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ZAMBIA'S UNFULFILLED STRUGGLE FOR A NEW CONSTITUTION:

COMMENTS ON THE 2016 CONSTITUTION

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In the last fifty years, Zambia has engaged in numerous efforts to develop a new constitution. Prior constitutions include the 1964 Independence Constitution, the 1973 Constitution and the 1991 Constitution. In addition, there has been significant constitutional amendments, including those of 1969 and 1996. The efforts have been directed at adopting a more democratic structure, as well as political institutions that would be less susceptible to political manipulation. At the core of the demands is a call for the development of viable institutions of state that promote participation, transparency, accountability and devolution in governance. Excessive concentration of power in the executive has put constitutional and institutional reforms on the national agenda. In January 2016 the Zambia Parliament adopted numerous amendments to the 1991 constitution. The Government hailed the amendments as a new era in democratic governance in Zambia. However, the amendments have been criticized by many both for the way they were adopted and for the substance contained in the amendments. In this article, we examined the 2016 amendments against the core demands of the people for a new and more democratic constitution and endeavored to see if those demands have been met. Our conclusion is that once again Zambia has failed to adopt a constitution that responds to the aspirations of the Zambia people. The amendments suffer from serious defects as well as bad drafting. The struggle for a new constitution in Zambia will have to be revisited. At earlier pointed out, the demands for a new constitution in Zambia is for the development of viable institutions of state that promote participation, transparency, accountability and separation of powers between the three branches of government-executive, judiciary and the legislature. A key issue, therefore, in this constitution reform project is the demand for constitutional governance with restraints on presidential powers and a reduction in the excessive concentration of power in the executive. Experience worldwide has shown that a presidential system is likely to lead to dictatorship and pose a danger for political freedom unless there is an effective system of checks and balances, undisputed rule of law, constitutionalism, free and critical public opinion, and a fair and democratic electoral system. The first observation one can make with regard to the amended Zambia Constitution is that it is too long-some 117 pages. Some of the provisions, such as the ones relating to pensions (Article 187), natural resources, (Article 253) and environmental protection (Article 255) do not belong to a constitution and are better dealt with in ordinary legislation. Additional examples of provisions that do not belong to a constitution are provisions relating to the treatment of foreign investment and assuring foreign investors that they will not be nationalized (Article 10 (3,4,5). A constitution should deal with a general provision relating to property. The constitution retains dictatorial presidential powers as contained in the 1991 constitution and as a matter of fact it expands on them. Examples of expanded powers are those allowing the president to divide and create provinces or alter their boundaries with no process designed to curb possible abuse. The only control being that the change should be ratified by Parliament.

Where the ruling party has majority this is no check at all. Below I give comments on specific provisions:

1. The preamble declares Zambia a Christian state and at the same time guarantees a person freedom of religion, conscience and belief. This is clearly contradictory. To compound the confusion, the same preamble declares Zambia as "multi-religious state." Declaring Zambia a Christian state contradicts Zambia's treaty obligations under the International Covenant for Civil and Political Rights (Article:18.1), and the African Charter on People's and Human Rights (Article: 8) which both guarantee freedom of religion. It further violates the Universal Declaration of Human Rights (article:18). Freedom of religion is a *jus cogens norm*. Declaring Zambia a Christian state promotes the pernicious idea that non-Christians are in some way second-class citizens. It is contrary to best practice in constitution making. No other African country has declared itself a Christian state.

2. Article 8 gives a number of national values and principles. It includes "morality" as a national value. Morality is incapable of definition and is a subjective standard. In a multicultural society, there is more than one standard of morality in play, coming from different religions and belief systems. It is therefore unfavorable to have it as a national value.

3. One of the main demands for a new constitution was for a constitution that prohibited all forms of discrimination including discrimination perpetuated under customary law. Article 8 includes the principle of "human dignity, equity, social justice, equality and nondiscrimination." In its efforts to manipulate the process, it avoided amending the bill of rights. This would have required a referendum. As a result, customary law continues to be immunized against conformity with human rights norms. The Zambian Bill Rights in article 23 provides that the provisions outlawing discrimination "do not apply to any law so far as that law makes provision (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;" …(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.." This is a major setback for women's rights.

