ensure that the police protect the safety of all persons who attend meetings or exercise the other rights, from violence from whatever source;
   (e) ensure that the meetings of the conference are held in peace;
   (f) respect the independence of the members; and
   (g) desist from any political or administrative action that will adversely affect the operation or success of the adoption process’.

It is important to refer to the composition of the conference in order to draw parallels with similar experiments elsewhere, in particular those of Kenya and Uganda. In terms of section 4 of the Act, a very broad spectrum of Zambian society will be
represented by approximately 500 delegates from the following categories of stakeholders:

(a) All Members of the National Assembly (158).

(b) ‘Six representatives from each political party and the forum of other parties which is a member of the Zambia Centre for Inter-Party Dialogue’.

(c) ‘Three representatives each of the Zambia Episcopal Conference, the Council of Churches in Zambia, the Evangelical Fellowship of Zambia and any other Church mother body which is registered under the Societies Act, Cap 119 of the Laws of Zambia and has been in existence for at least five years.’

(d) ‘Two representatives each of the following professional bodies: The Law Association of Zambia; the Economics Association of Zambia, the Zambia Association of Chambers of Commerce and Industry, the Engineering Institute of Zambia, the Local Government Association of Zambia, the Zambia Institute of Certified Accountants, the Medical Association of Zambia and the General Nursing Council;’

(e) ‘Two representatives of traditional healers;’

(f) ‘Eighteen traditional leaders representing the House of Chiefs;’

(g) ‘Two representatives each of private media organisations; public media organizations; the Non-Governmental Organisation Coordinating Council; the Anti-Corruption Commission; the Electoral Commission; the Drug Enforcement Commission; and the Human Rights Commission;’

(h) ‘Seven representatives of the Zambia Congress of Trade Unions;’

(i) ‘Three representatives of the Federation of Free Trade Unions of Zambia;’

(j) ‘Three representatives each of the Zambia Federation of Employers;’

(k) ‘Three representatives of trade unions affiliated to the Zambia Congress of Trade Unions;’

(l) ‘Three representatives of trade unions affiliated to the Federation of Free Trade Unions of Zambia;’

(m) ‘Two representatives each from the two State Universities and from registered private universities;’

(n) ‘Two student representatives each from the two state universities and the National Students’ Union;’

(o) ‘Five representatives from colleges and other institutions of higher learning;’

(p) ‘Two representatives each from the Judicial Service Commission, the Public Service Commission, the Police and Prisons Service Commissions, and the Teaching Service Commission;’
(q) ‘Two representatives each from the Zambia Army, the Zambia Air Force, the Zambia National Service, the Zambia Police Force, the Zambia Prisons Service and the Zambia Security and Intelligence Service;’

(r) ‘Three representatives each of the following: the Judiciary, the Department of the Clerk of the National Assembly, the associations of differently abled persons registered with the Zambia Agency for Persons with Disabilities …, the National Arts Council of Zambia; the Zambia Chambers of Commerce and Industry and the Zambia Agency for Persons with Disabilities …’

(s) ‘One eminent Zambian, from each province who has distinguished oneself in any business, field or profession;’

(t) ‘One senior citizen, from each province, who has held public office and is at least fifty-five years old;’

(u) ‘Ten senior civil servants;’

(v) ‘Three representatives of women’s organizations which are not members of the Non-Governmental Organisations Co-ordinating Council;’

(w) ‘Two representatives of registered youth organizations;’

(x) ‘Two representatives each of the Islamic Association and the Hindu Association;’

(y) ‘Ten representatives of registered non-governmental organizations;’

(z) ‘One freedom fighter, from each province, who participated in the struggle for independence and is at least sixty-five years old;’ and

(aa) ‘One councilor each of every local council in the country’.

PROGNOSIS FOR THE FUTURE

In the section above we reproduced the depth and breadth of representation so as to enable students of constitutional law in Zambia to compare what sort of representation was recommended by the Mun’gomba Commission and what is contained in the Act. It will be recalled that the Mun’gomba Commission recommended that the constitution-making process should be broad-based, inclusive and representative in order to give the constitution the necessary legitimacy. At face value the composition of the Conference as elucidated above goes far beyond what was recommended by the Mun’gomba Commission. It is therefore important to recognise that for the first time in the history of constitution-making in Zambia, a genuine attempt has been made to involve a very broad spectrum of Zambian society in the constitution-making process.

