AN EVALUATION OF THE CONSTITUTION MAKING PROCESS IN ZAMBIA AND THE LEGITIMATE SOURCES OF A CONSTITUTION.

BY

TENTHANI ISRAEL BANDA

UNZA 2008
“The Intent of man can not be tried for the devil himself knows not the intent of man.”

Chief Justice Brian, 1478, QB.
AN EVALUATION OF THE CONSTITUTION MAKING PROCESS IN ZAMBIA AND THE LEGITIMATE SOURCES OF A CONSTITUTION.

BY

TENTHANI ISRAEL BANDA
COMPUTER # 22103350

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

FEBRUARY 2008
AN EVALUATION OF THE CONSTITUTION MAKING PROCESS IN ZAMBIA AND THE LEGITIMATE SOURCES OF A CONSTITUTION.

BY

TENTHANI ISRAEL BANDA
COMPUTER # 22103350

An obligatory essay submitted to the University of Zambia, Law faculty, in partial fulfilment of the requirements of the Bachelor of Laws degree.

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW
P.O.BOX 32379
LUSAKA
ZAMBIA

FEBRUARY 2008.
I recommend that the obligatory essay prepared under my supervision by

TENTHANI ISRAEL BANDA

ENTITLED

AN EVALUATION OF THE CONSTITUTION MAKING PROCESS IN ZAMBIA AND THE LEGITIMATE SOURCES OF A CONSTITUTION.

Be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirements relating to format as laid down in the regulations governing obligatory essays.

Date: T/9/2 ... 2005... Prof Patrick M. Mvunga

[Signature]
DECLARATION

I, Tenthani Israel Banda, Computer number 22103350, do hereby declare that I am the author of this Directed Research Paper entitled AN EVALUATION OF THE CONSTITUTION MAKING PROCESS IN ZAMBIA AND THE LEGITIMATE SOURCES OF A CONSTITUTION, and confirm that it is my original work. I further declare that due acknowledgement has been given where other people's works have been used and I verily believe that this research has not been presented in the Law School or indeed in any other learning Institution for academic purposes.

Date: 6/02/08
Student's Signature: [Signature]
DEDICATION

To my wife Catrite Bulongo Banda who during the process of study took personal care of the family burdens and noise from the children.

Most of all to the almighty God for whose desire I submit to and purpose I live for.
ACKNOWLEDGEMENTS

My sincere gratitude go my supervisor, Professor Patrick .M. Mvunga for his patience, guidance and time taken out of his busy schedule to thoroughly scrutinise my work. I thank him for his invaluable ideas and searching questions, comments and suggestions that have greatly contributed to this work.

I also wish to thank my classmates and friends who encouraged me even when the school schedules competed with office work requirements. To Dickson Jere, Evans Sodala, Gabriel Lesa, Tresford Chali, I thank you greatly.
ABSTRACT

The constitution making process in Zambia is currently at crossroads with the government and the people through the civil society not agreeing on the constitutional roadmap. The government appointed Commission of Inquiry (Mung’omba Constitution Review Commission), drawing strength from the submissions of the citizens, recommended adoption of the Constitution through a Constituent Assembly, a recommendation that the government is not in support of. This comes against a background of sitting governments not adopting recommendations made by the people in the previous Constitution making processes. The Paper will attempt to review and evaluate the history of Constitution making in Zambia and contrast with the Constitution making processes in the region and internationally and attempt to answer the following research questions;

(a) How can Zambia put to rest frequent constitution changes and make successive governments respect existing Constitutions?

(b) What are the sources of constitutional legitimacy and have Zambian constitutions achieved this criterion?

(b) Are there any lessons that can be drawn from other countries on constitution making, which seeks to achieve legitimacy?

The proposed study will aim at discovering the fundamental reasons why constitutions in Zambia have not stood the test of time. It cannot just be human nature not to respect existing constitutions but there has to be some underlying reasons to every action that man takes.

A key issue will be to investigate the source of constitutional legitimacy and using the theoretical understanding, apply the tests on the various Constitutions, Zambia has had. The hypothesis to determine is whether Zambian Constitutions have in fact been legitimate or not. Furthermore an attempt will be made to determine whether the Constitution of Zambia has the following characteristics of being a Constitution: Inclusive of everyone, participative by everyone, beneficial to everyone.
1. National Constitutional Conference Act No. 19 of 2007
14. The Indian Constitution.
15. The Inquiries Act Chapter 41 of the Laws of Zambia.
<table>
<thead>
<tr>
<th>CASE</th>
<th>REFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Dr Timothy M. Njoya and Others v Attorney General and Others</td>
<td>LLR 4788 (HCK)</td>
</tr>
<tr>
<td>3. Godfrey Miyanda and The Heritage Party v. Attorney General</td>
<td>Cause Number 2007/HP/1145 (Matter is still before the Courts of law)</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

1.0 CONSTITUTION MAKING AND SOURCES OF LEGITIMACY.

1.1 Introduction ................................................................. 1
1.2 Statement of the problem .................................................. 1
1.3 Objectives of the study .................................................... 2
1.4 Limitations of the study .................................................. 2
1.5 Significance of the study .................................................. 2
1.6 Research Methodology .................................................... 3
1.7 The origin and nature of a Constitution ................................. 3
1.8 Qualities of a good Constitution ......................................... 4
1.9 The concept of legitimacy ............................................... 6
1.10 Conclusion .................................................................... 7

2.0 SELECTED CONSTITUTION MAKING MODELS.

2.1 Introduction .................................................................... 8
2.2 The United States of America Experience ............................. 9
2.3 The Indian Experience ................................................... 10
2.4 The South African Experience .......................................... 11
2.5 The Kenyan Experience .................................................. 14
2.6 Conclusion .................................................................... 18
3.0 CONSTITUTION MAKING PROCESS IN ZAMBIA.

3.1 Introduction .......................................................................................................................... 20
3.2 The pre-colonial period ......................................................................................................... 22
3.3 The constitutional framework during colonialism ............................................................. 23
3.4 The Independence Constitution ......................................................................................... 24
3.5 The One-Party Constitution ............................................................................................... 26
   3.5.1 The rationale for a one-party system of government ..................................................... 26
   3.5.2 Agenda .......................................................................................................................... 27
   3.5.3 Civic education ............................................................................................................. 28
   3.5.6 Cultivation of political will ......................................................................................... 28
   3.5.7 The Chona Constitution Commission ......................................................................... 28
3.6 The Multi-Party Constitution ............................................................................................. 29
3.6.1 The Mvunga Constitution Commission ........................................................................ 30
3.7 The 1996 Constitution ........................................................................................................ 31
   3.7.1 The Mwanakatwe Constitution Commission ............................................................. 31
3.8. The Mung’omba Constitution Commission ..................................................................... 32
3.9 Conclusion ............................................................................................................................ 33

4.0 THE CURRENT CONSTITUTION MAKING.

4.1 Introduction .......................................................................................................................... 35
4.2 Method of adopting and amending the Constitution .......................................................... 35
4.3 Government reaction to the adoption process ..................................................................... 36
4.4 The National Constitutional Conference Bill, 2007 .......................................................... 37
4.5 Salient provisions of the National Constitution Conference Act ........................................ 38
4.6 Conclusion ............................................................................................................................ 43
5.0 CONCLUSIONS AND OBSERVATIONS

5.1 Conclusion............................................................................................................45

5.2 Recommendations..................................................................................................47

6.0 BIBLIOGRAPHY ......................................................................................................50
Chapter 1

CONSTITUTION MAKING AND SOURCES OF LEGITIMACY.

1.1-Introduction.

The legacy of colonialism has many facets and one of the hallmarks of colonialism is the exciting doctrine of constitutionalism which was bequeathed to many of the new independent states be it in Africa, Asia or elsewhere. Of particular interest to this study is the constitutional legacy left in the Commonwealth by the British government to its former colonies and protectorates in particular the independent state of Zambia. Since the 1960s when most British protectorates achieved independence, it has been traditional to have these countries adopt a new constitution for the new state. The mode of promulgation has been of marked interest as many a time it has been negotiated, decided and agreed in some constitutional conferences involving a handful of political actors of the time. The Independence Constitution of the Republic of Zambia was determined at Marlborough House in London. The governments of the United Kingdom, Northern Rhodesia and the representatives of political parties in the Territory attended the Conference. The ordinary person in the Territory did not have any input either directly or indirectly. This Constitution was therefore short-lived up to 1973 following events of the referendum to end all referenda of 1969, which removed the requirement of a referendum to amend any part of the Constitution.

This pattern of constitutional changes continue to haunt Africa and an example is the fact that since independence in 1964, Zambia has had three Constitutions and is in the midst of yet another controversial constitution making process begging for legitimacy.

1.2 Statement of the problem.

The constitution making process in Zambia is currently at crossroads with the government and the people through the civil society not agreeing on the constitutional roadmap. The government appointed Commission of Inquiry (Mung’omba Constitution Review Commission), drawing strength from the submissions of the
citizens, recommended adoption of the Constitution through a Constituent Assembly, a recommendation that the government is not in support of.

1.3 Objectives of the study.

The proposed study will aim at discovering the fundamental reasons constitutions in Zambia have not stood the test of time. It cannot just be human nature not to respect existing constitutions but there has to be some underlying reasons to every action that man takes.

(a) A key issue will be to investigate the source of constitutional legitimacy and using the theoretical understanding, apply the tests on the various Constitutions Zambia has had. The hypothesis to determine is whether the Zambian Constitutions have in fact been legitimate or not. Furthermore an attempt will be made to determine whether the Constitution of Zambia has the following characteristics of being a constitution:

(a) Inclusive of everyone,

(b) Participative by everyone,

(c) Beneficial to everyone.