4. Article 10 does not belong to a constitution. Guarantees foreign investors protection from nationalization. Is it advisable to make government contracts with foreign investors' constitutional obligations? A constitution, according to Black's Law Dictionary (9th Edition), is "the fundamental and organic law of a nation or state that establishes the institutions and the apparatus of government, *defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties*. Its main scope is to define a government's duties and obligations to its citizenry, and the process of becoming a citizen, and citizens' rights and duties." As such, it is outside the constitutional scope to create promises to foreigners in commercial transactions with the State. The concerns of foreign business with regard to the risk of nationalization can be are met under the protection of the right to property provisions in the constitution.

Citizenship:

5. The constitution provides for citizenship by birth, descent and registration. As currently drafted there is no difference between citizenship by birth and citizenship by descent contained in Articles 34, 35 and 36. In both cases the citizenship arises from descent, whether one is born in Zambia or outside. A disambiguation of this should be done- if one cannot acquire citizenship by being born in Zambia of foreign parents, then the only citizenship in the constitution should be citizenship by descent and registration.

6. Article 43 provides a long list of "r*esponsibilities of citizenship."* They include: (a) to be patriotic and promote development, (b) protect and conserve the environment, (c) maintain a clean and healthy environment, etc. Are these enforceable or are they a general aspirational guideline to citizens? If they are enforceable, they may well infringe on freedoms of conscience and expression. However, if only aspirational guidelines, they should then be kept in the national values in Article 8.

7. Under the heading of electoral system, Article 45 (1) promises fair representation of various interest groups in society and gender equality in the National Assembly and in other elective positions. It does this without foreseeing how this will be achieved. If mechanisms are not established or required to be established by Parliament, this promise of fair representation will not be achieved.

8. Article 50 guarantees access to the media. A constitution cannot guarantee access to the media of a political candidate- this is based on commerce and the capability of the candidate to secure funds for the media campaign. However, the constitution can guarantee *equality of access* of all candidates in a political election- so that it is prohibited to deny one access to the media because of one's political affiliation.

THE EXECUTIVE

9. Article 90 (2) vests executive authority in the President. Executive authority should be 'exercised by' and not 'vested in' the President. This is more in line with the principle of the sovereignty of the people. Framing executive power that way emphasizes the supremacy of the people, and not the supremacy of the President.

Article 94 (1) (2)2 (2) which deals with a situation where executive action which requires parliamentary approval fails to get the necessary parliamentary approval. The approach of Article 94 (20) is to have such a situation referred to the constitutional court to decide whether the refusal by parliament to approve such action is justified. This exposes the Judiciary to unnecessary political pressure. It is forced to side with one party over the other on issues that may be entirely political- such as the acceptableness of an appointee to a position- a candidate may be technically qualified, but in the minds of parliament, may be unsuitable due to temperance or questionable integrity. Another example may be where a concession or treaty is entered into with a foreign state or company with a checkered history in relation to the state. Parliament may feel that the bad history with the corporation or state necessitates a refusal to ratify the President's decision, while the President feels that enough time has passed and the past should be forgotten. In parliament, the standard of questionable integrity or bad history is a political standard. In court however, the standard becomes a legal one- in the worst case scenario, one of beyond reasonable doubt. Transferring the political matter to court makes judges have to adapt their procedural tools to political ends- for which the tools are wholly inappropriate.

10. This subsection is furthermore wholly unnecessary- the business of co-ordination between the Executive and the Legislature is by and large political, and the leadership qualities of the leaders in both arms are aimed at harnessing political synergy to achieve their goals. As such, no safeguards are necessary to ensure action. An alternative of a mutually assured destruction has been developed in other countries to counter this situation- provisions to the effect that if the legislature and executive fail to co-operate to form a cabinet within a specified period (maybe 60 days), Parliament stands dissolved and the entire government goes back to a re-election. As the election activities are costly- in terms of time and money- and nothing is assured at the ballot, this provides an impetus to both groups to co-operate: an impetus to the President to choose candidates who are reasonably acceptable to a varied and divided Parliament, and an impetus to Parliament to reasonably consider the President's nominees.

