

“Constitution Making Process: The Zambian Experience”

By

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DECLARATION

I, VINCENT LUNGWANGWA, do hereby solemnly declare that this dissertation represents my own original work and that it has not previously been submitted for a degree at this or any other University. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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APPROVAL

This dissertation of VINCENT LUNGWANGWA has been approved as fulfilling the partial fulfilment of the requirements for the award of the degree of Master of Laws by the University of Zambia.

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ABSTRACT

Zambia has experienced constant constitutional instability since attaining independence in 1964 to date. That is, she has since independence, never achieved a Constitution that has been regarded as legitimate, democratic and durable. To date, the quest to achieve a legitimate, democratic and durable Constitution still rages on.

The objective of the study was to examine why Zambia has failed to achieve a legitimate, democratic and durable Constitution. The study primarily focused on the constitution – making processes embarked by the country, from the process leading to the crafting of the 1964 independence Constitution, to the current constitution – making process embarked by the Technical Committee on Drafting the Zambian Constitution (TCDZC). The study therefore, does not delve much into the contents of successive Zambian Constitutions.

The research employed the pure legal research methodology. The research was basically a desk review of secondary sources on constitution – making process in Zambia and other jurisdictions.

The study opened with a discussion of the notion of the people as the repository of constituent authority as the starting point to discussing constitution – making process. Thereafter, the study discussed the theory of New Constitutionalism or Democratic Constitution Making. This discussion was followed by an examination of the various constitution - making processes that the country has undertaken, beginning with the process leading to the crafting of the 1964 Independence Constitution, to the on - going constitution – making process.

The main findings of the study are, firstly, that the failure by Zambia to achieve a legitimate, democratic and durable Constitution has been attributed to the methods of constitution – making used to craft Zambia’s successive Constitutions. The methods used have been such that successive Constitutions have been imposed on the citizenry; hence these Constitutions have lacked legitimacy (acceptance) and moral authority of the citizenry. Secondly, that constitution – making process plays a vital role in achievement of a legitimate, democratic and durable constitution. And finally, that Zambia needs a proper legal framework to regulate and guide constitution – making process. The legal frame work should expressly vest in the citizenry, the power or authority to adopt and approve the final draft Constitution before it becomes law. The study concluded that to a very large extent, a legitimate, democratic and durable Constitution is inevitably achieved when the citizens participate in its adoption and final ratification.

The main recommendations of the study (in view of the findings), are that, firstly, there is need for a legal frame work that will vest expressly in the citizenry, the power or authority to adopt and approve final draft Constitutions before they are enacted into law. Secondly, that a legitimate, democratic and durable Constitution under the current process undertaken by the TCDZC will be achieved only if the TCDZC incorporates the people’s wishes into the final draft Constitution and that Government does not manipulate this final draft. In addition, the people should be given an opportunity to ratify the final draft Constitution through a referendum.

DEDICATION

This work is dedicated to my late mother Alexinah Nasilambo Lungwangwa

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Writing this dissertation has been a very hard and challenging experience. This is so because there were numerous moments when I got frustrated and contemplated quitting. However, persistence, patience and encouragements made me complete this work. It is for this reason that I have to pay gratitude to those that contributed to the successful completion of this dissertation.

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List of abbreviations

ANC	African National Congress
CoE	Committee of Experts
CRC	Constitution Review Commission
CCZ	Council of Churches in Zambia
EFZ	Evangelical Fellowship of Zambia
MICC	Mulungushi International Conference Centre
MMD	Movement for Multiparty Democracy
MP	Member of Parliament
N.A.B	National Assembly Bill
NCC	National Constitutional Conference
NGOCC	Non - Governmental Organisation Co-ordinating Committee
NP	National Party
NPP	National Progressive Party
PF	Patriotic Front
SC	State Counsel
S.I	Statutory Instrument
TCDZC	Technical Committee on Drafting the Zambian Constitution
UNIP	United National Independence Party
UPND	United Party for National Development
UPP	United Progressive Party
ZEC	Zambia Episcopal Conference

CHAPTER ONE

1.1 INTRODUCTION

Zambia attained her independence from Britain in 1964. Over a period of 50 years since the attainment of her independence, Zambia has endeavoured to craft a legitimate, democratic and durable Constitution. As a result, she has undertaken six (6) major phases in constitutional development within this period of 50 years, yet she has failed to craft a legitimate, democratic and durable Constitution. These six phases in constitutional development have been as follows: The first phase came with political independence itself in 1964. This was following successful negotiations for political independence in London, in May, 1964, whereby the Westminster passed the Order-in-Council which set forth the 1964 Independence Constitution. The second phase came on August 25, 1973, when the One – Party State Constitution was enacted by the National Assembly and assented to by then President, Kenneth Kaunda. This was preceded by the Chona Commission of Inquiry and the passing of the One- Party State Act that ushered into being the One – Party State on 13th December, 1972. The third phase was the enactment of the 1991 Constitution, which was passed by the National Assembly on 2nd August, 1991, and assented to by then President, Kaunda on August 29, 1991. The 1991 Constitution was preceded by the Mvunga Constitution Review Commission.

The fourth phase began on November 22, 1993, when then President Chiluba appointed the Mwanakatwe Constitution Review Commission, which was followed by the enactment of the 1996 Constitution, which is the current Zambian Constitution, enacted by the Constitution of Zambia (Amendment) Act, 1996. The fifth phase began on April 17, 2003, when then President Mwanawasa appointed the Mung'omba Constitution Review Commission, whose recommendations gave birth to the enactment of the National Constitutional Conference (NCC) Act.¹ The NCC was enacted to adopt a new Zambian Constitution though the process failed to bring into effect a new Constitution. The sixth phase is the current on - going constitution –

¹Act No. 19 of 2007

making process. This process commenced with the appointment of the TCDZC, appointed on November 16, 2011, by President Michael Sata. The TCDZC was set up to draft a new Constitution.

Having gone through all the five stated constitutional development phases, and still failed to craft a legitimate, democratic and durable Constitution raises the question: “why has Zambia failed to craft a legitimate, democratic and durable Constitution”? The answer to this question is mainly attributed to the constitution – making processes that Zambia has pursued in the making of its Constitutions. The constitution – making processes that have been used have not allowed widespread participation by the citizenry in the constitution – making process. This has resulted in successive Constitutions lacking legitimacy (acceptance) and moral authority of the citizenry, and hence failed to be durable.

The general Zambian populace have not widely participated in the constitution – making processes all the way through the processes up to the adoption and approval of the final Constitution. In fact, in all the first four phases of constitutional development stated above, the general Zambian populace had never at any point in time been invited to participate in the adoption and approval of the final Constitutions. The citizenry were only availed the opportunity to participate in the adoption of the Constitution, during the fifth phase, (the NCC constitution – making Process), though the process failed to bring into effect a new Constitution. In addition to this, the ongoing constitution – making process, availed the citizenry an opportunity to participate in the adoption process of the Constitution. The situation prior to the fifth and sixth phase was that participation by the citizenry in the constitution – making process was limited to submitting constitutional proposals to a constitution review commission.

The role of adopting the Constitution was undertaken by the President and his Cabinet (Executive) as well as the Legislature (Parliament). The process of constitution - making was such that the citizens would submit constitutional proposals to a constitution review commission. The constitution review commission would make recommendations to be adopted into the new Constitution. The President and his Cabinet would then through a Government

White Paper, adopt a draft Constitution by selecting recommendations they preferred, and rejecting those they did not prefer. Thereafter, the President and his Cabinet would then forward the adopted draft Constitution to Parliament, for onward adoption and eventually, enactment.

The result of this has been that the people's wishes and aspirations on fundamental issues have not found expression in successive Constitutions. Therefore, successive Constitutions have been merely imposed on the citizenry. This has been the Zambian experience, starting with the Independence Constitution of 1964, which was imposed by Britain (the colonial power) to the current Constitution which was imposed on the citizenry by Government in 1996. Just like the 1964 Independence Constitution which was imposed on the Zambian citizenry, the 1973 One – Party State Constitution was also merely imposed on the Zambians, by the Kaunda Government. The then Kaunda Government had decided to turn Zambia into a One – Party State without consulting the citizens whether or not they were in favour of the creation of a One – Party State. The citizens were only consulted on how the One – Party State should be implemented. Even then, their wishes and aspirations on fundamental issues regarding how they wanted the One – Party State to operate and submitted to the Chona Commission of Inquiry were not incorporated in the One – Party State Constitution.²

The 1991 Constitution was perceived as a product of compromise to facilitate the return to a plural political system. It did not contain the wishes and aspirations of many Zambians on many fundamental issues as submitted by them to the Mvunga Constitution Commission. The 1996 Constitution, which is the current Constitution, was also simply imposed on the Zambian citizens. The Constitution does not express the wishes and aspirations of Zambians. This is so in that the then Chiluba Government, through Government White Paper, rejected most of the Mwanakatwe Commission recommendations expressing the wishes and aspirations of the majority Zambians on fundamental issues.

²See Constitution Review Commission. *The Report of the National Commission on the Establishment of a One – Party Participatory Democracy in Zambia* (Lusaka: Government Printer, December 2005), and compare it with the Constitution of Zambia, Act, 1973.

The fact regarding the 1996 Constitution is that the then Government simply created a new Constitution through an Act of Parliament. That is, the then Chiluba Government using its Movement for Multiparty Democracy (MMD) over – whelming majority in Parliament obtained in 1991 general elections, simply substantially amended the 1991 Constitution through the enactment of the Constitution of Zambia (Amendment) Act, 1996.

Imposing Constitutions on the Zambian citizenry has been the major reason for constitutional instability in Zambia to date. This is the reason why successive Constitutions have lacked legitimacy and moral authority of the citizenry, hence failed to be durable, resulting in the constant constitutional instability to date. A Constitution can only command the loyalty and confidence of the citizenry as well as legitimacy (acceptance), if the citizenry are involved in the making of the Constitution including its adoption and approval.³

In fact, as will be shown below, the modern approach to constitution – making is premised on the fact that it is the people that are vested with ‘constituent power,’ that is the authority or power to adopt and approve the Constitution. It follows therefore that, the process of constitution making is crucial in achieving legitimacy of the Constitution.⁴ The constitution making – process must involve the participation of the citizenry throughout the process up to adoption and approval of the resultant Constitution, if the resultant Constitution is to achieve legitimacy.

Imposing of successive Constitutions on the Zambian citizenry, has been necessitated largely by the lack of appropriate legislation, constitutional or otherwise, providing for a people driven approach in the constitution – making process. As a result of lack of appropriate legislation on constitution – making process, successive constitution – making processes have been initiated

³BEN O. Nwabueze *“Constitutionalism in Emergent States.”* (London: Farleigh Dickinson University Press, 1973) 24 -25.

⁴Muna B. Ndulo and Robert B. KENT, *“The Constitutions of Zambia”*, *Zambia Law Journal* 30 (1998):2.

under the Inquiries Act.⁵ It is in fact this Act that has necessitated the imposition of successive Constitutions on the Zambian Citizenry.

This is so because the Act, gives the President wide powers in the constitution – making process. The powers include the power to set up a constitution commission, power to determine the terms of reference of a constitution commission, as well as the power to reject, accept, modify, add or subtract to or from the recommendations made by the constitution commission.⁶ In short, the Act gives the President and his Cabinet power to adopt a draft Constitution.