1.4 Limitations of the study.

Due to the nature of this Paper, the theory of legitimacy and legality and the practical performance of the constitutional safeguards cannot receive either the profound nor the exhaustive treatment they certainly deserve. To that extent, this Paper will attempt to present an academic research on selected Constitution making approaches from established world democracies and selected African countries that will be contrasted with the approach Zambia has taken in its constitution making processes.

1.5 Significance of the study.

The significance of the study stems from the fact that there is a constitutional debate in Zambia and during this debate a lot of theories and roadmaps have been proposed which have in the process confused the various stakeholders.
The difference between legality and legitimacy and standing the test of time has to be clearly understood so that when the nation discusses constitutional matters, a better understanding is required that would help to avoid glossing over serious issues concerning the process of constitution making which has a bearing on its legitimacy. The short comings in constitution making and lack of robustness of the Constitution will be laid bare as one draws on tested constitutional making processes from history and in the recent past to fortify findings.

1.6. Research Methodology.

The study employs non-empirical method of research. Scholarly materials such as books, journals, articles, law reports and legal instruments are investigated and utilised. Cyber space is also used where appropriate and necessary. A comparative analysis of the constitution-making process in other countries, with particular focus, on India, South Africa and Kenya is employed.

1.7 The origin and nature of a Constitution.

The unfortunate position that society found itself in, labeled the dark ages, was characterised by revolutions. The revolutions against these ruling classes recognised the need for a basic law in an identifiable document or group of documents called the Constitution, embodying a selection of the most important rules about the governing of the country or society.¹

A constitution defines and limits the powers of the government organs inter se and with the individual.² It vests power and function in various government authorities to achieve their legally set objectives. Any purported exercise of power beyond expressly conferred power is pro tanto void.³ This brings into issue the concept of constitutionalism. De Smith defines constitutionalism as follows:⁴

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty.

It is clear from the definition of the ‘Constitution’ and ‘constitutionalism’ that the idea of constitutionalism ought to be provided for in the Constitution itself. It however does not follow that a state that has a Constitution practices constitutionalism. A state may have a constitution that does not embody the idea and ideals of constitutionalism.

1.8 Qualities of a good Constitution.

A Constitution ideally should be an original act of the people. Intrinsic in this postulation is the need for the people to directly play a role in the formulation and adoption of the Constitution. The process by which a Constitution is promulgated is as important as the content of the Constitution and has a bearing on its posterity and legitimacy. The Constitution is legitimate when there is a direct link between the people as originators and the Constitution itself. This is in constitutional classical theory in general, the most commonly held explanation for constitutional legitimacy. That legitimacy flows from the fact that “we the People ... have consented to the Constitution, a view commonly referred to as the “consent of the governed” or “popular sovereignty”.

The Constitution does not become legitimate just because it is a Constitution because if it is inappropriately adopted it can be illegitimate. The question of legitimacy of the Constitution is concerned with how to make a Constitution command the loyalty and confidence of the people. A Constitution should be generally understood by the people and acceptable to them.

---

6 E.g. the U.S Constitution begins with these words.
7 R. E. Barnett, “Constitutional Legitimacy”, 103 Colombia Law Review 111,12 (2003), argues that the concept of “we the people” is a fiction, at p118.
To achieve this, a Constitution needs to be put through a process of popularisation with a view to generating public interest and an attitude that everybody has a stake in it\(^8\). A public participation programme assures the Constitution of its legitimacy. This will entail recognition by the people, that the resultant product is their Constitution upon which they were consulted and which they endorsed; that it contains provisions from which they derive demonstrable benefits that are worth defending; and that it encourages in the governed and governors alike, a habit of compliance and respect for its provisions\(^9\).

Under international law, every citizen has the right either directly or through freely chosen representatives, subject to reasonable restrictions, to take part in the government of his or her country\(^10\). The United Nations has interpreted this to mean that people have a right to participate in the making of Constitutions in their countries. This is illustrated in the case of *Marshall v Canada*\(^{11}\), brought before the United Nations Commission for Human Rights (UNCHR). In this case the leaders of the Mikmaq tribal society brought a complaint against the Canadian government alleging that the government, by excluding them from directly participating in a series of constitutional conferences, had infringed their right to take part in the conduct of public affairs of their country, contrary to Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR), to which Canada is a state party. The UNCHR in its ruling stated as follows:

> [A]rt issue in the present case is whether the constitutional conferences constituted a conduct of public affairs.... The Committee cannot but conclude that they do constitute a conduct of public affairs.

---


\(^9\) Ibid

\(^10\) Articles 13,21 & 25 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights & the African Charter on Human and peoples rights respectively.

To reinforce this ruling, the UNCHR in one of its general comments seeking to interpret Article 25 of the ICCPR, has stated that citizens participate directly in the conduct of public affairs when they choose or change their Constitution\textsuperscript{12}.

From the above it is clear that public participation in Constitution making is recognised under International law.

1.9 The concept of legitimacy.

Legitimacy is a term much invoked but little analysed in constitutional debates\textsuperscript{13}. Those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ. Confusion often results not only among readers and listeners but also, I believe, in the minds of those who write and speak about constitutional legitimacy\textsuperscript{14}.

The term legitimacy appeals to three distinct kinds of criteria that in turn support three concepts of legitimacy:

(a) Legal;

(b) Sociological and;

(c) Moral aspect.

When legitimacy functions as a legal concept, legitimacy and illegality are gauged by legal norms. As measured by a sociological criterion, the Constitution or a claim of legal authority is legitimate in so far as it is accepted (as a matter of fact) as deserving of respect or obedience, or in a weaker usage in so far as it is acquiesced to. Pursuant to the moral concept, legitimacy is a function of moral justifiability or respect worthiness. Even if a regime or decision enjoys broad support, or is legally correct, it may be illegitimate under a moral concept if morally unjustified. The legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other fundamental elements of the constitutional order, including

\textsuperscript{12} General comment No.25: The right to participate in public affairs, voting and the right of equal access to public service (Art 25) 12/07/96. CPR/21/Rev 1/Add 7.


practices of constitutional interpretation, also owe their legal legitimacy to current sociological acceptance. By contrast, most ordinary laws derive their legal legitimacy from distinctively legal norms established by or under the Constitution.

Constitutional legitimacy does not rest on a single rock of legitimacy, but on sometimes shifting sands. Realistic discourse about constitutional legitimacy must reckon with the snarled interconnections among constitutional law, its diverse sociological foundations, and the felt imperatives of practical exigency and moral right.

1.10 Conclusion.

The process of constitution making must be legitimate and in order for it to be legitimate it must be inclusive. It should represent the interests of all people in the country. The people must be made to feel that they own the process. A constitution should be the product of the integration of ideas from all the major stakeholders in a country i.e. all political parties both within and without Parliamentary seats, organized civil society and individuals in the society. Constitution making structures must be open to the views and opinions of all stakeholders who must be given a meaningful opportunity to make their views known. The process must be transparent, that is, it must be undertaken in full view of the country and the international community. A constitution that is perceived as being imposed on a large segment of the population or having been adopted through the manipulation of the process by one of the stakeholders is unlikely to gain sufficient popularity or legitimacy to endure the test of time.
Chapter 2

SELECTED CONSTITUTION MAKING MODELS.

2.1 Introduction.

The independence Constitutions in Africa were the result of agreements reached at independence conferences, following nationalist campaigns for independence. The texts of the Constitutions follow colonial models developed by the various colonial powers for newly independent states. Mozambique, Namibia, Angola and South Africa followed rather different paths because protracted liberation struggles preceded independence in those countries. A typical African Constitution contains hundreds of detailed provisions, which might in effect undermine its dynamic development and its ability to meet the needs of a rapidly changing society.

After independence, the practice in many African countries has been to adopt new Constitutions through the use of Commissions. The Commissions typically tour the country, soliciting views relating to possible constitutional arrangements from the public and recommend a draft Constitution for adoption by the national Parliament. This approach seems to fail at the adoption stage of recommendations by sitting governments. Zambia is a case in point where the opposition parties continue to dispute the Constitution adopted in May 1996 on the grounds that it does not reflect the views of the Zambian people. The only item adopted was the eligibility of a Presidential candidate in a manner clearly aimed at disentitling the former President Dr Kenneth Kaunda from re-contesting Presidency. This experience and others suggest that the use of Commissions to recommend a Constitution is susceptible to manipulation by the government in power and often results in the imposition of its preferred Constitution model. On practical grounds too, the methodology of a Commission with a broad and unregimented agenda to collect constitutional proposals is inappropriate for the elaboration of a complex document such as a Constitution.

After a Constitution is elaborated, there comes the question of how to involve the people in the adoption of the draft constitution so as to give it maximum legitimacy.
It has been argued that the adoption of the Constitution through a Constituent Assembly or through a referendum is unnecessary as the enactment of a Constitution was the legislative preserve of Parliament. Whether Parliament has power to enact a Constitution or not is not the issue. The question is really how does one ensure that the sovereign Will of the people on which the edifice of democracy rests occupies center stage in the process of producing a legitimate, credible and enduring Constitution. If anything the process of consulting the people strengthens Parliament as it implies an unequivocal acceptance of the fact that the people delegate legislative powers to it. Parliament must consult and submit humbly to the wishes of the people who after all are the source of popular sovereignty.\textsuperscript{15} Popular democracy demands the institutionalization of a culture of consultation and reciprocal control with regard to law making and the use of power and privileges. The adoption of the Constitution through a referendum is one of the most transparent ways of furthering the culture of consultation. On the other hand, requiring a two-thirds vote in parliament to approve a Constitution is not an effective safeguard against the adoption of an unpopular or unfair Constitution or amendments to it. The two-thirds majority requirement is often within the reach of the largest party in Parliament. The requirement is not in practice much more than the simple majority required for ordinary law making.

Popular consultation in the form of a referendum should in fact be entrenched in our constitutional practice as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to amendments.