\(^{90}\) See section 4 of the NCC Act.
That should meet the clamour for popular participation by the people of Zambia in the making of their own constitution. Popular engagement through the Conference also satisfies the demand that in order for the constitution to stand the test of time it ought to be a product of the will of the people expressed directly by the participants in that process. Thus in terms of representativity, inclusivity and popular mandate the conference meets the two critical benchmarks of ownership and durability of the end product of the Conference.

At the same time it is important to point out that in view of the fact that government did not reach a broad consensus with the main opposition party in the National Assembly, the Patriotic Front (with 44 MPs) and the Oasis Forum, the umbrella civil society organisation, which has been championing the cause for a broad-based Constituent Assembly it may well be that the constitution to be produced by the Conference will be lacking in legitimacy in the eyes of significant stakeholders in the constitution-making process. For, as Ndulo has correctly pointed out;

> Constitution-Making structures must be open to views and opinions of all stakeholders who must be given meaningful opportunity to make their views known … A constitution that is perceived as imposed on the population or having been adopted through manipulation of the process by one of the stakeholders is unlikely to gain sufficient legitimacy or stand the test of time.\(^2\)

The need to include all significant stakeholders was the subject of intense debate in the National Assembly even before the Conference began its deliberations. The Portfolio Committee on Legal Affairs, Governance, Human Rights and Gender Matters, in its report for 2006 recommended the repealing and replacement of the current constitution by a more popular body, pointing out that ‘the issue of enacting a new constitution was paramount to good governance’.\(^3\) However, the National

\(^91\) Simutanyi (n 9 above) pp 11-12. See also, press reports cited n. 8 above. The Patriotic Front has threatened to discipline its MPs participating in the Conference, see, *The Post* 21 December 2007 20.
\(^92\) As quoted by Simutanyi (n 9 above) 4.
\(^93\) Hon. Joseph Kasongo, Patriotic Front MP for Bangweulu and Acting Chairperson of the Portforlio Committee, Times of Zambia, 23 November 2007 (Note that Hansard was not available at the time of writing).
Assembly, in a tightly contested poll voted 63 – 61 against the report, with the government arguing that the NCC Act could not be taken back to Parliament for amendment within six months of its being passed after being assented to by the President and that the Government had reached a very advanced stage in its preparations for the NCC which was irreversible.\footnote{94}{Times Reporter \textit{Times of Zambia} 23 November 2007 p 1.}

Of course the argument that the NCC Act could not be amended, with the greatest respect, is fallacious. Parliament can amend and repeal any law, subject to the prescribed formalities.\footnote{95}{Section 62 of the Constitution of Zambia (Amendment) Act 18 of 1996.} At the very least the opposition parties in Parliament could sponsor a private members Bill to amend the Act. The current National Assembly has 150 members directly elected by the people and an additional 8 members nominated by the President. Currently the ruling party, the Movement for Multiparty Democracy has 74 seats, with the combined opposition holding 76 seats.\footnote{96}{African Elections Database p 7.} It is within the realm of possibility that a Private Members’ Bill could be passed by the National Assembly with the co-operation of some renegade MPs from the MMD. However, that mathematical chance is unlikely to receive Presidential assent given the determination of the government to go it alone.\footnote{97}{Times Reporter \textit{Times of Zambia} 23 November 2007 p 4 quoting Justice Minister George Kunda to the effect that Government had reached a very advanced stage in its preparations for the NCC which was irreversible and due to start in December 2007.}