In modern times, it has been proven by countries like South Africa and Kenya among others, that the achievement of a legitimate, democratic and durable Constitution is connected to the constitution – making process. Achievement of a legitimate, democratic and durable constitution is almost inevitable if the constitution – making process allows for general public participation and social inclusion in the process from adoption, to the approval of the final Constitution. That is, the general citizenry must be allowed to fully participate in the constitution – making process, including the adoption and approval of the resultant Constitution.

A new theory to constitution – making process, known as “New Constitutionalism” or “Democratic Constitution Making” has evolved in the 21st century. This new theory to constitution – making process aims at ensuring the achievement of a legitimate, democratic and durable Constitution. Therefore, the theory emphasises the need to allow for general public participation and social inclusion in the constitution - making process, including the adoption and approval of the final Constitution. This theory has been applied and has worked well in many countries including South Africa and Kenya, where it has been used. These two countries, among the many others have applied this theory to constitution – making, to achieve

⁵Chapter 41 of the Laws of Zambia

⁶Sections 5 and 4 of Cap 41

Constitutions that have been widely acknowledged by the majority of the citizenry in these countries as being legitimate and democratic, as will be shown later.

This study will proceed on the hypothesis that Zambia's failure to craft a legitimate, democratic and durable constitution is attributable to the constitution – making processes that Zambia has pursued to craft her Constitutions. The study will demonstrate that Zambia has not abided to the theory of New Constitutionalism or Democratic Constitution Making in crafting her successive Constitutions, hence her failure to achieve a legitimate, democratic and durable Constitution. The study will focus on the constitution - making processes used to craft successive Zambian Constitutions, beginning with the process leading to the crafting of the 1964 Independence Constitution, to the current constitution – making process, embarked on by the TCDZC.

1.2 STATEMENT OF THE PROBLEM

Zambia is now over 50 years of achieving political independence, having attained its independence in 1964. However, throughout this long period after attaining independence, she has endeavoured, but failed to achieve a Constitution that has been regarded by the majority of the citizens as being legitimate, democratic and durable. This desire to achieve a legitimate, democratic and durable constitution has seen her undergo several constitution making – processes. The tension over the need to have a legitimate, democratic and durable constitution still rages, and as a result, she is yet again currently undergoing constitution review process with the expectation this time around, to finally achieve that long awaited legitimate, democratic and durable Constitution.

The failure to achieve such a Constitution can be attributable to the constitution making process itself. This is so because most, if not all, of the previous constitution – making processes that she has undertaken, the citizens have not been widely involved in the process. That is, The Constitutions that Zambia has crafted since independence have not been people driven. They have been imposed by the former colonial master or the Government in power. As a result, these Constitutions have largely been foreign to the citizenry because they have not reflected

the aspirations and desires of the majority citizenry, as well as their customs, habits and way of life. Consequently, the majority of the citizenry has over the years not embraced these Constitutions as their own because they have lacked legitimacy, and moral authority, hence these constitutions have not been durable.

1.3 JUSTIFICATION

The justification of this study is that it has implications on whether Zambia will now enact a legitimate, democratic and durable Constitution.

1.4 AIM

The aim of this study is to demonstrate that the reason why Zambia has to date failed to craft a legitimate, democratic, and durable Constitution is attributable to the constitution making – processes that she has employed to craft her successive Constitutions since independence in 1964. The majority of the citizenry have not been fully involved in the process of making their Constitutions, that is, from inception up to adoption and final ratification of the final resultant Constitutions. This lack of full participation by the citizenry in the constitution making – processes is what has made Zambia fail to craft a legitimate, democratic and durable Constitution.

However, in 2007, there was an attempt through the NCC to involve the citizenry in the adoption of the draft constitution. However, the NCC constitution – making process could not result into enactment of a new Constitution due to alleged manipulation of the process through the NCC's skewed composition.

1.5 SCOPE OF THE STUDY

The scope of this study is limited to constitution making – processes undertaken by Zambia from independence in 1964 to date. That is, the study will focus on constitution making – processes starting from the process leading to the crafting of the 1964 Independence Constitution, to the ongoing constitution making – process embarked on by the TCDZC.

1.6 OBJECTIVES

General objectives:

To determine why Zambia has since independence failed to achieve a legitimate, democratic and durable Constitution despite having had several constitution – making processes.

Specific Objectives:

1. To determine why the 1964, 1973, 1991 and 1996 Zambian Constitutions failed to be legitimate, democratic and durable.
2. To determine why the NCC constitution – making process failed to result into enactment of a legitimate, democratic and durable Constitution.
3. To determine whether the TCDZC’s constitution making – process is bound to result into enactment of a legitimate, democratic and durable Constitution.

1.7 HYPOTHESES

The following hypotheses are made:

1. Constitution – making process plays a vital role to achieving a legitimate, democratic and durable Constitution.
2. The people (citizenry) are the repository or authority in whom the power to adopt and ratify the final draft Constitution lies.
3. Widespread participation by the people in the constitution - making process, including adoption and ratification by the people of the final draft Constitution, leads to achievement of a legitimate, democratic and durable Constitution.

1.8 RESEARCH QUESTIONS

The research seeks to answer the question: why Zambia has failed to craft a legitimate, democratic and durable Constitution. In answering this question, several other more specific questions need to be answered:

1. Why did the 1964, 1973, 1991 and 1996 Constitutions, fail to be legitimate, democratic and durable?
2. Why did the NCC’s constitution – making process fail to result into the enactment of a

legitimate, democratic and durable Constitution?

3. Is the constitution – making process embarked by the TCDZC bound to result into the enactment of a legitimate, democratic and durable Constitution?

1.9 METHODOLOGY

This research was a desk review of secondary sources such as successive Constitution review reports and draft Constitutions; Zambia’s successive Republican Constitutions; relevant data on constitution – making process in Zambia and other jurisdictions. Others will be published and unpublished materials on constitution – making processes such as theses; journals; statutes; newspaper articles; as well as other literature to be gathered throughout the research process.

1.10 OPERATIONAL DEFINITION OF TERMS

1. 10.1 New Constitutionalism or Democratic Constitution Making

This refers to the theory of Constitution making process that has evolved in modern times. This theory has been evolved by constitutional scholars following wide and various research works on constitution making in various countries. This theory espouses three tenets being that of widespread public participation; personal security; and freedom of speech and assembly in the constitution – making process. The theory espouses that a legitimate, democratic and durable Constitution is inevitably achieved when a constitution making - process embraces these tenets.

1.10.2 Legitimate Constitution

This refers to a Constitution that is accepted by the majority of the citizens, as reflecting their wishes and aspirations.

1.10.3 Democratic Constitution

This refers to a Constitution that has come about by way of a democratic process, that is, a Constitution that has been crafted following its adoption and approval by the majority of the citizens.

1.10.4 Durable Constitution

This refers to a Constitution that is long – lasting.

1.11 LITERATURE REVIEW

The following literature was reviewed:

1. Sipalo, Ngenda. **Constitution Development in Zambia 1890 – 1975.**⁷ Thesis (LLM). The University of Zambia, 1978. In this work, Sipalo analyses the constitutional development in Zambia between 1890 to 1975. The period 1890 to 1975 covers the colonial era, transition to independence, the immediate post independence era, and the one party state era. Yet this particular study examines the constitution making – process in Zambia from independence, in 1964, to date, when the TCDZC was set up to craft a new Constitution. This study will not focus on the contents of the various Constitutions enacted in Zambia since independence in 1964. It will only focus on Constitution making – processes used to craft the various Constitutions crafted from independence in 1964 to date.
2. Sangwa, John P. **The Making and Remaking of Constitutions in Zambia: The Need for A New Perspective.**⁸ Thesis (LLM) The University of Zambia, 1994. In this study, Sangwa gives an analysis of the constitutional development in Zambia from independence in 1964, to the period of the Mvunga Constitution Review Commission and the 1991 Constitution. Sangwa has focused mainly on the contents of Constitutions crafted between 1964 to 1991. This study will look at constitution – making process from independence – 1975 in 1964 to date.
3. Muna B. Ndulo and Robert B. Kent, **“The Constitutions of Zambia.”**⁹ Zambia Law Journal, Volume 30 (1998): 1 – 28. In this work, Ndulo and Kent analyze constitutional developments in Zambia from 1964 up to the period of 1996 Constitution. Ndulo and Robert’s focus is on the contents of the Constitutions formulated during the period under review.
4. Matibini, Patrick. **“CONSTITUTION MAKING PROCESS: The Case of Zambia.”**¹⁰ Zambia Law Journal, Special Edition (2008): 1 – 32. In this work, Matibini looks at constitution making process in Zambia. The analysis is both from the process and content perspectives. The work covers the period from independence in 1964, up to the Mung’omba Constitution Review

⁷Ngenda Sipalo, “Constitution Development in Zambia 1890 – 1975” (Masters’ thesis. University of Zambia, 1978).

⁸Sangwa, John P. “The Making and Remaking of Constitutions in Zambia: The Need for A New Perspective.”(Masters’ thesis. University of Zambia, 1994).

⁹Muna B. Ndulo and Robert B. Kent, “The Constitutions of Zambia,” *Zambia Law Journal* 30: (1998): 1-28

¹⁰Patrick Matibini, “CONSTITUTION MAKING PROCESS: The Case for Zambia.” *Zambia Law Journal, Special Edition* (2008):1-32

Commission and the National Constitutional Conference (NCC). However, Matibini's work does not go up to the failure of the NCC constitution – making process to result into enactment of a new constitution. And it does not also cover the process embarked by the TCDZC).

1.12 RESEARCH LAY OUT

The study will be divided into six chapters. Chapter one will introduce the research topic and also give background information on the same. Chapter two will discuss the notion of the people as the repository of constituent authority, as well as the modern theory to constitution – making process, known as “New Constitutionalism” or “Democratic Constitution Making.” Chapter three will examine the constitution – making processes used to craft the 1964, 1973, 1991, and 1996 Zambian Constitutions. At the end of the examination, the reason(s) as to why these Constitutions failed to be durable will be explored.

Chapter four will focus on the attempt to adopt a Constitution through the National Constitutional Conference (NCC), and the failure by the NCC constitution – making process to result into enactment of a new Constitution. Chapter five will focus on the constitution – making process embarked by the TCDZC, and the prospects of this process resulting in the enactment of a legitimate, democratic and durable Constitution. The last chapter, chapter six, will draw the conclusions and research findings, as well as the recommendations of this study.

CHAPTER TWO

APPROACHES TO CONSTITUTION – MAKING PROCESS

2.1 Introduction

This chapter will outline the theory to constitution - making process known as *new constitutionalism or democratic constitution – making*. This is a modern approach used in the constitution – making process. However, before outlining this theory, it is necessary first to analyse the concept of *the people as the repository of constituent power*, which concept is part of *new constitutionalism or democratic constitution – making*. After analysing the concept of *the people as the repository of constituent power*, I will proceed to outline the theory known as *new constitutionalism or democratic constitution – making*. At the end of the chapter, brief case studies of how new constitutionalism has been used to craft the South African and Kenyan Constitutions, will be considered. These Constitutions have undoubtedly been regarded as models meant to stand the test of time.

2.2 The People as the *Repository of Constituent Power*

With regard to constitution – making process, the philosophy established is that the people or citizens are the ones vested with *constituent power*. That is, the authority or power to adopt a Constitution either directly at a referendum or through a Constituent Assembly.¹¹ This approach can be traced to the making of the American Constitution in 1787. The American Constitution was adopted by the people through a Constitutional Convention, mandated to adopt the Constitution. The Constitutional Convention sat for four months from May to September 1787, in Philadelphia.¹² The American Constitution was not adopted by the Continental Congress (Confederation legislature), but by the people through a Constitutional Convention. In fact, the Confederation was in session in New York when the constitutional

¹¹ Ben O.Nwabueze, *Ideas and Facts in Constitution Making* (Lagos: Spectrum Books Ltd, 2004), 8.