\textbf{2.2 The United States of America Experience.}

The United States of America is generally referred to as the first country in modern times to frame and adopt a Constitution through the Constituent Assembly. However, it was not an Assembly popularly elected by the people, as we understand it today, but a convention of delegates sent by the American states, who made the American

Constitution. That was the time when the modern concept of popular election had yet to come into existence. Decision-making by the delegates had already been in practice in America ever since it achieved independence. The Americans had therefore applied the available democratic means of that time to provide the Constitution with a broader public ownership. Since then, the exercise of Constituent Assembly became the universally accepted ‘instrument of political self-determination’.\textsuperscript{16}

2.3 The Indian Experience.

Another example of Constitution making that shaped an enduring polity and nation from a diverse socio-political and cultural setting is India. The Indian people did not directly elect the Constituent Assembly, which framed the Constitution of India. In September 1945, the newly elected Labour Government announced its plan to leave India and called for elections for the provincial legislatures. These legislatures would act as electoral bodies for a constituent assembly. The provincial elections were held on the basis of limited franchise as granted by the Government of India Act 1935. Once the provincial elections were held, the British Government worked out what was later known as the Cabinet Mission Plan for the formation of the Constituent Assembly and to ensure a smooth constitutional transition to independence. It proposed that a Constituent Assembly draft a Constitution for independent India, which the Indian National Congress had demanded since 1934.

Although the Constituent Assembly was heavily dominated by the Indian National Congress (82 percent), the Congress leadership tried to bring all the talents and shades of opinion of the then India into the Assembly. Thus their ‘talents and experience in national affairs’ was made available to the benefit of the Constituent Assembly despite any differences they may have had with the leaders of the Indian National Congress.\textsuperscript{17}

\textsuperscript{17} A. Granville, \textit{The Indian Constitution: Cornerstone of a Nation}. Oxford University Press (1966).
After more than half a century of its operation and more than one hundred amendments, voices continue to be raised in India that the Constitution in its present form "cannot serve the purposes" and that as even amendments, both major and minor, cannot change its essence, there is "no choice left except to replace it by a new Constitution".\textsuperscript{18} It has been argued that the Constitution does not represent the sovereign people of India but the legacy of British colonialism. The people who were indirectly elected by the provincial legislative assemblies framed it and these assemblies were elected on 'limited franchise', not on universal franchise. Nearly a fourth of the members of the Constituent Assembly who represented the princely states were not elected by the people of the states but were nominated by the rulers of these states. Likewise, the Constitution of India was never put before the people for ratification, neither through referendum nor through provincial legislative assemblies. Therefore it does not carry the 'sovereign sanction of the people of India'.\textsuperscript{19}

2.4 The South African Experience.

South Africa provides the most recent example of Constitution making that addressed the issues confronting multiethnic and multicultural states. When the African National Congress under the leadership of Nelson Mandela and the white-minority racist regime led by President F. W. de Klerk agreed to end the protracted violent conflict through negotiation based on mutual reconciliation, a new series of constitutional principles and methods came up. Nelson Mandela and his African National Congress had to engage in a series of negotiations with other rebel groups such as the Inkatha Freedom Party, the Pan African Congress and the Azanian People's Party. Likewise the South African government also had to gain the confidence of political forces represented in the then white regime, including the opposition parties.\textsuperscript{20}

\textsuperscript{19} Ibid, p 401-402.
\textsuperscript{20} N. Haysom, "Negotiating the political settlement in South Africa: Are they lessons for other countries?" Track two, Vol 11, May 2002, p 11.
Today South Africa is widely referred to as an example of a successful conflict resolution, which heralded a new compact and amicable relationship between hitherto warring parties. It is also seen to have provided a model of constitutional transition. The National Peace Accord (1991), which aimed at ending the violence, was in fact a multi-party agreement. This was followed by an all-party convention called the Convention for Democratic South Africa. They then defined the Constituent Assembly, the Constitution-making process, and made arrangements for the interim government, which was named the “unity” government. A multi-party negotiating forum was created which agreed to take steps towards the ultimate constitutional transition. These steps included the:

a) adoption of constitutional principles by the Multi-Party Negotiating Process (MPNP);

b) binding of the Constituent Assembly to constitutional principles and making it justiciable in the Constitutional Court;

c) agreement of the MPNP on an interim Constitution.

South Africa has made four very important contributions, which are relevant for other countries where there is a widespread misperception that only the government holds formal authority to negotiate.

Firstly, South Africa devised a genuine multiparty negotiating process (MPNP). This was a formal mechanism to negotiate and take decisions with authority. This mechanism was later transformed into the Transitional Executive Council (TEC) which had the authority to supervise the government administration and the electoral process, ensuring not only fairness of the elections, but also that the result would be accepted by winners and losers alike.\(^{21}\)

Second, a general consensus formula was followed to arrive at any decision in the negotiating process. Efforts were made to follow the general consensus but where it was not possible, a pragmatic approach called ‘sufficient consensus’ was adopted as a

method of resolving deadlock. This meant that if a general consensus was lacking among the negotiating parties, a consensus reached between the major players was regarded as sufficient.\(^{22}\)

Third, the South African negotiations produced a 34-point list of ‘constitutional principles’, which all the constitution-makers had to abide by. This accord was regarded as inviolable and ‘sacred.’ It ensured, among other things, the unity of South Africa as a single sovereign state with common citizenship and a democratic system of government. The Constitutional Court saw to whether these accords were properly followed in the draft Constitution and had to verify the draft prepared by the Constituent Assembly.

Fourth, during the entire negotiation process, de facto authority of the state was shifted to the MPNP and the government held de jure authority. Though the de Klerk government continued to hold authority formally, it could only be exercised on the basis of a MPNP consensus. In fact, the Pretoria government ceased to hold authority after the National Peace Accord, which agreed to end the apartheid regime. After a series of multiparty talks and negotiations under the MPNP, an interim Constitution was adopted in 1994. This provided for the election of a 490-member Constituent Assembly to frame a new Constitution by the elected representatives of the South African people. Both men and women were guaranteed equal representation in the Assembly. The election for the Constituent Assembly, which was the first ‘non-racial’ democratic election in South Africa, was held in April 1994. The voters’ turn out was quite impressive, about 86 percent of the registered voters. The Assembly had to simultaneously function as a national legislature.

One of the most significant aspects of the South African constitution-making process was that it tried to ensure the maximum participation of the people in every possible way and create a document that the people really owned, rather than one owned only by the political elites involved in the process. The Assembly invited public

\(^{22}\)N.Haysom, Opt.cit, p21.
participation in a campaign, which generated wide ranging public debate on various aspects of the Constitution. It is estimated that the public education campaign of the constitution making process reached up to 73 percent of the population. The Assembly received two million submissions from individuals, advocacy groups, professional associations and other groups.23 A draft of the Constitution based on the ‘constitutional principles’ was then prepared through a series of consultations and negotiations. The first complete draft was adopted in 1996 and sent to the Constitutional Court for review. After receiving the Court’s review and comments the Assembly finalized the second draft, which was subsequently certified by the Constitutional Court. Ninety-eight percent of Constituent Assembly members approved the Constitution. The job of the Constituent Assembly was relatively easy because basic constitutional principles and structures were already agreed upon. The mandate of the Constituent Assembly was in this sense limited, and despite being the representative body of ‘sovereign’ people, it had no authority to go beyond those agreed principles. Besides, there was the Constitutional Court, a non-elected body that was empowered to certify whether the draft Constitution complied with the basic principles. The South African case thus shows that some basic constitutional principles can be adopted usefully by the Constituent Assembly as binding principles during the process of framing a Constitution.

2.5 The Kenyan Experience.

The current experience of Constitution making in Kenya is equally relevant for countries undergoing Constitutional changes. It is a unique example of people’s initiatives towards the creation of a new Constitution. When the government failed to respond to popular aspirations for changing the Constitution, the people of Kenya established the People’s Commission in June 2000 by means of religious communities, professional organizations, civil society and opposition political parties. The government then responded and joined the constitution-making process.

Kenya achieved independence from the Britain in 1963. Its independence Constitution was based on the parliamentary model. Kenyan independence leaders were not satisfied with some of the provisions of the independence Constitution. Within a year of independence, the Constitution was fundamentally altered. This destroyed Kenya’s basic foundation as a parliamentary democracy and changed Kenya into a republic, with executive powers vested in the President.24

It is important to note that unlike other African States, Kenya has had laws that permitted opposition parties but had a single party dominance. However, the people had lost respect for the Constitution and confidence in the political system. People were unwilling to defend the Constitution25 . It was against this background that the Kenyan Parliament felt the need to review the Constitution and accordingly passed an Act in 1998. But the review failed to materialize due to the political parties’ intransigent approach to the formation of the Review Commission.

However, as stated above, the people took independent initiatives and the government had to formalize the process through parliamentary legislation. Parliament passed the Constitution of Kenya Review Act 2000 and the government appointed a 17-member Constitution of Kenya Review Commission (CKRC) in November 2000. However, both the Commissions (The Peoples Commission created in June 2000 and CKRC) agreed to merge later. The new Commission consisted of 29 members, including 10 from the People’s Commission and two as nominees of the Parliamentary Select Committee.