11. Article 95: Establishes a procedure whereby in cases where Parliament does not approve of presidential appointments or measure requiring Parliamentary approval before it takes effect, the president can nominate another person. Where the National Assembly refuses or delays the ratification of the measure or appointment for the third time, that measure takes or appointment takes effect. It is difficult to see the rationale for this approach. The procedure outlined in this Article can be used as a political ploy- the President can lay out three wholly unacceptable candidates with no chance of making it through Parliament- while ensuring that the 3rd candidate, who is herself unacceptable on an obvious standard- let's say nepotism, goes through without need for ratification by Parliament. This is another example of the emphasis on the presidency that is evident throughout this constitution.

12. Article 98 deals with immunity of the president from civil and criminal proceedings. Article 98 (2) provides that the president shall not in his or her private capacity during the tenure of office as President, institute or continue civil proceedings against him. In 98 (4) it is provided that except where the immunity has been removed by parliament, the president is immune from criminal proceedings which immunity continues after that person ceases to hold or perform the functions of that office. With respect to 98 (2) it is not clear if this is an absolute ban. What about divorce proceedings? Can they go on? The President should not be immune from criminal proceedings after leaving office. This will encourage corruption and impunity. No one should have the opportunity to commit crimes, whether as a President or as a layman, without incurring liability. These sections are an affront to the country and to the rule of law.

13. There is a conflict between Article 104 (2) and Article 104 (3): the latter article declares that the incumbent President remains in office until the incumbent is sworn in. The former article however declares that the Speaker is the one who performs executive functions in the case of election petitions. Article 104 (3) is unnecessary and should be deleted. Even where the incumbent is seeking re-election for a second term and has an election petition against him, his first term is still in effect until a new president is sworn in, or he is sworn in for a second term. This maintains the stability of government, and avoids unnecessary transfers of power.

14. Given the abuse of patronage in the appointment of the cabinet, it would have been a good measure to limit the size of the cabinet. This should be provided for in the Constitution to prevent a bloated government. Article 111((5) which states that where a vacancy occurs in the office of the Vice –President except as provided under Article 81, the President shall appoint another person to be Vice President and the National Assembly shall by a resolution supported by the votes of not less than two thirds of the members of Parliament, approve the appointment of that person as Vice-President. The approach is devoid of any logic and the two thirds required for approval is the same as that required to amend the constitution. I see no justification for such a high threshold.

THE LEGISLATURE

15. Article 62 (1): states that Parliament consists of the President and the National Assembly. How is this reconciled with the doctrine of separation of powers? The fact that the president assents to legislation after it has been passed by Parliament does not mean he or she is part of Parliament. A similar provision in the Kenya constitution reads:" There is established a Parliament of Kenya which shall consist of the National Assembly and the Senate[1]." In Zambia there is no Senate, so Parliament should be the National Assembly. Parliament should be independent. Greater independence of Parliament is essential if Parliament is to be able to act as a check and balance to the Executive. An independent Parliament contributes to a more accountable government and increases the legitimacy of government action. Action of the Executive approved by Parliament is seen as one that has the approval of an independent house representing the interests of many varied positions in the country. This legitimacy and transparency should not be tainted by unnecessary intrusions into Parliament by the Executive.

[1] Article 93 (1) (2), Constitution of Kenya, 2010.

16. Article 72 (2) (c) (e) provides that a Member of Parliament loses his or her seat if he or she is expelled from the party which sponsored the member for election to the National Assembly. This article threatens the stability of people's representation in the Parliament. A Member of Parliament's seat is not only derived from his or her political party but also from his or her electorate. As such, the party should not be able to deprive the electorate of their elected representative by ejecting him or her from the party during the pendency of parliament. A compromise may be to allow a party to eject an MP from the party but this will not have the effect of removing the MP from his or her seat. However, if a Member of Parliament voluntarily quits his or her party, he or she should lose the seat. This will ensure the stability of political parties and avoids unnecessary expenses for by elections to fill the seat.

17. Article 81 (4) allows the President to dissolve Parliament if the Executive cannot effectively govern the country due to the National Assembly failure to objectively and reasonably carry out its legislative function. This section unnecessarily infringes the independence of the legislature by allowing the President to make quality statements about Parliament- its inability to objectively and reasonably carry out its legislative function. The executive cannot police the legislative function. If a deadlock is reached, it should be resolved through political means.