¹² “United States Constitution.” Wikipedia.org. Accessed November 14th, 2012. <http://en.Wikipedia.org/>.

Convention was sitting in Philadelphia. This demonstrates that it is the people, and not any State body, not even Parliament that is vested with constituent power.

Nwabueze also agrees that it is the people that are vested with the authority or power to adopt a Constitution. He states that the people can exercise this power either directly at a referendum, or through a Constituent Assembly.¹³ Nwabueze further states that it is disingenuous for an existing national assembly without prior popular mandate in that behalf to resolve itself into a constituent assembly, and in that capacity to assume the people's constituent power.¹⁴ Ndulo also concurs with this notion that the people are the repository of constituent authority. This is so, when he states with regard to future constitution – making processes in Zambia that:

“The constituent assembly and the referendum are devices which can be neglected no longer.”¹⁵

Matibini also agrees with this notion of the people as the repository of constituent power. This is so when he states that a democratic constitution must be a product of consensus by the people, and not imposed on the people by those who wield the power of the State.¹⁶ He further states that adoption of the Constitution by the Legislature does not lead to a legitimate Constitution.¹⁷

In addition, previous Constitution Review Commissions in Zambia have equally recognised the notion of the people as the repository of constituent power. For instance, the Mvunga Constitution Review Commission, 1991, recognised this when it stated that according to its understanding of the Constitution, the Constitution derives its authority and legitimacy from the people.¹⁸ The Commission stated that the source of State power is in the people.¹⁹ The

¹³Nwabueze, *Ideas and Facts*, 5.

¹⁴Nwabueze, *Ideas and Facts*, 8 – 9.

¹⁵Muna B. Ndulo and Robert B. Kent, “The Constitutions of Zambia,” *Zambia Law Journal* 30: (1998): 28.

¹⁶Patrick Matibini, “CONSTITUTION MAKING PROCESS: The Case for Zambia.” *Zambia Law Journal, Special Edition* (2008):28.

¹⁷Matibini, “Constitution Making Process,” 30 – 31.

¹⁸Constitution Review Commission, *Report of the Constitution Commission* (Lusaka: Government Printer, April, 1991), 11.

¹⁹CRC, *Report of the Constitution Commission, 1991*, 11.

implication of these statements is that the people themselves make the Constitution. Similarly, the Mwanakatwe Constitution Review Commission, 1993, recognised this notion. This, the Commission did when it recommended that in order for the Constitution to have legitimacy and to be durable, the Constitution should be adopted by a constituent assembly and a national referendum.²⁰ The Commission further stated that adoption of the Constitution by the Legislature leads to the Constitution lacking legitimacy and hence failing to be durable.²¹ Again the implication of these recommendations is that it is the people themselves that should adopt a Constitution, and that a Constitution adopted otherwise tends to lack legitimacy.

The Mung'omba Constitution Review Commission was no exception. The Commission equally recognised this notion. This the Commission did by unanimously recommending that the Constitution should be adopted through a constituent assembly, and a national referendum.²² In arriving at this recommendation, the Commission stated thus:

....."recognising the value of democracy and re – affirming the supremacy of the people in governance and constitutionalism, the Commission is persuaded that the new Constitution should be adopted through a constituent assembly, and a national referendum. And in this conclusion, the Commission is unanimous."²³

The TCDZC has equally recognised the notion of the people as the repository of constituent power. This the TCDZC has done, by providing for general public participation, and social inclusion in the constitution – making process.²⁴ Further, the mechanisms put in place for the Constitution – making process are likely to result in the final Constitution being adopted by the people through a national referendum.²⁵ This is so because the Constitution Consultative Process Guidelines make provision for subjecting the Final Draft Constitution to the people for adoption and ratification through a national referendum, as the ultimate stage in the

²⁰Constitution Review Commission, *Report of the Constitution Commission (Lusaka: Government Printer, June, 1995)*, Paragraph 27.0 at 204.

²¹*CRC, Report of the Constitution Commission, 1995*, 204.

²²Constitution Review Commission, *Report of the Constitution Review Commission (Lusaka: Government Printer, December, 2005)*, 804.

²³*CRC, Report of Constitution Review Commission, 2005*, 804.

²⁴See The Technical Committee Drafting the Zambian Constitution, *The Constitution Consultative Process Guidelines, 2012 (Lusaka: Government Printer, April, 2012)*.

²⁵*TCDZC, Constitution Consultative Guidelines*, Guideline 41 (3).

constitution – making process.²⁶ This is in recognition of the constituent authority vested in the people.

2.3 New Constitutionalism or Democratic Constitution Making: A Modern Theory to Constitution – Making Process

New constitutionalism or democratic constitution – making is a modern theory to Constitution – making process premised on the idea that for a Constitution to be legitimate, democratic and durable, it must be adopted and ratified by the majority of the citizens.²⁷ That is, new constitutionalism is based on the premise that for a Constitution to be legitimate, it must have the support of the people. That is, new constitutionalism realises that without this legitimacy, there is no assurance that either the Constitution, or rule of law generally, will be willingly accepted and internalised. Therefore, new constitutionalism ensures that the general populace is involved in the process of crafting the Constitution up to its adoption. Thus one of the core aspects of new constitutionalism is that of *social inclusion or widespread public participation* in the constitution – making process, and ensuring that *the people themselves adopt and approve* the final Constitution.²⁸

New constitutionalism or democratic constitution – making has gained increasing acceptance as the new technique to crafting Constitutions in modern times. South Africa and Kenya, among many other countries, have used this technique and have produced Constitutions that have received remarkable acceptance by the majority of the citizens in those countries. It is

²⁶ TCDZC, *Constitution Consultative Guidelines*, Guideline 41 (3).

²⁷ For more details on “New Constitutionalism” or “Democratic Constitutionalism,” see Vivien Hart, “DEMOCRATIC CONSTITUTION MAKING,” *United States Institute of Peace, Special Report No. 107*, (2003): 1 -11, Accessed February 12,th 2013 , United States Institute of Peace, www.usip.org; See also DEMOCRACY REPORTING INTERNATIONAL, *Lessons Learned from Constitution – Making: Processes with Broad based Public Participation, Briefing Paper No. 20*, (Berlin: Democracy Reporting International, November 2011) 1-7, accessed February 12th , 2013. <http://www.democracy-reporting.org>.

²⁸ Hart, “Democratic Constitution Making,” 1.

important to state that the approach taken by new constitutionalism or democratic constitution making is very different from the approach taken in crafting the American Constitution in 1787. This is so because new constitutionalism's core focus is that of social inclusion or widespread public participation in the constitution – making process. On the other hand, the American constitution – making process did not involve widespread public participation or social inclusion in the process. This is because the American process was managed by handpicked elites as delegates to the constitutional convention that adopted the American Constitution.

This notwithstanding, the American process produced a Constitution that has created to this day a strong democracy and constitutional system. This great feat is attributed to the era of history when the American Constitution was being crafted and the main focus then, was on the stability of Government than on ensuring general public participation and social inclusion in the constitution – making process. On the other hand, one of new constitutionalism's core focuses is that of social inclusion or widespread public participation in the constitution – making process, as well as ensuring that the people themselves adopt and approve the final Constitution. Therefore, widespread public participation takes centre stage in this process.²⁹

This public involvement usually commences with public education, which is often a necessity in countries where democracy is a novel concept. This education campaign will generally have two elements. First, the population must be educated about the role that they will play in formulation of the new Constitution. Then, the populace must also be informed about how democracy and constitutional supremacy works in general, and more specifically, about the possible considerations available to them in formulating the Constitution. This public education process permits the public to be consulted on what shape the Constitution should take. The populace is consulted on their views on such issues as the form of government (i.e. monarchy, parliamentary system or presidential system), the vertical sharing of power (i.e. a unitary state or a federal state), minority issues, and other general concerns that should be taken into account. These public consultations often target certain demographics of the

²⁹ Hart, "Democratic Constitution Making,"1.

population, to assure that the final result is as inclusive as possible.³⁰ This educational and consultative role is often done by some form of a constitutional commission (Constitution Review Commission), which calls for the public to submit to it constitutional proposals. All the submissions collected are then collapsed mainly in the form of a working document or draft Constitution, which is presented to another body charged with creating the Constitution such as a Constituent Assembly or Constitutional Assembly or Constitutional Conference.

It is highly recommended that the delegates to the Constituent Assembly or Constitutional Conference should be elected by the general public, though the Constitution Commission (Constitution Review Commission) may be appointed by the executive. This ensures that the delegates elected to the Constituent Assembly or Constitutional Conference represent the people. The Constituent Assembly or Constitutional Conference is then charged with the responsibility of crafting the final Constitution. However, the final Constitution is only crafted after full consideration of all the issues arising from the public consultation. Finally, the final Draft Constitution is then subjected to debate by the people and is eventually ratified by the people, mainly through a referendum. This gives the people the final say.³¹ It follows that the modes of public participation in new constitutionalism are not only limited to public participation in a Constitution Commission (Constitution Review Commission) followed by adoption of a draft Constitution through a Constituent Assembly and subsequent ratification of the draft in a national referendum.

The modes of public participation in the constitution – making process under new constitutionalism vary.³² This is so in that, apart from the mode outlined above, there is another mode. In this second mode, the constitution - making process may be begun by way of the public participating in the Constitution Commission (Constitution Review Commission) as outlined above, and then followed by the appointment of a Committee of Experts (CoE). The CoE's task will be that of crafting a working document (draft Constitution) based on

³⁰ Sam Brooke. "Constitution – Making and Immutable Principles." (Master of Arts in Law and Diplomacy Thesis, Tufts University, 2005) 8. Accessed February 12th, 2013, <http://www.fletcher.tufts.edu>.

³¹ Brooke, "Constitution – Making and Immutable Principles," 8.

³² Hart, "Democratic Constitution Making," 11.

constitutional proposals submitted to the Constitutional Commission. The working draft will then be presented to the general public for their comments and recommendations through what is known as the constitution consultative process.

This consultative process is supposed to be broad based, and ensure that there is general public participation in the constitution – making process. The process should embrace the three tenets of new constitutionalism, that is: allowing widespread public participation in the constitution consultative process; personal security; and freedom of speech and assembly. (The aspect of personal security entails that the State must provide personal security during the constitution – making process. On the other hand, freedom of speech and assembly entails that the State must allow the citizens to freely assemble and debate constitutional provisions during the constitution – making process). It then follows that all the comments and recommendations made by the general public through this consultative process, are then collapsed and incorporated in a final draft Constitution by the CoE. This final draft Constitution is then subjected to approval by the people through a national referendum. By following these procedures, it is the people themselves that adopt their own Constitution, while the CoE's role is that of crafting the draft Constitution. For instance, the current Kenyan Constitution was drafted by a CoE³³ although it was not adopted by a constituent assembly, it was still adopted by the people through mechanisms put in place in the constitution – making process, including final adoption and ratification by the people through a national referendum, as will be shown below.