However, the constitution-making process of Kenya was a very complex affair involving different layers at different stages. Next to the Commission, there were Constituency Constitutional Forums in each constituency for the purpose of debate, discussion, collection and collation of the views of the people with regard to constitutional changes. The forums provided the basis for the peoples’ consultation

with the Commission. The next layer was the National Constitutional Conference, which consisted of 628 members representing a broad spectrum of the Kenyan people. The draft Constitution prepared by the Commission was to be submitted to this Conference. The fourth layer was the provision for referendum, which would take place only to decide the issues not already resolved in the National Constitutional Conference. This approach led to court action with a decision in Reverend Timothy Njoya and others v. Attorney General and others 26 argue that the draft constitution could not be adopted as the new Constitution by Parliament. The crux of the applicants’ case was that there exists a constituent power of the people (the power to make a constitution) and that this power is embodied in sections 1, 1A, 3 and 47 of the Kenyan constitution. Further, according to the applicants, the constituent power of the people necessarily meant that the applicants in common with other Kenyans had a right to ratify any proposed new constitution through a referendum. In its decision the court held, inter alia—

[T]hat subsections (5), (6) and (7) of section 27 of the Review Act were unconstitutional to the extent that they converted the applicants’ right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right dependent on the absolute discretion of the delegates of the National Constitutional Conference and were accordingly null and void. That the Kenyan Parliament has no power under section 47 of the Kenyan Constitution to abrogate the Constitution and enact a new one in its place, its power being limited to amendment of the existing Constitution. That the constituent power belongs to the people of Kenya as a whole, including the applicants. The Constitutional Conference debating the issue was not representative of all the Kenyans.

The Court held that the draft could not be adopted unless through a referendum so as to recognise the constituent power which vested in the people being the power to elect governors; the power to question and monitor governance.

Similarly, the Kenyan Constitutional Division of the High Court delivered a landmark decision in Patrick Onyango and others v. The Attorney General and others 27 with a declaration that a stoppage of the proposed referendum would fly in the face of national interest. The court held that:
No single nation on the planet has endeavoured for a constitution longer than Kenya. Kenyans have agitated for a constitution for a long time. A constitution is the creature of the people’s law making power (constituent power). It is not in public interest for the court to interfere with the referendum.” The court argued further that “Power to make a constitution is not vested in Parliament, but in the people of Kenya. The people’s power to make a constitution is not derived from the Constitution. Courts can adjudicate on all disputes except a dispute on the constituent power of the people.

And finally there was the National Assembly, the unicameral Kenyan parliament, which held authority to enact and change the Constitution after the due process. The Commission adopted a comprehensive method of reviewing the constitution and ascertaining the views of the people. This included civic education on the Constitution, listening to the people, soliciting submissions from them, analyzing them and incorporating them in the draft document.

The Commission began to face political non-cooperation when its recommendations were finally made public. The Conference’s failure to adopt the draft would have meant sending it to the referendum. This, the Government seriously wished to avoid. The constitution-making process in Kenya is now in the final stage. The draft constitution prepared by the Commission has gone through all the stages but the National Assembly is waiting for the final enactment. However, the enactment has become very uncertain because the ruling party is not willing to reduce the powers of the president in favour of the Prime Minister as recommended in the draft constitution. Similarly, other parties too have their reservations on some provisions of the draft Constitution.

The constitution-making process in Kenya over the years was so popularized and created so much enthusiasm among the people that it would be virtually impossible for the government to backtrack or delay the draft for long. However, the Kenyan experience suggests that it is easy to draft the Constitution through a professional and competent body such as the Commission but extremely difficult to get it through a popular, elected parliament, where political lobbies are more interested in short-term gain than in genuine long-term constitutional considerations. It would be better if the
two processes could be blended together. Another major weakness of the Kenyan exercise is that the whole process lacked political backing and leadership. Without the strong commitment and backing of the political leadership, the Constitution-making process becomes weak and lacks the will to accept and implement a new Constitution.

2.6 Conclusion.

From the foregoing resume analysis, it follows that there are several models of constitution making dictated by the prevailing circumstances and times in which the processes are being taken. In a federal state and early in the 1700s, the USA had their model, which was representative and adequate for the time period that their Constitution was being agreed. What was paramount was the fact that there was consensus on the approach and the agreed Constitution was legally, sociologically and morally acceptable thereby granting it the required legitimacy and thereby standing the test of time.

For countries that were coming from colonial rule like India, with the influence of the departing colonial power, some form of consensus or acquiescence of the process was agreed. The ruling party though in majority brought in all shades of talents and experience to the benefit of the Constituent Assembly despite the differences they might have had with the opposition parties. Some consensus was therefore built and the adoption was not left to ruling party alone.

The South African situation provides an excellent model for any country more so those that are coming from discrimination and turmoil. The principle of give and take, tolerance and selflessness in constitution making was brought to the fore. The setting out of constitutional principles guiding the Constituent Assembly and the superintendence of the Constitutional Court over the process in quality assuring the content in relation to the constitutional principles was invaluable.

The Kenyan experience demonstrates the constitutive power of the people and that if the pressure for a new Constitution is not taken up by the government of the day, the people can exercise their constitutive power by mass organisation. It also shows the
common trend in Africa where recommendations are looked at through a tunnel view with myopic selfish interests from the governments of the day. It also demonstrates that Constitutions are not obtained or delivered on a silver plate but required the vigilant participation of the citizens and civil society including use of courts for interpretation of contentious matters that arise whilst managing the competing interests of government and the citizens.
Chapter 3

CONSTITUTION MAKING PROCESS IN ZAMBIA.

3.1 Introduction.

Zambia has experienced several changes in the constitution since independence. It has had four Constitutions, namely:

(a) The Independence Constitution of 1964;
(b) The 1973 Constitution that ushered in the One Party state;
(c) The 1991 Constitution that ushered in the multiparty regime; and
(d) The 1996 constitutional amendments.

Controversy on constitutional making started as early as 1972 when an opposition leader petitioned the High Court under section 28 of the Constitution for redress on the grounds that sections 13, 22 and 23 of the Constitution were likely to be contravened in relation to himself with the Government announcement of its intention to set up a One Party System in Zambia and appointment of a Commission to recommend changes to bring a One Party System in Zambia. The Commission was not allowed to hear submissions on the creation of a One Party State. The Court held that:

[T]he fact that petitioner cannot put his views forward before a particular Commission set up to deal with other matters is no restriction upon his freedom of expression and that section 28 (5) of the Constitution did not prohibit the advocacy of changes in the Constitution.

The Petition was therefore dismissed.

Prior to the constitutional amendments of 1996, another controversy arose when the Zambia Democratic Congress sought the intervention of the courts to compel the President and his Cabinet to adopt the Constitution through a Constituent Assembly as was overwhelmingly submitted by the petitioners to the Commission. The Government had rejected this recommendation citing what they called legal and

---


20
practical limitations in the recommendations. This was an appeal upon refusal to grant leave to commence judicial review proceedings by the lower court. The Supreme Court held that:

[T]he Constitution of Zambia itself gives parliament powers to make laws. Parliament cannot be equated to an inferior tribunal or body when it is exercising its legislative powers, although in appropriate cases, actions but not by judicial review, can be commenced against it. The powers, jurisdiction, and competence of parliament to alter the Constitution of Zambia are extensive provided that it adheres to the provisions of Article 79 of the Constitution. Article 79 limits the powers of Parliament only in relation to Article 79 itself and to Chapter III of the Constitution relating to fundamental rights and freedoms of the individual.

The appeal was dismissed.

There is currently an on going process of making a new Constitution which is now submerged in various controversy on the appropriate manner of both writing and adoption of the constitutional text to clothe it with the “illusive” legitimacy that is very much desired. This will represent for Zambia an average of a new Constitution every eight years: one of the highest rates of constitutional change in Commonwealth Africa.

The appeal for a constitution that “will stand the test of time” appears to be a fundamental demand that is generally shaping the political, economical and ethical minds of the public in Zambia today. This is rightly so because the significance of a good constitution is key to democracy, good governance, the rule of law and the development of the country.

It appears then that there is a need to affirm in a more clearer way the very close interconnection between content and process issues in order to assure a Constitution that will “stand the test of time”. Such an affirmation should also recognise and invoke the need for a constitutional consensus.

Unfortunately, the process used in the making of Zambia’s Constitutions, although involving public participation to some extent, does not involve maximum participation of the people. In order to effectively analyse the extent of participation of the Zambian people, it is necessary to examine where the country has been, where
it is, and where it ought to be heading, as regards constitution making process. To understand the present and influence the future, the past needs to be understood and this chapter examines and analyses the constitutional making process in Zambia from the pre-colonial era to the present time.

3.2 The pre-colonial period.

While pre-colonial Africa, including Zambia, did not have written constitutions, this is not to say that constitutionalism did not exist. Pre-colonial African societies, operated under certain principles of constitutionalism devised to achieve the main aim of constitutionalism, that is, limitation of power of the leaders. The leader’s decisions concerning the community were not normally made arbitrarily, but were subject to discussion and consensus. For instance, in Zambia, the King of Barotseland did not make any decisions without the advice of the Council called *kuta*. The Council was divided into three sub-councils that represented different interests. The most important of these sub-councils was called the *Katengo*. This was the Council of the mass of the nation, called the ‘Council of the many’. It consisted a large number of petty princes, councillors and Headmen who were widely dispersed throughout the nation, and therefore knew better the people’s wishes and feelings. Representatives of all the three sub-councils had to be present when a matter of Barotseland interest was to be considered. The King was expected to adhere to the advice of the Council.

In addition, the philosophical notion of social contracts between the rulers and the subjects existed. This was depicted in the very manner in which the king of the Barotseland was installed. At the installation of a King, the officiators always stressed

---

31 Ibid.
33 Ibid, at p51.
34 Ibid.
“You, heir, remember that you do not rule alone, but by the power of the people. Wisdom does not come from one man, but from many men.”35 To his subjects they said: “You will be weak and lost without a leader. Strengthen him, and you strengthen yourselves.”36

Thus decisions in pre-colonial Zambia were not made to suit the whims of the rulers but to satisfy the aspirations of the people. It was through this method that the foundation of the ruler’s legitimacy as a government actually lay.

3.3 The constitutional framework during colonialism.

The first significant constitutional development in Zambia was the Royal Charter of Incorporation of the British South Africa Company (1889), of which Cecil Rhodes was the leader and founder.37 Through this Charter, the Company was given power to obtain territories by treaties from the native chiefs, to administer the areas so obtained, and to engage in all forms of economic activity.38 Thus through treaties and concessions, obtained from African chiefs, the Company extended its control over most of Northern Rhodesia.