18. Section 81 (5) and (6) thrusts the Judiciary into this political dispute by asking the Judiciary to determine whether the situation in 84 (4) exists further infringe the independence of the Judiciary. Effective democracies have at their core a strong Parliament. This is absolutely a must if there is to be an effective system of checks and balances. The importance of a legislature that can act independently of the President t to ensure accountability of the President needs no special emphasis, unless parliament is in fact independent of the President, parliament's sovereignty simply means the sovereignty of the executive. To secure liberties in an open, plural, and democratic society, there ought to be an effective parliament which would not only be a focal point of policy, but one that is expected to play a crucial role in the checking and balancing of other powers. No constitution, however strongly entrenched, can be a guarantee against the temptations of power on the part of the executive unless there is an independent legislature to act as a counter poise against such temptation, and unless there is a strong national ethic against executive pretentions, the guaranteeing of rights of individuals is not worth the paper it is written on.

19. In Article 82 (4), dealing with the election of a Deputy Speaker it is provided that the Deputy Speaker shall be elected from a list of three names selected by political parties represented in Parliament. The prescription of 3 names assumes that the varied political parties shall be able to agree on 3 names to be nominated for First Deputy Speaker. Firstly, Articles 139 (1) and (5) have no prescription for the number of nominees for the posts of Speaker or Second Deputy Speaker respectively. Secondly, if there are more than 3 parties in parliament, and all want to nominate one of their own for election as First Deputy Speaker, how are they to decide who will make it to the final three? The prescription limiting the number to three should be removed.

THE JUDICIARY:

20. The amended constitution creates a separate constitutional court with its own judges. This might end up being an overload of the judicial system. Constitutional courts have their roots in civil law. In the Kenyan constitutional process, the first draft contained a proposal for a constitutional court, but this was rejected because it was felt that a separate constitutional court would make the judiciary bulky. It would seem to me that what Zambia needs is a division in the Supreme Court constituted to have a larger bench whenever the hearing of a constitutional matter arises. Furthermore, there are other problems associated with vesting jurisdiction to special courts only over constitutional matters. Constitutional law cannot be treated as a hermetically contained body impervious to effects from other branches of law. Being the fundamental law of the land, constitutional law is in constant interaction with other law streams. For instance, the right of a fair trial in a criminal proceeding is a constitutional matter rather than a criminal law question. There is no neat division between constitutional and other legal issues, and lawyers will always find a constitutional issue inextricably interlinked with banking, commercial law, company law and customary law disputes.

21. In Article 118 (c) among the principles of judiciary authority is included “the payment of adequate compensation where ever applicable”. Constitutional lawyers would not consider “adequate compensation shall be awarded, where applicable” as a principle of judiciary authority. Also the use of the “term repugnant to justice and morality” is outdated as a test for the application of customary law. The best practice is to test the validity of customary law against the bill of rights in the constitution.

22. Articles 121 states that "the Supreme Court and the Constitutional Court rank equivalently". This can lead to conflicts in the judicial system. What happens when there are conflicting decisions from the Supreme Court and the Constitutional Court? What if the Supreme Court refuses to certify a constitutional question to the Constitutional Court? What if the Constitutional court gives a decision and the Supreme Court fails to apply it? Also contrary to the trend elsewhere in the world, Article 125 (3) states that the Supreme Court is bound by its decision. This can cause unnecessary delays in the development of the law. This provision would mean that you would need parliament to change precedents which are no longer just given changes in society.

23. Articles 120 (1) creates the Supreme Court and the Constitutional Court. This is an unnecessary duplication of courts. To create a Supreme Court as just another level of appeals is an unnecessary lengthening of litigation. The Supreme Court should be the final court. International best practice also gives it the power to hear cases on referral that are of great importance. The work of a Constitutional Court can be divided between the Supreme Court and the High Court, which should be able to interpret the Constitution in the normal cause of litigation. Interpretative certainty on constitutional matters can be achieved by giving a right of appeal to the Supreme Court/Constitutional Court at the top of the court hierarchy. Furthermore, any specific references required for the Constitutional Court can be achieved by the top hierarchical court, whatever name it may assume.

24. The appointment of judges should be strictly on the recommendation of the Judicial Service Commission. To remove executive influence in appointments of judges, in most countries the president has to act on the recommendation of the Judicial Service commission. The president should not have any discretion in the matter. The process of appointing judges should be transparent and be clearly spelt out. Article 144 provides that a judge may be removed by the Judicial Complaints Commission. It is unusual to have the same type of procedure for dealing with complaints against the judiciary as for a serious matter such as the removal of a judge, which impacts on the independence of the judiciary. The removal of a judge in any jurisdiction is a serious matter and requires a judicial tribunal to decide the appropriate action. The appropriate tribunal is the Judicial Service Commission.