It is important to note that in some constitution – making processes under new constitutionalism, such as the South African process, prior agreement on broad constitutional principles assumed the first phase of the constitution – making process. It is equally important to note that the modes of public participation in new constitutionalism varies as demonstrated. That is, there is no one mode appropriate to all nations. In addition, it has been said that even where a nation chooses to follow one mode of public participation, very few nations have effectively completed all of these participation steps. For instance, the South African process

³³ Democracy Reporting International, *Lessons Learned*, 7.

used a constituent assembly as the mode of adoption of its Constitution, yet it did not hold a national referendum for the people to approve the final draft Constitution.³⁴ At the same time, it has also been stated that any form of new constitutionalism will require three basic factors to exist if the process is to succeed. These are social inclusion, personal security, and freedom of speech and assembly.³⁵ One of the most important benefits of new constitutionalism or democratic constitution – making is that it ensures legitimacy to the final Constitution, as well as ensuring that a strong democracy takes shape when the new Constitution comes into force. This process of constitution – making thus ensures constitutional stability.

2.4 New Constitutionalism or Democratic Constitution Making: the Case of South Africa and Kenya

New constitutionalism has been used in South Africa, and Kenya among other countries to formulate Constitutions that have widely been regarded as model constitutional texts.³⁶ Given that the modes of public participation in new constitutionalism vary considerably, it is important to analyse the modes of public participation used to achieve these two model constitutional texts.

2.4.1 The South African Case

The South African process of constitution-making is widely regarded as a positive example of broad public participation in the constitution - making process.³⁷ The process begun with the transition to end apartheid, where dialogue about an interim government, and constitutional reform was dominated by political parties. For most of the first stage of the process, civil society was excluded from participation.³⁸ After the political parties had agreed on an interim Constitution, elections for the Constituent Assembly were held in April, 1994.³⁹ Following the Constituent Assembly elections, the Constituent Assembly initiated a broad based public

³⁴ Hart "Democratic Constitution Making," 7 -11.

³⁵ Hart, "Democratic Constitution Making," 7 -11.

³⁶ Democracy Reporting International, *Lessons Learned*, 5.

³⁷ Democracy Reporting International, *Lessons Learned*, 6.

³⁸ Democracy Reporting International, *Lessons Learned*, 6.

³⁹ Democracy Reporting International, *Lessons Learned*, 6

participatory process for the second stage of the process, which was the process of crafting the draft Constitution. The Constituent Assembly ensured that the constitution – making process adhered to the three principles of inclusivity, accessibility, and transparency. The first step in this participatory process was a widespread education campaign to inform the public about constitutional issues in general, their fundamental rights and their right to participate in the constitution – making process. This public campaign used many avenues, which included newspapers (including a biweekly assembly newspaper with a circulation of 160,000), billboards, radio and television, a telephone hotline and the internet.⁴⁰ Citizens were expressly invited to present submissions, and more than 1,000 educational workshops were conducted all over the country over a period of 12 months.⁴¹

One significant aspect of this consultative process was public meetings that gave members of the Constituent Assembly the opportunity to present their work and enabled participants to make their voices heard. Contributions and suggestions from these public meetings were recorded and transcribed. In addition to these public meetings, specific meetings were held on specific subjects, such as the bill of rights, the judiciary and the administration, where about 600 civil society organisations participated.⁴² Overall, direct interaction took place between members of the Constituent Assembly, and more than 117,000 people.⁴³

Another cornerstone of the process was the Constituent Assembly radio programme, which was broadcast in eight languages, and reached approximately 10 million people per week; one quarter of the population then.⁴⁴ In total, citizens presented 13,443 substantive submissions with 90% coming from individuals,⁴⁵ and over 2 million people signed petitions on various

⁴⁰Democracy Reporting International, *Lessons Learned*, 6

⁴¹Democracy Reporting International, *Lessons Learned*, 6

⁴²Democracy Reporting International, *Lessons Learned*, 6.

⁴³Hassen Ebrahim, "Constitution-Making in South Africa – A Case Study," *LinkedIn*, Accessed December 18th, 2012, <http://www.linkedin.com>.

⁴⁴Democracy Reporting International, *Lessons Learned*, 6.

⁴⁵See Catherine Barnes and Eldred De Klerk, "South Africa's Multi-Party

Constitutional Negotiation Process," *public-participation/south Africa - multiparty-process*, Accessed December 18th, 2012, <http://www.c-r.org/our-work/accord/.php>.

issues.⁴⁶ These submissions were then processed by the secretariat of the Constituent Assembly, and summarised by the technical groups of the various thematic committees in order to make them more accessible. It followed that special consideration was given to submissions by organisations or groups with specialised knowledge on contentious issues.

In the third stage of the process, which was the stage after the publication of the draft Constitution, the public was again invited to participate and submit their views on specific issues regarding the draft Constitution. The public made submissions and comments on the draft Constitution, which submissions were condensed and attached to the respective articles for consideration by the members of the Constituent Assembly. With this input, it followed that the final negotiation process began. This part of the process was somewhat criticised by some observers who stated that deals on deadlocked issues were struck behind closed doors during bi- or multilateral party meetings.⁴⁷ While some groups felt excluded from the constitution-making process, the majority of the population had a positive impression and was satisfied with the level of consultation.⁴⁸ The Constituent Assembly passed the final text of the Constitution with a majority of 85%, obtaining the required two-thirds majority.⁴⁹

However, this final draft Constitution had to obtain a Certificate of Compliance by the South African Constitutional Court, confirming compliance with constitutional principles laid out in South Africa's 1994 interim Constitution.⁵⁰ The constitutional principles were the original basic principles that were to be reflected in the new Constitution, agreed upon by the opposing sides before beginning the constitutional negotiations. It followed that this final draft Constitution was denied certification by the Constitutional Court on September, 6, 1996 (1st Certification Judgment).⁵¹ The court denied the certification after identifying the draft's deficiencies.⁵² It

⁴⁶Democracy Reporting International, *Lessons Learned*, 6.

⁴⁷Democracy Reporting International, *Lessons Learned*, 6.

⁴⁸Democracy Reporting International, *Lessons Learned*, 6.

⁴⁹Democracy Reporting International, *Lessons Learned*, 6.

⁵⁰Paper presented by Santiago M. Alvarez Carreno, "The South African Constitution – making process" (paper presentation at the University de Murcia, Spain, February 16 – 23, 2000). 301.

⁵¹Carreno, *The South African Constitution – making process*, 301.

⁵²Carreno, *The South African Constitution – making process*, 301.

followed that the Constituent Assembly reconvened and amended their original draft.⁵³ This amended version was later certified by the court, and came into force on 4th February, 1997 (2nd Certification Judgment).⁵⁴

2.4.2 The Kenyan Process

The path towards a new Kenyan Constitution passed two milestones: the failed 2005 draft and the successful 2010 Constitution.⁵⁵ Kenya had been a one-party state for many years, with political pressure for democratisation constantly growing from the early 1990s. However, the first attempt at a comprehensive Kenyan Constitution reform process did not start until about the early 2000s.⁵⁶ The legal basis mandating the constitution reform process was the Constitution of Kenya Review Act, which explicitly prescribed specific modalities, and detailed instruments of broad public participation in the constitution – making process.⁵⁷

After broad consultation processes, focusing both on the specific issues to be put on the agenda and the specific substantive content of the constitution before drafting, the Constitution of Kenya Review Commission and the National Constitutional Conference, which was convened for broad discussion and debate, presented the Bomas Draft Constitution in 2004.⁵⁸ This draft was intensively debated for about one year, but was never enacted by parliament or presented to the people for ratification through a referendum. One of the most contentious issues with this 2004 Bomas draft Constitution related to executive power. For fear of a strong and non-accountable President, the Bomas draft established a system of power sharing between the President, and an executive Prime Minister elected by parliament. The Bomas Draft Constitution, was however, later amended by the Kenyan parliament to provide for a weak

⁵³Carreno, *The South African Constitution – making process*, 301.

⁵⁴Carreno, *The South African Constitution – making process*, 301.

⁵⁵Democracy Reporting International, *Lessons Learned*, 7.

⁵⁶Democracy Reporting International, *Lessons Learned*, 7.

⁵⁷The Constitution of Kenya Review Act, as amended in 2001, provided for a comprehensive constitutional reform.

⁵⁸ Alicia Bannon, “Designing a Constitution-Drafting Process: Lessons from Kenya,” *The Yale Law Journal* 116: 8 (June 2007): 1830.

Prime Minister appointed by and reporting to the President.⁵⁹ This amendment was done through the 2005 draft Constitution. The opposition party and parts of the governing coalition heavily criticised these amendments.⁶⁰ The ensuing political power struggle and the fact that the amended draft Constitution of 2005 did not sufficiently reflect the results of the participatory Bomas draft Constitution, contributed to the failure of the 2005 draft Constitution to pass in a referendum in 2005, with 57 % of the vote against it.⁶¹

Following the post-election violence in 2008, the agreement to settle the conflict also provided for constitutional reform.⁶² A CoE on Constitutional Review was established and charged with drafting a new Constitution. The CoE had nine members—six Kenyans and three others from Zambia, South Africa, and Uganda.⁶³ One of the guiding principles for the drafting process was that the CoE and other public bodies were to ensure that the review process provides the people of Kenya with an opportunity to actively, freely, and meaningfully participate in generating and debating proposals to review and replace the Constitution.⁶⁴ Civic education programmes and public participation were part of the CoE's efforts to ensure an inclusive process.⁶⁵

However, in contrast to 2005, public consultation on the content of the Constitution did not play a prominent role before and during the drafting process.⁶⁶ Instead, participation and outreach programmes in the form of regional public hearings, along with sectoral and thematic consultations, mainly took place after the first draft had been presented, asking people to suggest changes to the draft Constitution.⁶⁷ After the public had been consulted, the draft was

⁵⁹Democracy Reporting International, *Lessons Learned*, 7.

⁶⁰Democracy Reporting International, *Lessons Learned*, 7.

⁶¹Democracy Reporting International, *Lessons Learned*, 7.

⁶²Democracy Reporting International, *Lessons Learned*, 7.

⁶³Democracy Reporting International, *Lessons Learned*, 7.

⁶⁴See the Constitution of Kenya Review Act (2008), paragraph 6(d)(i).

⁶⁵Democracy Reporting International, *Lessons Learned*, 7.

⁶⁶Democracy Reporting International, *Lessons Learned*, 7.

⁶⁷Democracy Reporting International, *Lessons Learned*, 7.

revised and went to the competent parliamentary committee and, later, to Parliament.⁶⁸ It was adopted by a referendum in 2010 with a high approval rate of more than 67%.⁶⁹

2.5 Conclusion

In conclusion, it can be stated that this chapter has outlined the concept of the people as the repository of constituent power, which concept is part of new constitutionalism or democratic constitution – making. It has been demonstrated that with regard to constitution – making process, the notion established is that it is the people that must adopt their Constitution and not otherwise. The chapter has also outlined the theory to constitution – making process known as new constitutionalism or democratic constitution – making. This theory is the modern approach used to craft modern democratic Constitutions. This theory is premised on the desire to ensure legitimacy to a resultant Constitution as well as ensuring that a strong democracy takes shape when the new Constitution finally comes into force. Kenya and South Africa have provided illustrative models in the use of new constitutionalism to crafting Constitutions in Africa.

The next chapter will examine the constitution – making processes used to craft the 1964, 1973, 1991, and 1996 Zambian Constitutions. At the end of the chapter, the reason(s) as to why these constitutions failed to be durable will be considered.

⁶⁸Democracy Reporting International, *Lessons Learned*, 8.