By 1900, British rule had been formulated by two orders, the North-Western Rhodesia Order-in-Council of 1899 and the Northeastern Rhodesia Order-in-Council of 1900.39 The territories were merged in 1911 as Northern Rhodesia.40 Company rule lasted until 1st February 1924 when the Order-in-Council of that year established direct colonial rule under a Governor.

Up to the end of the colonial history of Northern Rhodesia, democratic self-government was alien to the Territory. Northern Rhodesia was a protectorate with the basic documents of the Constitution being the;

(a) Northern Rhodesia Order in Council, 1924;

(b) Northern Rhodesia (Legislative Council) Order in Council, 1924 and;

36 Ibid.
Attention was not directed at explicitly establishing a constitutional framework but an administrative structure. Thus, Moris and Read have observed that:

[T]he colonial territories might be termed administrative states. The structure of the administrative hierarchy was in fact the constitution. These constitutional arrangements decreed by the British Government, and enacted through Orders-in-Council were designed to preserve the colonial rule with the cooperation of the white settler community and the acquiescence of the Africans. They were also authoritarian with the Governor and his predecessors setting the agenda and wielding most powers. The Zambian people did not play any part in their formulation of the agenda and administrative powers. The traditional constitutional devices that make up the foundation of constitutionalism namely, separation of powers, checks and balances and other hallmarks of constitutionalism were absent. It was the belief of the British that good governance in their colonies did not depend on constitutionalism, but on the wisdom of good men.

An attempt to introduce constitutionalism was only embarked upon shortly before Zambia attained independence. This was done through haste efforts being made by the colonialists to extend fundamental rights and freedoms to the natives, and to replace authoritarian state structures with a democratic constitution.

3.4 The Independence Constitution.

The interests of the African leadership were limited to acquisition of political power through political independence. The leaders were inspired by events in other African

41 J.W. Davidson, The Northern Rhodesian Legislative Council (1946), p22.
countries like Ghana, Tanzania and Kenya who had secured political independence. Nkrumah, the inspiration behind most African liberation struggles, expressed the desire for independence in great style:

Seek ye first thy political kingdom and everything else shall be added unto thee.\(^{48}\)

It was thus, current political opinion that with the advent of independence, and the attendant self-determination, the people of Zambia would be able to resolve their problems and enhance their standard of living.

The independence Constitution clearly revealed the predominant interest of the colonial authority to safeguard the interests of the white settlers.\(^{49}\) Due to colonial rule’s disregard for constitutional legitimacy and the biased concentration of interest on the white settlers, the settlers acquired immense material wealth. It was therefore in the colonial government’s political interest to safeguard its nationals abroad.\(^{50}\)

As a result, the Constitution that resulted broadly reflected the colonial government’s aspirations. The Constitution had an entrenched Bill of Rights\(^{51}\) which provided that every person in Zambia, regardless of race, place of origin, political opinion, colour, creed, or sex was entitled to fundamental rights and freedoms. These included the right to life, liberty, security, and the freedom of property, conscience, expression and assembly.\(^{52}\) The judiciary was independent from the executive and the Constitution also provided for the procedure to amend or alter its Articles. In order to amend the Constitution, the amendment bill had to be supported by not less than two-thirds of all the members of the National Assembly.\(^{53}\) Where the amendment bill concerned any of the fundamental rights and freedoms, the bill had to be submitted to a national referendum for approval.\(^{54}\)

\(^{50}\) Ibid.
\(^{51}\) Constitution of Zambia, 1964, Chapter III.
\(^{52}\) Ibid, sec 13-25.
\(^{53}\) Ibid, Chapter V, sec 72(2).
\(^{54}\) Ibid, sec 72 (3).
3.5 The One-Party Constitution

There is complete discord as to the origins of the inspiration for the one-party system in Zambia. Shimba attributes it more to the experiences of francophone Africa.\(^{55}\) Nwabueze attributes it to the communist regimes of China and the Soviet Union.\(^{56}\) In addition, the 1960s witnessed immense growth in scholarship by African leaders. Enlightened leaders like Kwame Nkrumah and Julius Nyerere wrote volumes on a new brand of socialism christened ‘African Socialism’.\(^{57}\) For Kaunda and his stalwarts, they were keen to follow what the enlightened leaders outlined.\(^{58}\) For this reason Zambia’s path to one-party rule, resembles closely the occurrences in other African countries such as Ghana and Tanzania.

3.5.1 The rationale for a one-party system of government.

Kaunda expressed his desire to introduce the one-party system as early as March 1964. He however indicated that this would only happen with the consensus of the Zambian People.\(^{59}\) The desire for a one-party system was re-iterated by Kaunda in 1967 at the annual UNIP Conference. The party’s stand on a one-party system was summed up as follows:\(^{60}\)

We are in favour of a one-party system; we do not believe in legislating against the opposition; by being honest to the cause of the common man we would through effective party and government organisations paralyse and wipe out any opposition thereby bringing a one-party state; and we declare that we would not legislate against the formation of opposition parties because we might be bottling up the feelings of certain people no matter how few.

The most cogent argument advanced by Zambian protagonists of the one-party system was that Zambia was fragmented due to the number of ethnic groupings. The country

---


\(^{56}\) B.O.Nwabueze, Presidentialism in Commonwealth Africa, Opt.cit

\(^{57}\) A. Thomson, Opt.cit

\(^{58}\) Kaunda’s inspiration to socialist philanthropy was manifest in his various articles. See KD Kaunda Humanism in Zambia and a guide to its implementation (1967).

\(^{59}\) L. Shimba, Opt.cit, p 125.

\(^{60}\) Proceedings of Annual General Conference of UNIP held at Mulungushi Lusaka 14-20 August 1967.
has 73 ethnic groupings. It was felt that a nation with such intrinsic factionalism could not be united for purposes of economic development with plural politics.  

The argument further postulated that opposition parties not national in character sought refuge in creating pockets of support in regional ethnic groups where political leaders came from, and that political competition would create tension amongst the various tribes, leading inevitably to civil strife and destruction of the state.

It was also argued that Zambia being adjacent to minority white ruled countries, Rhodesia, South West Africa, Angola and Mozambique were always at the risk of military invasion from the volatile white settler regimes. The argument was bolstered by evidence of actual invasions into Zambia by these foreign forces, resulting in loss of lives and property.

The other argument postulated is that the independence Constitution was always viewed as a colonial vestige. It was essential that a home grown autochthonous constitution be developed to truly convey the aspirations of the Zambian people. The institutions, which the independence Constitution created, were all alien, and not conducive to Zambia’s socio economic development. It is obvious that this is a plausible argument especially in view of how the independence Constitution was promulgated.

The process of constitutional development leading to attainment of the one-party system was most simplistic. Kaunda announced the change at a press conference on 25 February 1972 that due to incessant and ever increasing calls for a one-party system, cabinet had decided to bring about a one-party system through legislation. It is unclear at which platform the incessant demands were expressed. No empirical evidence of the weight of support for the one-party system was shown. Thus in Nwabueze’s view, the calls were from party stalwarts.

---

61 Shimba, Opt. cit, p 130.
3.5.2 Agenda

It is not possible to identify any deliberate formulation of an agenda to manage the process. Unless government covertly formulated an agenda before the pronouncement, it can only be described as a spontaneous decision devoid of agenda and nation wide inspiration.

3.5.3 Civic education

Civic education was the responsibility of the ruling party. Other members of society never identified with the direction that the constitutional development was heading. It was obvious that the participation of the people was not the cardinal concern of the government. The government was more interested in the result rather than in the process.

3.5.6 Cultivation of political will

The key players in the country were never engaged in negotiations to cultivate the necessary political WILL to accept the resultant constitution as an original act and will of the people. Paltry efforts were made to bring the major political player, ANC, on board. Understandably, the ANC refused Government’s offer for representation on the Chona Commission.  

3.5.7 The Chona Constitution Commission

Kaunda appointed a Constitution Commission under the Inquiries Act on 30 March 1972. The Inquiries Act allowed the President to appoint a commission of inquiry to investigate into any matter, which in the opinion of the President is in public interest. The people of Zambia and all other interest groups played no role in the appointment of the Commission.

The terms of reference of the Commission were to consider and examine changes in the Republican and UNIP Constitutions; and practices and procedures of government,

67 Chapter 41 of the Laws of Zambia.
which were necessary to create a one-party system in Zambia.\textsuperscript{68} It was not within the terms of reference to hear petitions against one-party system of government, as the government already preferred the one-party system. The people's participation in the making of the constitution was therefore limited to giving their views on the character of the one-party system.

The extent of the consultative process remains doubtful. It is unclear which authorities in government played the role of adoption of the Constitution. It is manifestly clear that the government rejected a lot of the submissions from the people. This denied the Constitution the attribute of being an original act of the people and of its legitimacy.

The Commission made a number of recommendations that had the effect of curtailing presidential powers. Government analysed the various recommendations and presented a white paper, which rejected all the recommendations pertaining to the limitation of presidential powers.

The recommendations and the various additions government made to them were drafted into a Constitution (Amendment) Bill, submitted to the National Assembly and duly enacted on 13 December 1972. The amendment read as follows:

"There shall be one political party in Zambia, namely UNIP."

The party, UNIP, took precedence over all institutions in the country, government inclusive. Political competition was curtailed, dominant political parties were fortified, administrative structures were expanded, and decision-making was heavily centralised around the President and his cohorts.\textsuperscript{70} Happily a nationwide movement compelled the government to reintroduce multi politics in 1991.