25. Article 216 states that the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority in the performance of its function under the constitution. And yet, independence is not secured by the manner of appointment of commissioners, who are in any event likely to be dominated by government functionaries. The constitution should specify the membership of the Judicial Service Commission. The best practice is to have a body that represents the courts, the law society and civil service commission. Members should serve for specified terms.

26. Article 123 states that the Judiciary shall be a self- accounting institution and shall deal directly with the Ministry of Finance in matters relating to its finances. There is conspicuously missing a provision setting up a Judiciary Fund to ensure the financial independence of the Judiciary. The fund would guarantee that the Judiciary's budget is not scrutinized by the Finance Ministry and is submitted directly to Parliament. This is important to ensure that the Judiciary are not at the whims of the Executive, at the threat of a reduction of their budget if they do not comply, while maintaining a public face of independence through security of tenure.

27. The Appointment of Deputy Chief Justice and Deputy President of the Constitutional Court: there appears to be some ambiguity as to the procedure of appointing these two offices. In Article 140, there seems to be a general procedure of appointing all judges (these two included), of the President's appointment subject to JSC's recommendation and the ratification of the National Assembly. However, in Articles 137 (2) and 138 (2), there seems to be a contrary procedure where these two are appointed by the President, in consultation with the JSC. The first procedure is recommended, as its strong language underlines the independence of the Judiciary. The Judges are to be appointed *on the recommendation of*, and not *in consultation with* the JSC.

DEVOLVED GOVERNMENTS

28. Clearly, what is being provided for under this constitution is not devolution but decentralization of the center. Devolution is about devolving constitutional authority to sub national governance structures. The constitution seems to confuse decentralization (administration outside the headquarters) and devolution, which refers to semi-autonomous systems of government. Devolution involves the creation and sustenance of a system of local authorities that are semi-autonomous with respect to their authority, responsibility, finance, and human resources and accountability arrangements. These are constant elements of the legal construct of devolution in all countries irrespective of their political or economic system. Executive authority of the provincial government must reside in the provincial government. In devolution the two-tier system of government needs to be codified. The constitution has to protect regions from encroachment from the center. In the amended constitution, the provincial minister, who will be head of the province will be a presidential appointee. Several sections recite devolution language, e.g. giving power to local communities, giving autonomy, equal distribution of resources without actually doing so. The issue of revenue collection for local government does not receive serious attention in the constitution. Local authorities ought to be encouraged to raise their own resources. Local taxes are important not only from fiduciary viewpoint but also because they help mobilize citizens' interest in the work of local government. Taxes also enhance the demands of the governed for accountability from their governors.

29. There should only be two levels of government. This will lessen the wage bill- each level of government comes with a Chief Executive and a Legislative Assembly. Even if the Provincial Level was primarily formed of people already in existence- Mayors, Chiefs, etc. - these will still command sitting allowances at their sittings, which will be an unnecessary burden on the taxpayer. Far richer and more populous nations only have two levels of government- the National and the State/County/Federal State. Administrative Units: Administrative units must be prescribed in the Constitution. The President should not have power to prescribe these as this encourages administrative units being created not based on need but on cronyism- to create positions for political friends by creating new units. These administrative units need to be as few as possible to make them economically viable- to ensure that they can run independently and be internally financially sustainable. The choice is between Provinces and Districts. It is suggested that the devolved unit be a province, which is a larger area with more resources.

30. There seems to be no certainty of the system of decentralization in the draft constitution. First and foremost, the Provincial Level's Executive, which seems to be the main level of decentralization, is completely in the control of the President. The Provincial Minister and Provincial Permanent Secretary is appointed by the President. This is not real devolution, it is only deconcentration of presidential power from the Administrative Capital (Lusaka) to the provincial capital, or as stated by the World Bank's Decentralization Thematic Team, the redistribution of decision making authority and financial and management responsibilities among different levels of *central* government (See World Bank's Decentralization Thematic Team, *Decentralization*, available at www.ciesin.org/decentralization/English/General/Different_forms.html).