⁶⁹Democracy Reporting International, *Lessons Learned*, 8.

CHAPTER THREE

CONSTITUTION – MAKING PROCESSES: THE 1964, 1973, 1991 AND 1996 ZAMBIAN CONSTITUTIONS

3.1 Introduction

The focus of this chapter will be to examine the constitution making – processes used to craft the 1964, 1973, 1991, and 1996 Zambian Constitutions. At the end of the analysis, the reason(s) as to why these Constitutions failed to be durable will be explored.

3.2 THE 1964 INDEPENDENCE CONSTITUTION

The first phase in constitutional development in Zambia came with political independence itself in 1964.⁷⁰ The 1964 Independence Constitution was crafted following successful negotiations for political independence held in London, at Marlborough House on 5th May, 1964.⁷¹ This 1964 Constitution was preceded by elections based on universal adult suffrage that were held in January, 1964.⁷² These elections were necessitated by the last Constitution of Northern Rhodesia, known as the 1963 Constitution, which had conferred effective self – government upon Northern Rhodesia with an election machinery based on universal adult suffrage. The January, 1964, elections saw the United National Independence Party (UNIP) emerge as the dominant party winning fifty five (55) of the sixty – five (65) seats on the Main Roll. The African National Congress (ANC) secured the remaining ten (10) seats on the Main Roll. Having emerged victorious, Dr Kaunda, as the leader of UNIP became the first Prime Minister of Northern Rhodesia, and therefore the Governor requested him to form Government.

Immediately following Kaunda’s becoming Prime Minister of Northern Rhodesia, and the formation of his new government, a conference was held at Marlborough House in London on

⁷⁰Patrick Matibini, “CONSTITUTION MAKING PROCESS: The Case for Zambia.” *Zambia Law Journal, Special Edition* (2008): 3.

⁷¹ See Great Britain/ Office of Commonwealth Relations, *The Report of the Northern Rhodesia Independence Conference, 1964*, (London: H.M. Stat. Off., May 1964), 4.

⁷²Muna B. Ndulo and Robert B. Kent, “The Constitutions of Zambia,” *Zambia Law Journal* 30: (1998): 5.

5th May 1964. This Conference was chaired by Mr. Duncan Sandys, MP, and Secretary of State for Commonwealth Relations and the Colonies. The purpose of this conference was to determine the necessary changes that had to be made to the 1963 Constitution to establish an independent Republic with a Presidential system of government to be called the Republic of Zambia.⁷³ In short, this Conference was held to adopt the Independence Constitution of Zambia. In terms of attendance, the Conference was attended by the Governments of Britain, Northern Rhodesia, the Governor of Northern Rhodesia, Northern Rhodesia Government officials, Representatives of the African National Congress (ANC), and the National Progressive Party (NPP).⁷⁴ The Conference held 14 plenary sessions between 5th May and 19th May 1964, under the Deputy Chairmanship of Mr. Richard Hornby, MP, Parliamentary Undersecretary of State for Commonwealth Relations and the Colonies. The Conference decided on a number of provisions to be included in the Independence Constitution.

After the settling of constitutional provisions, the British Government decided that Northern Rhodesia to be called the Republic of Zambia should become a sovereign State on 24th October, 1964.⁷⁵ It therefore followed that on 24th October, 1964, Northern Rhodesia became the Independent Republic of Zambia under a Constitution that named Dr. Kaunda as the first President.⁷⁶ The way this was done was that the British Government passed the Zambia Independence –Order in Council 1964, to which the 1964 Independence Constitution appeared as a Schedule. Thus the 1964 Zambian Constitution was enacted by the British Parliament. The Independence Constitution of 1964, was bequeathed to the Zambian citizenry as part of the package for Zambia’s political independence. The Zambian citizenry did not participate in the crafting of the independence Constitution. This gives the impression that it was Britain’s tradition to bequeath Constitutions to its former colonies at independence. On the contrary, this was not the case with other former colonies of Britain. The case of India is one such example. The Indian Independence Act 1947, was enacted for India, by the British Parliament.

⁷³GB/ OCWR, *The Report of the Northern Rhodesia Independence, 1964*, 4.

⁷⁴GB/ OCWR, *The Report of the Northern Rhodesia Independence, 1964*, 4.

⁷⁵See the Constitution of Zambia, 1964.

⁷⁶Zambia Independence Order, 1964, Section 32.

However, the British Parliament did not confer a Constitution on India at the same time it granted her independence. Instead, the British Parliament, through the Indian Independence Act, 1947, made a provision for the summoning of a Constituent Assembly, which Assembly was to work out the Indian Constitution.⁷⁷ This procedure was to ensure that an indigenous Indian Constitution was crafted. However, just like the Zambian case, the Commonwealth of Australia Act 1900, was passed by the British Parliament which contained the Independence Constitution of Australia.⁷⁸ The same was also the case for South Africa in 1909.⁷⁹ A Constitution was bequeathed to South Africa in 1909, when it was granted self – governing status by Britain.

However, despite the manner that the Independence Constitution was crafted, it can be said that the Independence Constitution facilitated the transition to Zambia’s independence and Statehood. It provided the basic framework of a Government under a multiparty democracy, in which UNIP had 55 seats, ANC 10 seats, and NPP 10 seats. It is generally accepted that the 1964 Independence Constitution provided a relatively functioning liberal democracy under a presidential system of Government.⁸⁰ The President was the Chief Executive and head of State, thus this Constitution created a very powerful executive President vested with very enormous and broad executive powers.⁸¹ This Constitution was such that the powers of the colonial Governor passed largely intact to the executive President.⁸²

In addition, the Independence Constitution contained entrenched provisions, whose amendment required following a stringent prescribed procedure followed by a national referendum.⁸³ However, on 17th June, 1969, the Kaunda Government obtained the necessary support, ‘Yes vote’ (85.02%) to amend the Independence Constitution so as to expunge the

⁷⁷See The Indian Independence Act 1947, Section 8.

⁷⁸The Constitution of Australia appeared as a Schedule to the Commonwealth of Australia Act chapter 12, enacted on 9th July, 1900, by the British Parliament.

⁷⁹The Constitution of South Africa appeared as a Schedule to the Act to Constitute the Union of South Africa 1909, enacted on 20th September 1909 by the British Parliament and commenced on 31 may 1910.

⁸⁰See John M. Mwanakatwe, *The End of the Kaunda Era*, (Lusaka: Multimedia Publications, 1994), 42 -43.

⁸¹Ndulo and Kent, “The Constitutions of Zambia,” 7.

⁸²Ndulo and Kent, “The Constitutions of Zambia,” 6.

⁸³See Constitution of Zambia, 1964, sections 72(1); 72(2)(a)(b) and 72 3(a)(b)(c).

referendum clause.⁸⁴ The effect of this outcome was that the Zambian Legislature was empowered to amend the Constitution with just a two – thirds majority without reference to a referendum. It is this simplified procedure to amend the Independence Constitution that paved way for the repeal and replacement in 1973, of the Independence Constitution with the 1973 Constitution, otherwise known as the One – Party State Constitution.

3.3 THE INQUIRIES ACT

The 1964 independence Constitution was repealed and replaced by the 1973 Constitution, known as the One – Party – State Constitution. The One – Party State Constitution was enacted following a constitutional review process initiated under the Inquiries Act.⁸⁵ The constitution review process saw the appointment of the first ever Constitution Review Commission in Zambia, called the Chona Commission; named after Vice- President Mainza Chona. The Chona Commission was appointed under the Inquiries Act.⁸⁶ Following the appointment of the Chona Commission, the practice of initiating constitutional reviews under the Act was entrenched. In addition, the fact that there has been no specific legislation provided by successive constitution review processes or an Act of Parliament or by other means, providing for complete review of the Constitution, resort has been had to the Inquiries Act.

This practice of using the Inquiries Act to review the Constitution has been, in my view, the significant source of constitutional instability in Zambia. This is because of the wide power enjoyed by the President under the Act. The wide power has been used to impose Constitutions on the Zambian citizens beginning with the 1973 Constitution, to the current Constitution. In this regard, it is important to analyse some of these wide powers of the President under the Act, in relation to constitution – making process. Under the Act, the President is empowered to

⁸⁴Melvin L.M. Mbao, “THE POLITICS OF CONSTITUTION – MAKING IN ZAMBIA: WHERE DOES THE CONSTITUENT POWER LIE” (Paper presented at a Conference on ‘Fostering Constitutionalism in Africa,’ organised by the African Network of Constitutional Lawyers, Nairobi, Kenya, April 18 – 20 2007), 6; See also the Constitution of Zambia Amendment Act 3 of 1969.

⁸⁵Cap 41 of the Laws of Zambia.

⁸⁶The Chona Commission was set up by Statutory Instrument No.46 of 1972.

set up a Constitution Commission,⁸⁷ appoint its Commissioners,⁸⁸ and determines the terms of reference of the Commission.⁸⁹ The Commission having been appointed, then conducts a public inquiry. Under the Act, the Commissioners are required to make full, faithful and impartial inquiry according to the terms of reference concerned, and to report the result of the inquiry to the President.⁹⁰ The report to the President in practice takes the form of recommendations or advice.⁹¹ The President is at liberty either to accept or reject the recommendations or advice tendered.⁹² All this is done through Government White Paper. In essence, this entailed that the President and his Cabinet adopted the draft Constitution, thereafter prepared the Constitution Bill for presentation of the adopted draft Constitution to Parliament, for onward adoption, and enactment.⁹³

This procedure of Constitution – making is inconsistent with crafting a legitimate, democratic, and durable Constitution. This is because the President and his Cabinet are empowered under the Inquiries Act to reject the wishes of the majority of the citizens presented as *recommendations* by a Constitution Review Commission. It will be shown below that in successive constitution - making processes, the wishes of the majority of Zambian citizens on fundamental issues have been rejected by the Government through Government White papers using the Inquiries Act. A legitimate, democratic, and durable constitution must be a product of consensus by the citizens and not one imposed on the citizens by the Government.⁹⁴

It is also noteworthy that adoption of the Constitution by the President and his Cabinet as well as by the Legislature amounts in fact to usurpation of the people’s constituent power to adopt their own Constitution as described above. Adoption of a Constitution by the Legislature is also prone to the dangers associated with one party dominance.⁹⁵ Despite all these deficiencies, this

⁸⁷Chapter 41 of the Laws of Zambia, section 2.

⁸⁸Chapter 41 of the Laws of Zambia, Section 2.

⁸⁹Chapter 41 of the Laws of Zambia, Section 2 (2).

⁹⁰Chapter 41 of the Laws of Zambia, section 5.

⁹¹Matibini, “Constitution Making Process,” 31.

⁹²Matibini, “Constitution Making Process,” 31.

⁹³Matibini, “Constitution Making Process,” 31.

⁹⁴Matibini, “Constitution Making Process,” 31.

⁹⁵Matibini, “Constitution Making Process,” 31.

procedure of constitution - making has been the one used to craft successive Zambian Constitutions from the 1973 Constitution, to the current Constitution as will be shown later.