\textbf{3.6 The Multi-Party Constitution.}

The years of one-party system in Zambia, like elsewhere in Africa, were very difficult. The economic and social development expected under one-party rule failed

\textsuperscript{69} Amendment No 22 of 1972.
\textsuperscript{70} N. Chazan; P. Lewis; R. Mortimer; R. Rothchild & D. Steadman, \textit{Politics and society in contemporary Africa} (1999) 46.
to materialise. Social infrastructure such as Universities, Schools, and Hospitals collapsed, with the government in some cases failing to pay the salaries of civil servants. Inevitably, this led to the people venting their frustrations through riots and demonstrations.\footnote{P. Ochenje, Opt.cit, p 179-180.}

In addition, although the World Bank and the International Monetary Fund initially insisted on economic liberalisation as one of the conditions for further financial assistance to countries such as Zambia, they later came to a conclusion that economic liberalisation alone was not enough.\footnote{A. Thomson, Opt.cit, p 234.} In addition countries had to reform their political institutions. This meant putting in place constitutions that guaranteed free competition for political power, and guaranteed the citizens certain fundamental rights and freedoms.\footnote{Ibid.} The most significant pressure for democratic reform came from Civil Society. Once political space had been created by the decline of state authority, opposition parties, church groups, human rights activists, students, legal professionals, just to mention a few, provided leadership for a rejuvenated civil society. Through this leadership, mass discontent was channeled into a call for multi-party democracy. Prior to the multi-party elections, the government amended the Constitution so as to revert to multiparty politics. It also announced its intention to make comprehensive amendments to the Constitution, and consequently appointed a Constitution Commission called the Mvungu Constitution Commission to commence the process.\footnote{The Commission was appointed on 8 October 1990 under Statutory Instrument No 135 of 1990.}

3.6.1 The Mvungu Constitution Commission.

The Commission toured the country extensively and obtained the views of a broad range of people on the future constitution of Zambia. Having obtained the views of the people, the Commission presented its report, containing recommendations, to the government.\footnote{Report of the Constitution Commission (1995).} The UNIP government in like manner to the Chona Commission recommendations picked what they preferred and prepared a draft Constitution for
adoption by Parliament. Parliament controlled by UNIP, adopted and enacted the constitution on 2 August 1991.\(^7\)

Almost two months after the enactment of the 1991 Constitution, general elections were held on 31 October 1991. The Multi Movement Democracy (MMD) won by a wide margin and defeated UNIP, and Frederick Chiluba became the second President of Zambia.

3.7 The 1996 Constitution.

Prior to the MMD coming into power, it undertook, once elected, to change the 1991 Constitution and replace it with one that would be above partisan considerations and reflect national consensus. Thus on 22 December 1993, a year after the MMD acquired power; Chiluba appointed a Commission called the Mwanakatwe Constitutional Review Commission.\(^7\)

3.7.1 The Mwanakatwe Constitution Commission.

The Commission had wide terms of reference compared to the two earlier Commissions. The Commission was given this broad mandate to enable it to consider provisions that would help the country create an open, transparent and democratic society and a constitution that ‘would stand the test of time’.\(^8\)

Its terms of reference included recommending a system that would ensure that Zambia was governed in a manner that would promote the democratic principles of regular and fair elections, transparency and accountability, and that would guard against the re-emergence of a dictatorial form of government.

The government in a White Paper rejected most of the recommendations of the Mwanakatwe Report.\(^9\) It rejected the idea of a referendum pleading ‘parliamentary sovereignty’ as well as ‘legal, logistical, financial and material imperatives,’ as legal and practical barriers. It also rejected the recommendation that a presidential


\(^{7}\) The Commission was appointed on 22 November 1993 under Statutory Instrument No 151 of 1993 as amended by Statutory Instrument No 173 of 1993.


candidate should obtain 50% plus one of the valid votes cast to be declared winner. Other rejected recommendations included the introduction of several new personal rights, and the establishment of a constitutional court and an independent electoral commission. The government clearly departed from its original promise in 1991 to introduce in Zambia a Constitution that would strengthen individual rights and freedoms, and lessen the powers of the executive. The most telling of the government responses to the Report was the rejection of the Commission’s call for a broadly based Constituent Assembly to ratify proposed constitutional changes. Interestingly, the Commission recommended that a presidential candidate had to be born from parents who were citizens of Zambia by birth.\textsuperscript{80} This was obviously aimed at preventing Kenneth Kaunda from contesting the up-coming general elections. The government accepted this recommendation.

The government White Paper was widely condemned by opposition parties, scholars and students, members of trade unions, and a broad section of the Zambian population. Civil society organised what was termed a ‘citizens conference’ to raise public awareness and enlist public resistance to the governments proposed measures.\textsuperscript{81} Despite the widespread criticism, the government proceeded to amend the 1991 Constitution through the enactment of the Constitution of Zambia (Amendment) Act 1996. The major effect of the amendments was essentially confined to the parentage clause for presidential aspirants.\textsuperscript{82}

\section*{3.8. The Mung’omba Constitution Commission.}

On 17 April 2003,\textsuperscript{83} President Levy Mwanawasa announced the appointment of a fourth constitutional review commission.\textsuperscript{84} He called upon certain groups of Civil Society to nominate members to sit on the Commission.

\textsuperscript{80} Government White Paper, Opt.cit.
\textsuperscript{81} “Civil society condemns government White Paper on Constitution” The Post, 29 April 1995 at p2.
\textsuperscript{82} Constitution of Zambia (As amended in 1996), Art 34(3).
\textsuperscript{84} The Mung’omba Constitutional Review Commission (2005).
The Commission toured the country more than the Mvunga and Mwanakatwe Commissions by reaching every Constituency in Zambia to obtain the views of the people. It then proceeded to prepare, and publish its report and a draft Constitution.\textsuperscript{85} Significantly, the Commission recommended that the draft Constitution be adopted by a constituent assembly and thereafter be subjected to a national referendum for approval. It also recommended that for a person to be elected President, he or she had to obtain 50% plus one of the valid votes cast, and where none of the candidates obtains this, a re-run should be held between the candidates with the two highest scores.

The government's response, in particular to the above recommendations is that the Constitution of Zambia clearly states that the legislative power of the Republic of Zambia is vested solely in Parliament, and that it does not provide for the adoption of the constitution by a constituent assembly.

As regards the second recommendation, the government's position on this is that the probability of a presidential candidate not obtaining 50% plus one of the valid votes cast, and thus having a re-run, which would entail expending the same amount of money spent on the elections, is very high. It is also the government's view that the basic principle of democracy is that the majority decision should always prevail, regardless of the number of votes obtained.\textsuperscript{86}

\textbf{3.9 Conclusion.}

The constitutional foundation of Northern Rhodesia lacked the contribution of Africans, and who were reasonably expected to assume the reigns of power at some point. In essence the constitutional foundation of Northern Rhodesia lacked political legitimacy. Those wielding political power, and not the people, had had the final say on the character of the Constitutions of Zambia.


\textsuperscript{86}"Government interim comments to the Constitution Review Commission draft Constitution" The Post 11 October 2005 at p2.
Upon independence the process of manipulation of the Constitution making process continued with interference of successive governments that reduced the legitimacy of the end product. The failure by successive governments to adopt recommendations of the majority of citizens and adopting of minority views eroded the legitimacy in Constitutions.

One can therefore conclude that all the governments since independence have undermined popular demands to further narrow, selfish and transient interests.
Chapter 4

THE CURRENT CONSTITUTION MAKING PROCESS.

4.1- Introduction.

The constitutional development in Zambia from independence right through all the republics showed the power of the ruling government as far as constitution making is concerned. The reason we are still talking about constitutional making, forty-three years after independence is because those who controlled the government in the past used Constitution making processes to advance their own narrow and often transient political interests. They used the Constitution as political tool to disadvantage their competitors. Examples are abound where UNIP systematically destroyed the ANC through introduction of a one party state in 1972; the Chiluba government amended the 1991 Constitution with the effect of debarring the first President of Zambia to re-contest as President. The citizens have thus developed mistrust for the government in handling the constitution making process to the effect that the people over whelming submitted in support of adopting the current Constitution through a Constituent Assembly.

4.2- Method of adopting and amending the Constitution.

The Mung’omba Review Commission recommended among other issues that the:

(a) current Constitution should be repealed and replaced

(b) Constitution should be adopted by a Constituent Assembly followed by a National Referendum.

(c) composition of the Constituent Assembly was provided for and other matters to regulate the conduct of the process of transparency and accountability in the entire process.

---

Furthermore the Commission recommended the process of amending the Constitution, which among other things provided that:\textsuperscript{89}

(a) The Constitution should not be amended too often,

(b) Amendments to the Constitution should be made by an Act of Parliament,

(c) Amendment of entrenched clauses to require not less than two thirds majority of all members of Parliament and a national Referendum,

(d) Amendment of any other provision to require not less than two thirds of all members of the National Assembly, etc.

The demand to have the draft Constitution considered by the Constituent Assembly and presented to the people for approval is a solution to the problem of making and remaking of constitutions over the past four decades. The people want a Constitution that “will stand the test of time” and that will have the requisite stamp of legitimacy.

\textbf{4.3- Government reaction to the adoption process.}

The timing of the Mung’omba Commission report was such that a new Constitution was feasible before the 2006 Presidential and General elections. As usual the Government was not committed to the recommended process citing legal and economic reasons to adopting the Constitution through a Constituent Assembly and a Referendum. Various roadmaps and cost structures were given as alternatives by the government with civil society countering the government position with cheaper alternatives and roadmaps. The government contended that it was very expensive and not worthwhile to spend a lot of taxpayer’s money instead of delivering services to the public.

However with a combination of initiatives including the Zambia Centre for Inter-Party Dialogue (ZCID), Political party Presidents meeting and mounted pressure from Civil Society, the government endorsed the process but had to put it aside until after the 2006 Presidential, Parliamentary and Local government elections.

\textsuperscript{89} Interim Report for Mung’omba Commission, Opt.cit, chapter 27, p 815-822.