The second challenge to the Act has come from the leader of one of the smaller opposition parties not represented in the National Assembly, Godfrey Miyanda of the Heritage Party.\footnote{98}{J Konayuma ‘Miyanda Petitions Court over NCC’ \textit{Zambia Daily Mail} 15 November 2007. I am again grateful to Dr Matibini for availing me a summary of the petition.} He has petitioned the High Court to determine the constitutionality of the NCC Act. Miyanda is seeking a court order declaring sections 4, 14, 17, 21 and 32 of the Act discriminatory, undemocratic and unconstitutional. His arguments can be summed up thus:

(a) That Section 4 (1) (b) which provides for the representation of political parties which are members of the Zambia Centre for Inter-Party Dialogue is discriminatory and violative of
Article 21 of the Constitution protecting the freedoms of assembly and association in that political parties like his, which are not members of the Zambia Centre for Inter-Party Dialogue, are precluded from nominating delegates to the NCC.

(b) That section 14 (a) of the Act is unconstitutional because it limits the mandate of the NCC to altering or amending any provisions of the Constitution, including Article 62 (on the legislative power of parliament).

(c) That the procedure of nominating members to the NCC is uncertain and vague ‘and left room for speculation and manipulation’, for example, section 4, para (5) referring to ‘eminent Zambians’, para (t) referring to ‘senior citizens’, para (s) referring to ‘senior civil servants’ and (aa) on ‘freedom fighters’. Miyanda’s argument comes down to this: how are these representatives to be identified and nominated?

(d) That section 21 (1) of the Act prohibiting the publication of, or disclosure of information to unauthorised persons does not uphold the values of democracy, transparency, accountability and good governance and that it violated Article 20 (1) of the Constitution protecting freedom of expression.

Miyanda’s petition was before the High Court at the time of writing. Without prejudging the outcome of that case it is respectfully submitted that there is considerable force in Miyanda’s submissions. The exclusion of registered political parties which are not represented in the National Assembly and therefore not members of the Zambia Centre for Inter-Party Dialogue lends credence to the view that the process is not inclusive enough. In our considered opinion, the better approach should have been to adopt the formula recommended by the Mwanakatwe Constitutional Review Commission, 1995 to effect that each registered political party not represented in the National Assembly have one representative in the Constituent Assembly.

Another disquieting feature of the Act is that the process prescribed therein departs significantly from the recommendation of the Mun’gomba Commission that the result of the Constituent Assembly ‘shall be final and legally binding’, subject to the outcome of the National referendum, and implemented by resolution of the
Constituent Assembly.\textsuperscript{99} In stark contrast to that recommendation, section 13 (2) leaves it open to the conference to make crucial determinations as to whether to submit a draft bill for the enactment of those provisions of the Constitution which do not require a referendum or submit the entire draft constitution to a referendum. Simutanyi, has correctly noted that ‘there are fears that government may easily manipulate the process given what appears like an inbuilt majority’.\textsuperscript{100} These fears are exarcebated by the fact the National Assembly in which the ruling party, the MMD currently holds 74 seats out of 150 retains the power to alter whatever will be agreed to at the conference.

**CONCLUSION**

This paper has attempted to identify the process and critical factors underlying Zambia’s constitutional development. The thread which runs through the discourse has been that historically, constitution-making in Zambia has been dominated by political elites, resulting in what Simutanyi calls ‘elite consensus’ … aimed at minimalist positions to serve the interests of power holders.\textsuperscript{101} We have pointed out that successive governments have been able to use the Inquiries Act to achieve their own narrow partisan interests. This method of constitution-making and reform has allowed the political parties in office to override the wishes of the people.

We have noted that in the on-going constitutional project the trenchant cry of the people of Zambia has been that the people themselves should define the constitution-making process and that the constitution should be a product of the sovereign will of the people. Given the deep seated mistrust between the government on one hand and opposition political parties, civil society organisations and the church on the other, it would appear to us that the outcome of the National Constitutional Conference will of overwhelming relevance and absorbing interest to students of constitutional law in

\textsuperscript{99} Mun’gomba Commission Report (n 19 above).
\textsuperscript{100} Simutanyi (n 9 above) 12.
\textsuperscript{101} Simutanyi (n 9 above) 9.
Zambia and will continue to engage us for some time to come. Our hope is for a document that the people of Zambia will identify as their own.

References


Government Publications