3.4 THE 1973 CONSTITUTION

3.4.1 The One – Party- State

On 13th December, 1972, Zambia became a One Party State.⁹⁶ This was as a result of the amendment to the 1964 Independence Constitution, and the enactment of the One – Party State Act. The amendment provided that UNIP shall be the only Party and that it was unlawful to form or belong to or sympathise with any political party.⁹⁷ Therefore, the constitutional amendment providing for a One – Party State, and the subsequent enactment of the One – Party State Act, completely abolished multi- party democracy in Zambia. The One – Party system of Government was introduced, with UNIP governance structures assuming supremacy over Cabinet.⁹⁸ For instance, initiation, and formulation of Government policy became the executive function of UNIP’s Central Committee and its National Council,⁹⁹ while Cabinet remained merely an advisory body to Government. To demonstrate UNIP’s supremacy over Government, the UNIP Constitution stated that:

should any decision of the Central Committee conflict with any decision of the Cabinet on any matter of Government or party policies, the decision of the Central Committee shall prevail.¹⁰⁰

This in essence put the Party - UNIP - above every other organ of the State.

In terms of justification for introducing the One – Party State, it has been stated that many factors were used by the Kaunda regime to justify a One – Party State. Among these was a desire to eliminate political conflicts, and build a united political order.¹⁰¹ The Kaunda Government, like other countries on the continent, justified a One – Party State as a variant of

⁹⁶See Constitution (Amendment) No.5 Act. 1972.

⁹⁷See the Constitution of Zambia Act, 1973 Art. 4 (1) (2).

⁹⁸See the Preamble to the UNIP Constitution which Constitution was annexed to the 1973 One – Party – State Constitution.

⁹⁹See Article 12 of the UNIP Constitution.

¹⁰⁰Article 12 (3) of the UNIP Constitution.

¹⁰¹Constitution Review Commission, *Report of the Constitution Review Commission* (Lusaka: Government Printer, December, 2005), xxviii.

democracy, best suited to the peculiar African circumstances.¹⁰² Cases of inter – party political violence, the hostile regional environment within Southern Rhodesia (now Zimbabwe), the need for political self – preservation by UNIP, and the socialist influence from the Eastern European Bloc, all combined to provide a strong basis or justification for the introduction of a One – Party – State by the Kaunda Government.¹⁰³ It is important to state here that President Kaunda’s critics on his decision to introduce the One – Party –State system of Government at that time, and in that manner point to partisan political motives, in particular, his desire to insulate himself from political competition through the elimination of all political opposition.¹⁰⁴

3.4.2 The Chona Commission of Inquiry and Drafting of the 1973 One – Party State Constitution

Following the turning of Zambia into a One – Party State in 1972, a Constitution Commission was appointed to recommend the form and details of the single party system of Government.¹⁰⁵ This Commission was chaired as earlier observed by the then Vice – President of the Republic, Mainza Chona.¹⁰⁶ The appointment of the Chona Commission was done under the Inquiries Act.¹⁰⁷ This marked the second phase in Constitution development in Zambia, as well as the first time a Constitution Commission was appointed under the Inquiries Act, to initiate constitutional reform by inquiring from the citizens how they wanted their Constitution to be. This is unlike the manner in which the 1964 Independence Constitution was crafted; practically no consultation with the citizenry on how they wished their Constitution to be formulated.

¹⁰²CRC, *Report of the Constitution Review Commission*, xxviii.

¹⁰³CRC, *Report of the Constitution Review Commission*, xxviii.

¹⁰⁴Ben O. Nwabueze, *Presidentialism in Common Wealth Africa* (New York: St Martin Press, 1974) 225; See also Mubako S ‘ “Zambia’s Single – Party Constitution: A search for unity and development” *Zambia Law Journal* 5(1973) 2 -3; See also, IN Re Kapwepwe and Kaenga, (1972) Z.R. 248

¹⁰⁵The move to constitute a Commission with the aim of establishing a one – party – state was challenged in court by Mr Harry Mwaanga Nkumbula, leader of the ANC. He contended that the Government’s decision to establish a One- Party State and to appoint a Commission to facilitate this was likely to infringe his freedom of Association. However, Mr Nkumbula lost the Petition both in the High Court and in the then Court of Appeal. (See the Case of Nkumbula V. The Attorney – General, (1972) Z.R. 204; See also the Court of Appeal Judgment No.6 of 1972).

¹⁰⁶The Chona Commission was set up by Statutory Instrument No. 46 of 1972.

¹⁰⁷Chapter 41 of the Laws of Zambia.

This Commission was set up to recommend the form and details of the One – Party State system of Government,¹⁰⁸ by getting the views and wishes of Zambian citizens on how they wanted the One – Party system of Government to operate. It is worth noting that the decision to turn Zambia into a One – Party State was imposed on the Zambian citizens by the Government. This is so because the Chona Commission’s terms of reference did not include the hearing of views on whether or not Zambians were in favour of the introduction of the One – Party State, but simply on the form the One Party State should take.¹⁰⁹ The Government had already decided to turn Zambia into a One – Party State. Government justified this decision to have been taken in the interest of unity, and economic development.¹¹⁰

The Commission, in carrying out its work, held public hearings and received submissions from Zambian citizens in all the provincial headquarters of Zambia, on the framework, and features the citizens desired in the operation of the One – Party system of Government. The Commission received a large volume of written and oral submissions, deliberated the same, and presented its report to President Kaunda in October, 1972.¹¹¹

The Chona Commission Report was widely praised for its thoroughness, balance and thoughtfulness of its report.¹¹² Among the fundamental recommendations made by the Commission that were rejected by the Kaunda Government through Government White Paper No.1 of 1973, which recommendations did not find expression in the resultant 1973 Constitution were: the recommendation that under the One Party State, a President be permitted to serve no more than two consecutive five year terms;¹¹³ the recommendation advocating a division of executive powers between the President and Prime Minister where the

¹⁰⁸See Terms of Reference of Statutory Instrument No. 46 of 1972.

¹⁰⁹See Terms of Reference of Statutory Instrument No. 46 of 1972.

¹¹⁰Ndulo and Kent, “The Constitutions of Zambia,” 11.

¹¹¹Ndulo and Kent, “The Constitutions of Zambia,” 12.

¹¹²Ndulo and Kent, “The Constitutions of Zambia,” 12.

¹¹³Ndulo and Kent, “The Constitutions of Zambia,” 13; The Government ‘s rejection of this recommendation resulted in President Kaunda serving in total an un interrupted 27 years term as President of Zambia from 1964 to 1991.

Prime Minister was to have the authority to appoint other Ministers;¹¹⁴ with respect to elections, it was the recommendation that under the One – Party State, the Party (UNIP) should place three Presidential candidates before the electorate at elections. This recommendation was rejected in favour of the Party naming a single candidate for the people to accept or reject.¹¹⁵ The UNIP's General Conference was given the important mandate of providing the sole candidate for Presidential elections.¹¹⁶

In the area of human rights, the recommendation curtailing the President's powers of detention was rejected.¹¹⁷ The recommendation that a standing tribunal should be established to review Presidential detentions and restrictions within three months and that its decisions be binding on the President was equally rejected in favour of retaining substantially all the excessive powers of detention of the president.¹¹⁸

In addition, the President's position was also strengthened by the state of emergency which had been declared by the last British Governor of Northern Rhodesia, Sir Evelyn Hone on 25th July, 1964.¹¹⁹ The President had, among others, wide powers to detain without trial, declare curfews, and control assemblies. The state of emergency continued for twenty seven years after independence.¹²⁰ The government, having rejected the recommendations expressing the wishes of the majority Zambians on fundamental issues regarding how they wished the One-Party system of government were to operate, went ahead to prepare a Constitution for adoption by Parliament.¹²¹ Thus the Second Republic came into being on 25th August 1973; the

¹¹⁴Ndulo and Kent, "The Constitutions of Zambia," 13; The Government rejected this recommendation and instead retained and enhanced the enormous powers of the executive President.

¹¹⁵Ndulo and Kent, "The Constitutions of Zambia," 13 ; the rejection of this recommendation saw President Kaunda always contesting as the sole presidential candidate at general elections throughout the 17 years period of the One – Party – State from 1973 to 1991.

¹¹⁶*CRC, Report of the Constitution Review Commission, 2005, 62*; See also Constitution of Zambia Act, 1973, Article 48(1); See also UNIP Constitution, articles 7 and 8.

¹¹⁷*CRC, Report of the Constitution Review Commission, 2005, 62.*

¹¹⁸*CRC, Report of the Constitution Review Commission, 2005, 61.*

¹¹⁹*CRC, Report of the Constitution Review Commission, 2005, 61.*

¹²⁰*CRC, Report of the Constitution Review Commission, 2005, 62.*

¹²¹Ndulo and Kent, "The Constitutions of Zambia," 13.

One-Party State Constitution having been enacted by the National Assembly, and assented to by President Kaunda.

3.5 THE 1991 CONSTITUTION

3.5.1 The End of the Second Republic and the Advent of the Third Republic

The Second Republic and the One – Party system of Government lasted for a period of about nineteen years from 1972 to 1991. The years of the Second Republic and the One – Party State have been described as having been difficult for Zambia.¹²² This is so in that throughout the whole of this period, the Zambian economy continued to stagnate with attendant unhappiness of many segments of the Zambian society.¹²³ The Party (UNIP) and Its Government became increasingly unpopular, receiving from time to time increasing hostility from citizens.¹²⁴ For instance, during this period of the One – Party State, two significant coup attempts were made, one in 1980 and another in 1990. The 1990 coup attempt followed food riots to protest against the rising cost of food, particularly maize meal.

As the decade of the 1980s drew to a close, demands for an end to the One – Party State became more insistent.¹²⁵ Pro – democracy groups, initially stimulated by the trade union movement formed the MMD.¹²⁶ The end of communism in Eastern Europe also provided a significant opportunity for change of Government system in Zambia.¹²⁷ At first resistance of change, the Kaunda government announced a referendum to decide on whether or not the One – Party State should continue, and as such, a Referendum Commission was established in 1990.¹²⁸ Subsequently, in September 1990, government changed its mind and abandoned the referendum.¹²⁹ Instead, Government promptly amended the 1973 Constitution to allow for multi partyism, and further promised to hold elections by the end of 1991, two years before the

¹²²Ndulo and Kent, “The Constitutions of Zambia,” 16.

¹²³Ndulo and Kent, “The Constitutions of Zambia,” 16

¹²⁴Ndulo and Kent, “The Constitutions of Zambia,” 16

¹²⁵Matibini, “Constitution Making Process,” 6.

¹²⁶Matibini, “Constitution Making Process,” 6.

¹²⁷*CRC, Report of the Constitution Review Commission, 2005*, xxviii.

¹²⁸Ndulo and Kent, “The Constitutions of Zambia,” 17.

¹²⁹Ndulo and Kent, “The Constitutions of Zambia,” 17.

expiry of its five year term.¹³⁰ The Government also announced that a Constitution Commission would be appointed to recommend the Constitution for the Third Republic.¹³¹

3.5.2 The Mvunga Constitution Review Commission and Drafting of the 1991 Constitution

The Mvunga Constitution Review Commission was appointed by President Kaunda, on 8th October, 1990.¹³² The Commission was headed by Professor M.P. Mvunga, SC, then Solicitor General; hence the Commission's name, the Mvunga Commission, after its Chairperson. The appointment of the Mvunga Commission marked the third phase in Constitution development in Zambia since independence. In addition, it marked the second time that a Constitution Review Commission was appointed under the Inquiries Act. The thrust of the Terms of Reference of the Mvunga Commission was to design a Constitution that would mark a departure from the One – Party Constitution, and usher in a regime suited to plural politics.¹³³ The MMD opposed the appointment of this Commission; it advocated instead the re – introduction of the 1964 Constitution, with necessary amendments to reflect changed circumstances.¹³⁴ That being the case, Arthur Wina and Akashambatwa Mbikusita Lewanika, Chairperson and Secretary respectively of the MMD declined to assume their places on the Commission.¹³⁵

In undertaking its work, the Commission held sittings in all Provincial Headquarters of Zambia. The Commission received a total of 586 oral submissions, and 401 written submissions from petitioners.¹³⁶ The Commission produced its Report, and draft Constitution. And presented it to President Kaunda on 25th April, 1991. Most of the Commission's recommendations were rejected both by the Government and the opposition Parties.¹³⁷ Key among the fundamental recommendations of the Mvunga Commission which were rejected by the Kaunda regime

¹³⁰Ndulo and Kent, "The Constitutions of Zambia," 17.