31. The proposed system will not lead to a knock-down development effect for people at the grassroots level, as the system is still concerned with the maintenance of its core-Lusaka. For true devolution to occur, and for far-flung areas to experience a chance at development, the system of devolution needs to create several cores which are nearer to the people- maybe at Provincial Level. The people should elect the leaders at these levels, to feel ownership of the authority, and they should only be accountable to the people who elected them. The concentration of all duties apportioned to the Provincial and Local Government will also give these units a better chance to effect the lives of people in their units, and true financial management will also be devolved. The current system where the Provincial Administration and the Local Government is answerable to the national government does not offer sufficient administrative or financial freedom to be effective.

INDEPENDENT OFFICE HOLDERS

32. The qualifications of the Attorney General (Art. 213 (3), Solicitor-General and Director of Public Prosecutions: It is suggested that the Attorney General be qualified to be a Supreme Court Judge. This reflects the importance of this office as the primary legal advisor to the Government. The qualifications of the Solicitor-General and the Director of Public Prosecutions should be that of a High Court Judge, for specificity's sake.

33. Electoral Commission is established by Article 229 (1). One of the keys to guaranteeing an independent electoral commission is a transparent appointment system for the members of the commission. The constitution as presently structured does not guarantee that. Article 242 provides that the appointment and regulation of commissions including the electoral commission shall be prescribed. In practice this has meant that the President appoints the members of the electoral commission, subject to ratification by the National Assembly. Where the commission is appointed by the President, the commission will be composed of people who will implement the President's wishes. It is better to have in place a clear appointment process. The constitution should grant members tenure and specifying a fixed term for commissioners to serve on the Electoral Commission. The Electoral Commission composition should be well spelt out, with the number of appointees to make up the electoral commission clearly stated.

34. Gender Equality Commission and the Human Rights Commission are established under articles 231 and 230 respectively. Gender equality is a human right (Article 3, International Covenant on Civil and Political Rights). The creation of two commissions in effect is a duplication of duties and an unfortunate and unnecessary burden on the taxpayer in separate building headquarters, staff, etc., whereas their activities will invariably keep intersecting. They should be combined into the Human Rights and Gender Equality Commission- so as to reflect the important position that gender equality has as a value in Zambia. South Africa in its 1996 constitution was the first country to establish a Gender Commission; however, the South Africa approach has not been very successful. Thinking on this matter has evolved and the practice is now to establish one Commission which is both a Human Rights and a Gender Commission. Kenya, in its 2010 constitution, combines the two commissions and establishes the Human Rights and Equality Commission. One of its responsibilities is "to promote gender equality and equality generally and to coordinate and facilitate gender mainstreaming in national development[2]."

[2] Article 59(1), Kenya Constitution, 2010.

35. Judicial Service Commission (Article 219) and Judicial Complaints Commission (Articles 236) these are two commissions that should be combined into one. There is a visible overlap in their duties- the JCC hears complaints against Judges, while the JSC hears appeals, and neither are courts. It is recommended that the JSC be the only commission, which hears complaints, investigates and gives recommendations to the Chief Justice for the removal of a Judge. Any appeals should be heard by the highest court in the land (Supreme Court/Constitutional Court), to reflect the importance of judges as persons who have the primary responsibility to exercise judicial authority of Zambia, and also to ensure finality- and this procedure should be constitutionally entrenched. The Judicial Service's Commission constitution should also be constitutionally entrenched, to ensure its independence- it should not have a majority of people appointed by the President and should also have as members judges and a magistrate elected at every level of the Court hierarchy (Supreme/Constitutional, Court of Appeal, High Court, Magistrate), and representatives from the Law Society.

36. The amended constitution establishes a State Audit Commission (Article 234): There is no need for this commission. It seems to have no other duty but to recommend the appointment of the Auditor General. It is an unnecessary burden on the taxpayer. The process of interviewing of the Auditor-General should be done by the Public Service Commission, and the current controls to the effect that the appointment by the President must be subject to ratification by Parliament be maintained.

37. Financial Independence of Commissions and Independent Offices: All independent offices and commissions should have full financial independence. They should be able to present their budgets straight to Parliament (perhaps as annexes to the Ministry of Finance's Budget), and not "*deal directly with the Ministry responsible for finance*" (Article 238). The current provisions of the constitution will ensure some level of control by the Ministry of Finance, and therefore by the Executive, because an independent commission will always be under the implicit threat of not having its budget approved by the Ministry (as opposed to it being approved by Parliament). Provisions dealing with commissions fail to structure commissions that are independent. Clear guidelines are needed as to how members of the commissions are appointed and how their security of tenure is secured.