On 1\textsuperscript{st} August 2007, the Attorney General promulgated the National Assembly Bill number 26 of 2007. The introduction of the NCC Bill in the National Assembly brought about intensive debate from various stakeholders as to various aspects and challenges but not limited to the following:

(a) Why the government opted to avoid the Constituent Assembly as recommended by the people through the Mung’omba Commission. To some stakeholders the NCC was fundamentally different from the Constituent Assembly.

(b) The constitution of the members to the NCC was a major concern to some stakeholders as to their election and where they were to be nominated the process of nomination. Further it was a contention of other stakeholders that the membership was heavily tilted towards government since it had several numbers through the various civil servants and government employees that were to be appointed to the NCC.

(c) Other concerns included the lack of powers for the NCC in relation to adopting the new constitution, as it had to refer it either to the referendum of the National Assembly for further action.

The President finally assented to the NCC bill on 31\textsuperscript{st} August 2007. As consensus was not built given the tight race in the National Assembly debates, the challenges took another twist with some stakeholders swearing to boycott the NCC process as a way to pressurising the government to amend the Act and include their views.

Various interest groups held consultative meetings to decide on whether to participate in the NCC process or not. The Law Association of Zambia, United Party for National Development and several other stakeholders decided to participate in the process and contribute to the process. The Patriotic Front, a major party in Zambia resolved to
boycott as an official party policy the NCC process as they contend that they do not want to be used to legitimise a flawed process. The National Heritage party has remained excluded from the NCC on account of their party not being a member of the ZCID.

4.5- Salient provisions of the National Constitution Act.

The NCC Act defines the composition, functions and powers and provides for matters connected with or incidental to the foregoing. The membership of the NCC is reserved for particular organisations that represent various interest groups in the country. The only exception is the eminent persons, the senior citizens and the freedom fighters who will be chosen by each province. Those opposed to the NCC Act have declared that they want the representation based on the Mung’omba Commission Report as the current NCC composition favours political dominance at the expense of civil society. The measure of popular representation in the constitution making process is therefore, in the number of people that have a claim to popular mandate. The Mung’omba Commission Report recognized this aspect by reserving a larger composition for parliamentarians and other popularly elected people two-thirds representation in the Constituent Assembly. This trend has been maintained through the provision of membership to the NCC.

The functions of the NCC are to consider and deliberate the provisions of the Mung’omba Commission Report and the draft Constitution, to adapt a draft Constitution or part thereof. The import of the foregoing provisions is that members of the NCC will be limited in their deliberations within the framework of the draft Constitution. They will by and large not embark on making another draft Constitution but they may vary, confirm, add or subtract from the draft Constitution items, which shall receive consensus at the NCC.

90 NCC Act No. 19 of 2007, see preamble.
91 Ibid, sec 4.
92 Ibid, sec 13(1)(a)
93 Ibid, sec 13(1)(b)
94 Ibid, sec 13 (3).
Notwithstanding that the Mung’omba Commission was mandated to formulate a draft Constitution, the NCC is not bound by the recommendations of the Commission. The significance of this is that the foregoing decisions will not be made by the President or a sitting government through a white paper but by NCC after debate and building consensus. Since the constitution-making process started in 2003, no forum has been availed to debate the content of the draft Constitution other than commentaries in the media. In the past, the politicians had taken over the constitution making process once the Commission had submitted its report but this time the government has passed the responsibility of determination of the final text of the Constitution to the NCC.

The members of the NCC shall during their deliberations determine whether they shall submit the adopted draft Constitution to the Minister for enactment through Parliament or submission to a referendum where entrenched clauses are altered or on an item where there has not been any agreement.\textsuperscript{95} In the exercise of the functions, the NCC shall be accountable to the people of Zambia and recognise the importance of confidence building, engendering trust and developing a national consensus for the adoption process.\textsuperscript{96} Furthermore they are to ensure that the final outcome of the adoption process faithfully reflects the wishes of the people of Zambia.\textsuperscript{97} The import of the foregoing is that decisions of the NCC must be informed by what is in the best interest of the people of Zambia. Any departure or failure to achieve this will not be on account of inadequacy of the law but failure to observe the broad principles.

The NCC Act has also set out principles for democratic and secure adoption process to guide the deliberations and delimit responsibility. It provides that the NCC shall among other things; recognise the legislative power vested in Parliament\textsuperscript{98}; avoid discord, violence or threats of violence or other acts of provocation during debate and adoption process. They will further ensure that the meetings are held in peace and respect the independence of the members and desist from taking any political or

\textsuperscript{95}NCC Act, Opt. Cit, sec 13(2)
\textsuperscript{96} Ibid, sec 13 (4).
\textsuperscript{97} Ibid, sec 13 (4) (d).
\textsuperscript{98} Ibid, sec 14
administrative action that will adversely affect the operation or success of the adoption process.\textsuperscript{99}

The quorum at any meeting of the NCC and of any of its committees shall be one half of the members \textsuperscript{100}, and all questions before the NCC or any of the committees shall be determined by consensus short of which it shall be determined by a two thirds majority vote of members present by secret ballot.\textsuperscript{101} This recognises that making of a Constitution is all about interests and the challenge is to resolve the competing interests and find common ground with sufficient consensus.

The validity of any proceedings, act or decision of the NCC shall not be affected by any vacancy in the membership or by any defect in the appointment of any member.\textsuperscript{102} The import of this is that as long as a quorum is formed, absence of any other member either by default or boycott will not affect the validity of proceedings save for failure to master a two-thirds majority of members present. Furthermore with the challenge on the modalities of selecting senior citizens, the eminent citizens and freedom fighters, any defect to any appointment to the NCC will not negate the validity of the proceedings. This was quite ingenious in a country like Zambia where the public has of late been extremely litigious.

The meeting of the NCC shall be held in public\textsuperscript{103} and there is prohibition of publication, or disclosure of information to unauthorised persons without written consent of the NCC.\textsuperscript{104} This is presumably to support proper discharge of the functions of the NCC and the principles for democratic and secure adoption process.

The Act has thus allowed the members to elect one of their members to be their spokesperson.\textsuperscript{105}

\begin{footnotesize} \begin{itemize}
\item \textsuperscript{99} NCC Act, Opt.cit.
\item \textsuperscript{100} Ibid, sec 17 (4).
\item \textsuperscript{101} Ibid, sec 17 (7).
\item \textsuperscript{102} Ibid, sec 17(10).
\item \textsuperscript{103} Ibid, sec 19.
\item \textsuperscript{104} Ibid, sec 21 (1)
\item \textsuperscript{105} Ibid, sec 17(6).
\end{itemize} \end{footnotesize}
The NCC shall complete its work within a period of one year from commencement date unless the President upon request has extended it.\textsuperscript{106} This engenders the idea of a timely delivery more so that the process itself is not cheap and a cost to the citizens. The NCC is further required to publish a draft report and draft bill for the information of the public and to ensure that the initial report is available to the public for a period of sixty days.\textsuperscript{107}

Upon expiration of the period specified, the NCC shall facilitate public discussion and debate on the content of the draft bill and in addition invite and receive memoranda on the same.\textsuperscript{108} The NCC is further empowered to incorporate into the draft bill public’s views, as the members shall consider appropriate.\textsuperscript{109} The NCC may where it considers appropriate translate the draft bill into Zambian local languages with the approval of the minister.\textsuperscript{110} From the foregoing the NCC Act has sufficient provisions for public participation and determination. The work of the NCC shall have to be subjected to public approval before it is concluded. The process as provided for in the NCC Act is quite inclusive and speaking in truth and in recognition of the fact that there is no ideal constitutional making process, any failures in the current process as provided for by the NCC Act, will be to this generation due to acquiescence and not the enabling Act or government of the day. This is however based on the assumption that Parliament will not abuse the trust that the electorate and citizens at large will have placed on them to enact a new Constitution when it is finally tabled before the National Assembly where partisan interests have a history of success after party caucus meetings.

The current split in the Patriotic Front is rather too early to conclude whether the Members of Parliament belonging to this party have defied their party’s position

\textsuperscript{106} NCC Act, Opt. cit, sec 22.
\textsuperscript{107} Ibid, sec 23 (1) (a) (b).
\textsuperscript{108} Ibid, sec 23 (1) (c).
\textsuperscript{109} Ibid, sec 23 (1) (d).
\textsuperscript{110} Ibid, sec 23 (2)
based on principle and not material gain. If it is on principle, it may be argued that Zambians are now becoming of age on matters of national interest.

The President may dissolve the NCC if at any stage the members conduct themselves in such a manner that they fail to deliberate on the provisions of the draft Constitution or in any manner that adversely affects the adoption process or fail to execute their mandate.\textsuperscript{111} As already alluded to, there has to be some government in charge of the process and therefore there has to be some semblance of law and order to support a successful constitution making process.

However notwithstanding the various strengths and safe guards of the NCC Act, discontent still continues with the Patriotic Front insisting on the boycott of the NCC process by its members. The registration and accreditation for the members of NCC commenced which recorded a good turn out with at least twenty seven (27) Members of Parliament for the Patriotic Front registering amidst a n ultimatum of forty-eight (48) hours from their party President to resign or face expulsion if in defiance.\textsuperscript{112}

Godfrey Miyanda and the Heritage party have sued the Attorney General to the High Court in a petition filed on 14 November 2007 under Cause Number 2007/HP/1145. They contend that several provisions of the NCC Act are inconsistent with the Constitution of Zambia and in particular that; section 4(1) (b) contravenes Article 23 as it discriminates against those who are not members of the ZCID. The criteria and method for nominating the persons named in sections 4 (1) (s), (t), (u) and (aa) is inconsistent with the spirit and letter of the Constitution as the method to be used is not certain and does therefore not uphold the values of democracy, transparency, accountability and good governance as espoused in the Constitution. Section 14(a) is inconsistent with the spirit and letter of the Constitution as its effect limits the

\textsuperscript{111} NCC Act, Opt.cit.sec 32 (4).