¹³¹Ndulo and Kent, "The Constitutions of Zambia," 17.

¹³²Statutory Instrument No. 135, 1990.

¹³³See Terms of Reference No. 1 of Statutory Instrument No. 135 of 1990.

¹³⁴Ndulo and Kent, "The Constitutions of Zambia," 17.

¹³⁵Matibini, "Constitution Making Process," 7.

¹³⁶Constitution Review Commission, *Report of the Constitution Commission*, (Lusaka: Government Printer, April, 1991), 7 – 8.

¹³⁷Ndulo and Kent, "The Constitutions of Zambia," 17.

through Government White Paper No.1 of 1991, and which recommendations did not find expression in the resultant 1991 Constitution were: the recommendation to add more rights and enhance the existing rights in the Bill of Rights;¹³⁸ the recommendation to establish a Constitutional Court to deal with violations of human rights;¹³⁹ the recommendation to fund political parties from Government resources in order to strengthen democracy;¹⁴⁰ the recommendation to establish Review Tribunals to consider cases of individuals detained under the preservation of Public Security Regulations;¹⁴¹ and the recommendation to introduce the Chamber of Representatives as a second house of Parliament.¹⁴² In addition, the Mvunga Commission rejected submissions from petitioners who submitted that the Constitution should be debated and adopted by a Constituent Assembly or a National Convention.¹⁴³ This, the petitioners stated was important in ensuring that the Constitution was legitimate.¹⁴⁴ However, in response, the Mvunga Commission reiterated that there was no need for a Constituent Assembly to adopt the Constitution as there was in place a legitimate and lawfully constituted National Assembly.¹⁴⁵ The Commission therefore refused to recommend the adoption of the Constitution through a Constituent Assembly, or National Convention, but instead recommended that the Constitution should be adopted by Parliament.¹⁴⁶

Having picked the recommendations it preferred and rejected the others, the Kaunda Government prepared a Constitution for adoption by Parliament. It was the resulting Constitutional Bill that gave rise to serious differences between the Kaunda Government and the MMD, whereby the MMD threatened to boycott the elections.¹⁴⁷ The MMD rejected the resultant Constitutional Bill, despite it providing for multi – party democracy. This was because not only was the Commission perceived to be dominated by UNIP, but the ensuing Constitution

¹³⁸CRC, *Report of the Constitution Commission, 1991*, paragraph 7 (b) (vi).

¹³⁹CRC, *Report of the Constitution Commission, 1991*, paragraph 10 (C) (D).

¹⁴⁰CRC, *Report of the Constitution Commission, 1991*, Paragraph (7) (b) (i).

¹⁴¹CRC, *Report of the Constitution Commission, 1991*, Paragraph (v) (vi).

¹⁴²CRC, *Report of the Constitution Commission, 1991*, Paragraph (10) (b) (i).

¹⁴³CRC, *Report of the Constitution Commission, 1991*, Paragraph 13 at 190.

¹⁴⁴CRC, *Report of the Constitution Commission, 1991*, Paragraph 13 at 190.

¹⁴⁵CRC, *Report of the Constitution Commission, 1991*, Paragraph 13 at 190. Paragraph 14 (b) (i)(ii)(iii) at 192 – 193.

¹⁴⁶CRC, *Report of the Constitution Commission, 1991*, Paragraph 13 at 190. Paragraph 14 (iv) at 195.

¹⁴⁷CRC, *Report of the Constitution Review Commission, 2005*, 64.

would be enacted by a Parliament overwhelmingly controlled by UNIP.¹⁴⁸ As a result, a stalemate ensued.¹⁴⁹ This impasse was only resolved when the churches intervened, and mediated the dispute. In fact, the mediation was spearheaded under the Chairmanship of the Anglican Church Bishop, Stephen Mumba.¹⁵⁰ An Inter – Party Group of Experts was formed on 25th July, 1991, to look at the mechanics of the Constitution of the Third Republic.¹⁵¹ The inter – party dialogue led to an agreement to reformulate the 1973 Constitution in order to facilitate the re – introduction of multi – party politics.¹⁵²

On 2 August, 1991, the 1991 Constitution was passed by the National Assembly, and assented to by President Kaunda on 30th August, 1991. The most significant feature of the 1991 Constitution was the establishment of a multi - party system of Government. This meant the end of the One – Party system of Government where UNIP was the sole political party allowed to exist in the country. In terms of legitimacy, the 1991 Constitution was seen as a transitional instrument to answer the immediate pressures of the time, and there was no time to do a comprehensive review of the Constitution.¹⁵³ It has in fact been termed as an unsatisfactory compromise patched up under pressure to facilitate multiparty elections.¹⁵⁴ This is so because the 1991 Constitution was a reformulated version of the 1973 Constitution, agreed upon by the Kaunda Government and the opposition parties, which agreement the general citizens were not part of.

¹⁴⁸Ndulo and Kent, "The Constitutions of Zambia," 13.

¹⁴⁹*CRC, Report of the Constitution Review Commission, 2005, 64.*

¹⁵⁰*CRC, Report of the Constitution Review Commission, 2005, 64.*

¹⁵¹*CRC, Report of the Constitution Review Commission, 2005, 64.*

¹⁵²*CRC, Report of the Constitution Review Commission, 2005, 64.*

¹⁵³*CRC, Report of the Constitution Review Commission, 2005, 64.*

¹⁵⁴Matibini, "Constitution Making Process," 8.

3.6 THE 1996 CONSTITUTION

3.6.1 The Mwanakatwe Constitution Review Commission and Drafting of the 1996 Constitution

The 1991 Constitution was perceived as a product of compromise to facilitate the return to a plural political system.¹⁵⁵ The MMD campaigned in the 1991 elections on the platform that if elected to power, it would replace the 1991 Constitution, with one that would be above partisan considerations and would strengthen democracy and the protection of human rights.¹⁵⁶ It followed that the MMD won the 1991 general elections with Fredrick Chiluba becoming the second president of Zambia from Kaunda. Thus, on 22nd November 1993, using the Inquiries Act, President Chiluba appointed another Constitution Review Commission.¹⁵⁷ The Commission was headed by lawyer, John Mwanakatwe SC, a former Minister in the First and Second Republics. The Commission was named the Mwanakatwe Commission after its chairperson.

The appointment of the Mwanakatwe Commission marked the third time that a Constitutional Commission was appointed under the Inquiries Act since independence, as well as the fourth phase in Zambia's constitutional development since independence. The Mwanakatwe Commission's terms of reference were clearly wider than those given to any other previous Constitutional Commission before that time.¹⁵⁸ Notable among these wide terms of reference were the Terms that directed the Commission to recommend among others, whether the Constitution should be adopted by the National Assembly or by a Constituent Assembly, or by a National Referendum or by another method.¹⁵⁹

¹⁵⁵Matibini, "Constitution Making Process," 9.

¹⁵⁶*CRC, Report of the Constitution Review Commission, 2005*, 65.

¹⁵⁷This Commission was appointed by Statutory Instrument No. 151 of 1993.

¹⁵⁸*CRC, The Report of the Constitution Review Commission*, (Lusaka: Government Printer, June, 1995, Chapter 1, Paragraph 1.3 at 6

¹⁵⁹See the Terms of Reference No. (9) of the Statutory Instrument no. 151 of 1993.

In undertaking its function, the Commission travelled extensively throughout Zambia holding public sittings between March, 1994, and September, 1994.¹⁶⁰ The Commission held forty - six public sittings in the nine provinces of Zambia with a total of 996 petitioners having made submissions.¹⁶¹ The Commission also received written submissions. The Commission submitted its report, and the annexed draft Constitution to President Chiluba on 16th June, 1995. It is important to state that the Mwanakatwe Commission made far-reaching recommendations as to what the Zambians wanted their Constitution to be. However, Government, through Government White Paper No. 1 of 1996, rejected most, if not all the fundamental recommendations.

It has been said that had many of the recommendations of the Mwanakatwe Commission been adopted, they would have greatly strengthened democracy in Zambia.¹⁶² Notable among the fundamental recommendations made by the Commission and rejected by the Chiluba Government were: The recommendation that the Constitution should be adopted through a Constituent Assembly and a National Referendum;¹⁶³ In rejecting this recommendation, the Chiluba Government advanced arguments of legal and practical limitations.¹⁶⁴ However, these arguments were criticised as being baseless.¹⁶⁵ The recommendation that subsequent amendments to the Constitution should be made through a National Referendum;¹⁶⁶ a President be elected by a fifty percent plus one vote threshold;¹⁶⁷ the vice – President be elected as a running mate to the Presidential candidate.¹⁶⁸ Cabinet Ministers be appointed from outside the National Assembly.¹⁶⁹ This recommendation was meant to ensure separation of

¹⁶⁰ *CRC, Report of the Constitution Review Commission, 1995, 7.*

¹⁶¹ *CRC, Report of the Constitution Review Commission, 1995, 7.*

¹⁶² Ndulo and Kent, "The Constitutions of Zambia," 20.

¹⁶³ *CRC, Report of the Constitution Review Commission, 1995, chapter 27.0;* the commission stated that this should be done in order to achieve legitimacy and durability of the constitution. The commission even went further to recommend the composition of the constituent Assembly.

¹⁶⁴ See Government White Paper Number 1 of 1995; Summary of the Mwanakatwe Review Commission and Government Reaction to the Report at 104

¹⁶⁵ Matibini, "Constitution Making Process," 16.

¹⁶⁶ *CRC, Report of the Constitution Review Commission, 1995, Chapter 28.*

¹⁶⁷ *CRC, Report of the Constitution Review Commission, 1995, Chapter 11, Paragraph 11.2.*

¹⁶⁸ *CRC, Report of the Constitution Review Commission, 1995, Chapter 11, Paragraph 11.18.1.*

¹⁶⁹ *CRC, Report of the Constitution Review Commission, 1995, Chapter 11, Paragraph 11.19.*

powers between the Executive and the Legislature. Others were the recommendations curtailing the President's excessive powers to declare States of Emergencies,¹⁷⁰ President's power of restriction and detention under Emergencies,¹⁷¹ the president's power to veto legislation,¹⁷² as well as the president's power to dissolve the National Assembly.¹⁷³ Equally rejected was the recommendation to introduce in the Bill of Rights, a new set of rights, as well as reformulating the existing ones.¹⁷⁴ In addition, the recommendation to establish a Constitutional Court to have jurisdiction over matters relating to any alleged violation of guaranteed fundamental rights, as well as any matter relating to the interpretation of the Constitution was rejected.¹⁷⁵

This list of the recommendations that were rejected is illustrative and not exhaustive. By rejecting these progressive recommendations, the Chiluba government clearly departed from its original promise made during the 1991 general elections campaign. The promise was to introduce in Zambia, a Constitution that would strengthen individual rights and freedoms, and reduce the power of the executive. The Government White Paper was widely condemned and criticized by a broad section of the Zambian population.¹⁷⁶

In fact, Non – Governmental Organizations, and the churches organized what was termed as a *Citizens Conference* to raise public awareness and elicit public resistance to the Government's move to reject most of the Mwanakatwe Commission's recommendations, as well as Government's decision to have the Constitution adopted by Parliament instead of the Constituent Assembly and referendum as recommended by the Mwanakatwe Commission. However, despite this widespread criticism, the Chiluba Government proceeded to amend substantially the 1991 Constitution through the enactment of the Constitution of Zambia (Amendment) Act, 1996. Every part of the 1991 Constitution was repealed and replaced, except

¹⁷⁰CRC, *Report of the Constitution Review Commission, 1995*, Chapter 10, Paragraph 10.1.