Public Service Commission

38. The President has very wide powers under article 185 to appoint public officers, terminate their employment and exercise disciplinary control over them. The president is allowed to constitute public offices for the republic and abolish any office. These are excessive powers in a President. They provide a route for patronage. This provision makes the president very powerful. They provide an avenue for undermining the constitution by constitutional means. At the very least, public offices created by the President should require effective parliamentary approval. The objective with regard to the public service appointments should be to remove the public service from political control. It should be to ensure that merit rather than political considerations would serve as the only criterion for appointment and promotion, that dismissals and disciplinary control are not used as instruments of political victimization and thereby jeopardizing the political neutrality of the public service. It is also part of the general scheme of institutional safeguards against political and ethnic based appointments. This is particularly important in Zambia where the civil service has been politicized and turned in what I would term a "presidential service." It must be realized that the civil service is the bedrock of the government, providing not only expert advice on the basis of which policy is determined but also the machinery for the execution of policy.

39. Article 185 (1) is extremely problematic. It vests the power to confirm appointments to public office and to exercise discipline on public officials in the president. To avoid politicization of the public service, this power should be in the public service commission. If Zambia is to develop a professional civil service, the Public Service commission must be independent and empowered to exercise professional judgement over matters affecting the civil service.

40. Article 235 provides for the creation of a) and Anti-Corruption Commission; b) an Anti-Drug Abuse Commission; c) and Anti-Financial and Economic Crimes Commission; and d) a Police and Public Complaints commission. A separate Commission for Financial and economic Crimes is unnecessary; the Anti-Corruption Commission should be adequate. Again, the Constitution fails to secure the independence of these commissions, and it is not clear to whom they report. Article 216 provides that in the performance of their functions under the constitution, the commissions shall not be subject to the control or direction of any person or authority. This, however, is not reflected in the provisions that create the commissions. The relevant articles fail to secure the independence of the commissions through mandating a transparent appointment system, guaranteeing secure tenure of commissioners, and ensuring that the commissions do not report only to the president. In fact, Article 242 leaves it to Parliament to enact legislation ensuring that persons appointed to the commission are persons of integrity. The appointments are to be made by the president, subject to ratification by the National Assembly. According to Article 242, the composition of services created under the article is left to be determined by Parliament. This is wrong. If these commissions are meant to be independent, the commissions must be constituted and their powers defined by the constitution. Otherwise what you have is parliamentary commissions and complete control of the commissions by the President.

Defense and National Security

41. Articles 190 -197 deals with defense and security. Once again the constitutional provisions on this matter are weak and lack substance. The question of appointing security and defense chiefs is left to a law to be enacted by parliament. Here again the issue is how to prevent patronage and politicization of appointments in this sector. The constitution ought to deal with how security and defense chiefs are appointed and put in place measures that ensure security of tenure. The 2010 Kenyan constitution includes some innovative provisions that could be helpful in formulating appropriate provisions for Zambia on this matter[3].

[3] See Chapter 14, Kenya Constitution, 2010.

Public Finance and Budget

42. Article 214 (2) makes the Governor of the central bank also Chair of the Board of Directors for the bank of Zambia. A better approach would be that, among its many functions, the Board would have oversight of the Governor and the Bank. How could the Board perform oversight functions when the Governor of the bank is also the chair of the Board?

Conclusion

A stable political order can only be achieved by establishing a constitutional order that is legitimate, credible and enduring, and which is strongly accessible to the people without compromising the integrity and effectiveness of the process of governance. The stark lessons learned from various constitutional processes that have taken place all over the world is that the process of adopting the constitution is as important as its substance, and the process must be legitimate for it to be acceptable to all stakeholders. In order for the process to be legitimate, it must be inclusive. No party, including the Government should control it. A constitution should be the product of the integration of ideas from all stakeholders in the country, including political parties both within and outside parliament, civil society and individuals in society. The new Zambian constitution was developed by a process which ignored all these principles. The result is an unworkable and unsatisfactory document that leaves the desire by Zambian people for a democratic constitution unfulfilled.