\textsuperscript{112} Times of Zambia, 13 December 2007, issue No 14,016. The Patriotic Party President threatened the expulsion of his MP's who he alleged that they had abandoned their electorates for the sake of lucrative government allowances paid to NCC members. He reiterated that they had bought their way out of Parliament.
mandate of the NCC to alter or amend any provisions of the Republican Constitution, including article 62

Section 17(9) is undemocratic as it is not transparent, is not accountable and is a recipe for poor governance in that it allows for proceedings to continue in the absence of a quorum or where persons masquerading as members of the NCC transact business in the name of the said Conference... and that the impugned legislation prejudices their interest and political aspirations as individuals and members of a political party that has not subscribed to the ZCID trust deed. At the time of writing this text, the petition is yet to be heard.

There are concerns, which the Act has not been able to guide clearly, regard being to the provisions of section 33 of the Act wherein the Minister may make regulations for the better carrying out of the provisions of this Act:

The NCC may decide to come up with a complete draft Constitution, to replace the current Constitution. Such a draft may be subjected to a referendum if it alters Part III or Article 79 of the Constitution or any provision of the draft Constitution in respect of which there is no agreement or the entire draft Constitution.\footnote{NCC Act, Opt.cit,sec 13(2).} Where the Conference decides to amend the Constitution and the bill is presented before the National Assembly for enactment, the Act is silent on the role of the Members of Parliament since they were also members of the NCC that will have come up with such proposals. Will the Members of Parliament merely endorse the bill without debate or they will have the liberty to make changes to the Bill regard being to the provisions of the NCC Act section 14 (a).

\textbf{4.6- Conclusion.}

Unlike in the past constitution making processes, the government has this time side stepped their powers and created specific legislation to facilitate wider consultation and debate with specific mandates on delivery and revalidation with the people by way of availing the NCC draft Constitution to the people for discourse. The
composition of the NCC is as wide as it can be under the prevailing political set-up and again the various interest groups have been taken care off despite not allowing elections for the members to the NCC. The ultimate outcome can only be determined upon completion of the exercise but that notwithstanding, the government has made great concessions and the determinate factor will be the calibre, intellect and integrity of the representatives that will determine the final text of the Constitution.
Chapter 5

CONCLUSIONS AND OBSERVATIONS

5.1 Conclusion.

The experiences of past constitutional reviews reveal one crucial feature that constitution making in Zambia has not been inspiring and lacked legitimacy. There have been several challenges that have been a constant feature in the various constitutional making processes.

No country can however afford to trust a temporary majority with the Constitution-making process. By drawing on the emerging jurisprudence from South Africa whose own transition to a constitutional democracy was universally praised as the most remarkable example of political rapprochement of the twentieth century, we have been able to discover that constitution-making is a painful process which cannot be left to one segment of society. In order to adopt the new Constitution through a people driven process, the government and the other forces in the country need to agree on that process first and foremost. Secondly, they need to agree on the preparatory steps and guiding principles. Enabling legislation must be enacted to create the Constituent Assembly or what ever process they elect as long as it is inclusive of all the stakeholders.

The constitutions drafted in Africa have shown a significant shift in strategies in constitution making. A Constituent Conference at which most of the interested parties were represented popularly drafted the interim Constitution of South Africa. The final Constitution was drafted by a Constituent Assembly made up of the National Assembly and Senate sitting together. The conditions in South Africa dictated that the constitutional changes be pursued in two phases, a situation very novel in the history of constitution making in Africa.

In Zambia, under the Inquiries Act, the government reserves the power to determine the terms of reference and the power to appoint commissioners. The Commission, after collection of people’s views, submits its documents (the Draft Constitution and
the Interim Report) to the President. Then the Executive (the President and Cabinet) issues a “White Paper” from which there preferences are spelt out. Eventually such text has finally been enacted into Zambia’s Constitutions.

In the last forty-three years, successive administrations have unfortunately initiated constitutional reforms under the Inquiries Act and have defied the collective wisdom of the people and popular sovereignty. And using the Inquiries Act, the government denied their people a constitution-making process that is broad-based, inclusive and representative, in order to create a Constitution that is legitimate.

Constitutional review processes have been over-centralised. Notably, the question of process of adopting the Constitution has been the subject of much debate and particularly heightened in the earlier position government took in refusing to adopt the Constitution through a Constituent Assembly. Since then, the source of conflict has been in the failure to reach consensus between two interests being the need to:

(a) encourage popular engagement in the method of review of the Constitution (through a Constituent Assembly) and;

(b) ensure government’s authority is not undermined (hence, frequent use of the Inquiries Act).

And yet all stakeholders agree that the bone of contention in constitution making is the continued application of the Inquiries Act. This has created mistrust even with the enactment of the NCC Act to the extent that some parties are boycotting the process and others dragging the Attorney General to the High Court challenging some provisions of the NCC Act.

From the foregoing research, the Constitutions of Zambia have not been legitimate to the extent that the process has been flawed with successive governments refusing to adopt the reports of Commissions they appointed and the use of Parliament to enact the drafts that sitting governments promulgated.
Fortunately the current government under the leadership of His Excellency President Levy Patrick Mwanawasa have in an unprecedented move surprised everybody by enacting legislation for the creation of NCC to regulate the adoption of the draft Constitution for the Republic. The present government has accepted the key recommendation of popular adoption of the Constitution, the only difference being that they have passed legislation creating the Constitutional Conference as opposed to a Constituent Assembly. In reality there is no difference as the mandate, functions and composition are basically the same despite what one elects to call it.

It is my belief that Zambia is now on the correct path to consensus building and adopting a popularly determined Constitution. The process has now been aligned; the legislative frameworks enacted and the NCC has begun its sittings. Unless Parliament tampers with the will of the people by amending the draft Constitution that the NCC shall adopt, Zambia is destined for a historical enactment of a durable Constitution that will stand the test of time.

5.2 Recommendations.

The major difference between the past constitution making process and the current one is that the government of Levy Mwanawasa has accepted to adopt the new Constitution through the NCC. However notwithstanding this concession from the government, there are still several challenges that have been recognised and herein some recommendations have been outlined.

First, there has been a continued lack of civic education on the content of the current Constitution. Most citizens of Zambia do not know what is contained in the current Constitution, neither in full text nor abbreviated summary, in official English language or in simplified vernacular translation (which are non-existent). Worse still, it is even more difficult to get a copy of the full text from a bookstore, from the Government Printing Office. Hence, people’s awareness and contributions may be limited by lack of availability of information.
It can be argued quite reasonably that people’s participation in constitution-making process from beginning to its completion is an inevitable prerequisite of any democratic institution, community or society. In its absence, the final product of that process (the Constitution) suffers setbacks with regard to ownership by the people who are the ultimate custodians of the Constitution.

Secondly, the current Zambian Constitution has no provision relating to adoption of draft Constitutions. Adoption is a concept that is not recognised by the Constitution and not part of the practice of the Zambian Parliament. Because the Constitution is silent over the matter, the Executive has in the past unilaterally adopted the draft Constitution and tabled it before Parliament. The Mung’omba Commission observes in its final report that although the term “adoption” is not defined in the Constitution, “adoption of the Constitution by popular mode” is ordinarily understood to mean that the people themselves make the Constitution and give it their seal of approval. This would give it the stamp of legitimacy.

Thirdly, civic education on all matters of constitutional review (for example, as it relates to the implementation process of the Constituent Assembly and the Referendum) is necessary. In order to have a durable Constitution understood by the majority of Zambian citizens, there is need for effective popular mobilisation. This increases wide participation at grass-root levels, and ensures that the people pledge to support the content of the Constitution as committed stakeholders. A comprehensive and objective public awareness campaign is essential for the people to be familiar with the process. It is amazing how ignorant non-lawyers are on constitutional matters. The campaign should not be used to advance a government’s preferred direction. A comprehensive and objective public awareness campaign will ensure that the people feel part of the process and the Government should fund such a process.

Fourthly, the success of the current constitutional review process largely depends on collaborative efforts of all stakeholders engaged in the process to foster consensus, trust in the process, focussed and sustained civic education of the public, in urban and
rural areas, among the young and the old, with all classes of people. Undoubtedly, these three basic standards of: consultation, civic education and competency are necessary to move forward at the present moment.

Fifthly, it is undeniable that for a constitution-making exercise to be effective the timing is important and process protects content. Constitution making must take place at a time when there is a national consensus for a new constitution to be drafted or when it is possible to enlist wide support for the exercise. It is not enough that a particular leader sees such a need. Its frequency in a country erodes the sanctity of the Constitution and erodes legitimacy.

Sixthly, transparency and accountability are essential to successful implementation of the constitution making-process. Transparency insists that every procedure is open and above board, while accountability requires that the body conducting the process be elected directly by the people or appointed in a manner where the government has no direct hand save for establishing the empowering legislation. The appointment of some members who do not belong to established organisations to the NCC needs review.

Seventhly, experts in constitutional law should play a major role in shaping and evaluating provisions of a Constitution. It is essential that a constitution assist in meeting the people's deliberate aspirations. Only experts can see through a provision and evaluate its utility for posterity.

Finally the Constitution must stand the test of time. This gives it respect and recognition as a grand norm. If a constitution is going to be changed at will, nothing will distinguish it from ordinary statutes. However, this is not to say that a country should be inextricably wedded to a constitution. If a constitution no longer reflects the aspirations of the people it can be amended accordingly.
6.0-BIBLIOGRAPHY


11. General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25) 12/07/96. CCPR/C/21/REV.1/Add 7.


24. Moris, H.F. & Read, J.S., "Indirect rule and the search for justice" in F Rejntjens Authoritarianism in Francophone Africa from the colonial to the postcolonial state (1989),


30. Nkrumah, K., Consciencism: Philosophy and Ideology for De-colonisation (1964),


42. The International Covenant on Civil and Political Rights of 1966.
43. The Universal Declaration of Human Rights of 1948.