¹⁷¹CRC, *Report of the Constitution Review Commission, 1995*, Chapter 10, Paragraph 10.6.

¹⁷²CRC, *Report of the Constitution Review Commission, 1995*, Chapter 12, Paragraph 12.1.

¹⁷³CRC, *Report of the Constitution Review Commission, 1995*, Chapter 11, Paragraph 11.12 and Chapter 12, Paragraph 12.23.

¹⁷⁴CRC, *Report of the Constitution Review Commission, 1995*, Chapter 7, Paragraph 7.0.

¹⁷⁵CRC, *Report of the Constitution Review Commission, 1995*, Chapter 13, Paragraph 13.6.1.

¹⁷⁶Ndulo and Kent, "The Constitutions of Zambia," 23.

part III which governs protection of fundamental rights and freedoms of the individual. Having rejected the Mwanakatwe Commission's recommendation for the Constitution to be ratified by a Constituent Assembly and national Referendum, the government in effect created a new Constitution through an Act of Parliament made possible by its overwhelming majority in Parliament obtained in the 1991 general elections. The 1996 Constitution is the current Constitution.

One of the most telling stories about the 1996 Constitution – making process was that of the insistence and the resolve of the Chiluba Government to have the Constitution adopted by Parliament. This was despite the Mwanakatwe Commission's overwhelming recommendation as regards the mode of adopting the Constitution, as well as the massive public resistance against the Constitution being adopted by Parliament. Despite all this, the Chiluba Government went ahead to adopt the 1996 Constitution through Parliament by way of amendment, and which amendment, the Chiluba Government vehemently stood by, and supported.¹⁷⁷ This the Chiluba Government did by insisting that the amendment was non – negotiable with President Chiluba emphasizing that:

.....The constitutional amendments which recently came into force and the procedures followed were handled within the context of the provisions of the existing Constitution, and everything provided for in the Constitution was more than complied with.¹⁷⁸

It can be asserted that the Chiluba Government, just like the previous Kaunda Government before it, had no political will to deliver to the Zambians, a people inspired Constitution. This can be deduced from the behavior and attitude of the Chiluba Government during the constitution – making process. For instance, during the process, the Chiluba Government stifled public debate on the Mwanakatwe Constitution Review Commission proposals by banning, *Post* Newspapers issue number 401, which carried an article on the Government's proposed

¹⁷⁷Mbao, *The Politics of Constitution Making in Zambia* at page 16 states that the Constitution (Amendment) Act was passed in Parliament on 22nd May, 1996 after its second reading when 121 MMD members voted for it, 2 National Party MPs voted against it while 22 UNIP MPs walked out in protest. On 28th May, 1996, President Chiluba assented to the amendment and the Constitution of Zambia (Amendment) Bill 18 of 1996 became law.

¹⁷⁸Mbao, "The Politics of Constitution Making in Zambia," 17.

constitutional changes.¹⁷⁹ In addition, on 17th July, 1996, using section 53 of the Penal Code, President Chiluba banned any further public debate on the Mwanakatwe Draft Constitution.¹⁸⁰ Finally, when it came to adoption of the Constitution, the Chiluba Government used the least favored mode of adopting the Constitution, that of using Parliament. This was contrary to the Mwanakatwe Commission's recommendations, as well as the massive public resistance against having Parliament adopting the Constitution.

3.7 FLAWS IN THE CONSTITUTION - MAKING PROCESSES USED TO CRAFT THE 1964, 1973, 1991, AND 1996, CONSTITUTIONS

The main flaw in the crafting of the 1964, 1973, 1991, and 1996, Constitutions has been that of lack of widespread participation by the citizens in the constitution – making processes. For instance, the 1964 Independence Constitution, was crafted without the involvement of the citizenry. The crafting of the 1973, 1991, and 1996, Constitutions was also done with limited public participation. This was so because the participation of the citizens was limited to submitting proposals to a Constitution Review Commission as shown, while the important role of adopting and approving the final Constitution was left to the executive (President and Cabinet), and Parliament. This has led to successive Constitutions being imposed on the citizenry. The views of the majority of the citizens on fundamental issues submitted to Constitutional Review Commissions, were not always included in the resultant Constitutions as shown above. This has led to the resultant Constitutions lacking legitimacy and moral authority. Hence the constant constitutional instability. The *constituent authority*, or the authority to adopt and approve the Constitution vests in the citizens. Even new *constitutionalism or democratic constitution making* has recognised this concept. A legitimate and democratic Constitution can only be realised if the general public participates in the constitution making process. In fact, new constitutionalism recognises that it is the people that must adopt and approve the final Constitution.

¹⁷⁹Mbao, "The Politics of Constitution Making in Zambia," 18.

¹⁸⁰Mbao, "The Politics of Constitution Making in Zambia," 18.

3.8 Conclusion

This chapter therefore has demonstrated that Zambia's failure to craft a legitimate, democratic and durable Constitution to date is attributable to the constitution – making processes that have been used to craft successive Constitutions. These Constitutions have lacked legitimacy and moral authority of the citizens. This is so because the wishes of the majority citizens on fundamental issues have not found expression in the resultant Constitutions. Hence successive Constitutions have failed to be durable. The reasons why the majority citizens' wishes on fundamental issues have not found expression in the resultant Constitutions are because the public has not participated in the formulation of the Constitutions.

The next chapter will focus on the attempt to adopt a new Constitution through the National Constitutional Conference (NCC).

CHAPTER FOUR

THE NATIONAL CONSTITUTIONAL CONFERENCE

4.1 Introduction

This chapter will focus on the attempt to adopt a new Constitution through the National Constitutional Conference herein after referred to as the NCC. The chapter will also analyse the failure by the NCC constitution – making process to bring about a new Constitution.

4.2 The Mung'omba Constitution Review Commission

On 17th April, 2003, President Mwanawasa appointed the fourth Constitutional Review Commission in Zambia headed by Lawyer and Banker Wila Mung'omba.¹⁸¹ The appointment of this Commission marked the fifth phase in constitutional development in Zambia, as well as the fourth time that a Constitutional Review Commission was appointed under the Inquiries Act. This Commission was called the Mung'omba Commission after its Chairperson. The Commission was appointed against the backdrop that the 1996 amendment to the Constitution lacked legitimacy, because it did not take into account most of the submissions made by the Zambian people to the Mwanakatwe Constitution Review Commission.¹⁸² Furthermore, the 1996 amendments to the Constitution introduced contentious clauses, and the phenomenon of a minority President.¹⁸³ Contending political parties in the 2001 general elections pledged an immediate review of the Constitution after the elections.¹⁸⁴

It transpired that Levy Mwanawasa was pronounced the winner of the 2001 general elections; hence the MMD retained the power.

¹⁸¹Statutory Instrument No. 40 of 2003.

¹⁸²Constitution Review Commission, *Report of the Constitution Review Commission* (Lusaka: Government Printer, December 2005), 68.

¹⁸³*CRC, Report of the Constitution Review Commission, 2005*, 68.

¹⁸⁴*CRC, Report of the Constitution Review Commission, 2005*, 68.

For the first time in the history of constitution – making in Zambia, this Constitutional Review Commission conducted public sittings in all the 150 Constituencies of Zambia, between August 2003, and September 2004.¹⁸⁵ The Commission received a total of 12,647 submissions from petitioners.¹⁸⁶ The Terms of Reference for the Commission were broad and many in terms of numbers. The Terms of reference were 31 in number.¹⁸⁷ Notable among the Terms of Reference of the Commission were the Terms empowering the Commission to:

Examine the views submitted to the Chona Commission of 1972; the Mvunga Commission of 1990; and the Mwanakatwe Commission of 1993;¹⁸⁸ recommend whether the Constitution should be adopted, altered or re – enacted by the National Assembly, by a Constituent Assembly, or by a national referendum or by any other method.¹⁸⁹

In respect of the former Term of Reference referred to above, it can be stated that the Mung’omba Commission Report was both a consolidation and restatement with variations where appropriate, of all the previous Constitution Review Commissions Reports.¹⁹⁰ It follows therefore that the Mung’omba Commission Report was expansive and addressed subjects that had not been previously dealt with in any of the Constitution Review Commissions.¹⁹¹ The Commission was directed that prior to submission of its final Report, and final draft Constitution, it was to publish an Interim Report together with an initial draft Constitution, and invite the public to comment thereon within ninety days.¹⁹²

On 29th June, 2005, the Commission simultaneously presented to President Mwanawasa and the public the Initial Report and Initial draft Constitution. And invited comments from the public on the two documents.¹⁹³ The Commission received comments from the public up to 31st

¹⁸⁵ *CRC, Report of the Constitution Review Commission, 2005, 1.*

¹⁸⁶ *CRC, Report of the Constitution Review Commission, 2005, 1.*

¹⁸⁷ See Terms of Reference of Statutory Instrument No.40 of 2003.

¹⁸⁸ Terms of Reference No. 19.

¹⁸⁹ Terms of Reference No. 21.

¹⁹⁰ Patrick Matibini, “Constitution Making Process: The Case for Zambia,” *Zambia Law Journal*, Special Edition:(2008): 18

¹⁹¹ Matibini, “Constitution Making Process,” 18.

¹⁹² See Statutory Instrument No. 84 of 2004.

¹⁹³ See the Chairperson, Wila D. Mung’omba’s address to the President, His Excellency Mr Levy Patrick Mwanawasa, SC, in the Report of the Commission.

October, 2005.¹⁹⁴ Those who commented included the three organs of Government. Namely, the Executive, the Legislature and Judiciary; and other public institutions; civil society organisations and individuals.¹⁹⁵ On 29th December, 2005, the Commission released to the public, its final Report and final draft Constitution, as well as a Summary of the Comments from the public on the Initial draft Constitution and Initial Report and the Commission's Reactions to them.¹⁹⁶

As regards the method of adopting the Constitution, the Commission observed that the manner in which a Constitution was finally adopted was crucial in determining its legitimacy, popularity and acceptability.¹⁹⁷ The success or failure of the constitution – making process, the Commission observed, hinged on the mode of adoption of the Constitution.¹⁹⁸ Having made these observations, the Commission then recommended the repeal and replacement of the current Constitution,¹⁹⁹ as well as adoption of the new Constitution through a Constituent Assembly, followed by a national Referendum.²⁰⁰ The Commission even went further to recommend the composition of the Constituent Assembly.²⁰¹ In recommending the constituent assembly as the mode of adopting the constitution, the Commission stated that this was in response to the overwhelming number of petitioners in favour of the Constituent Assembly, and national Referendum as the mode of adopting the Constitution.²⁰² In this respect, the Commission equated a Constituent Assembly to a White Paper by the people.²⁰³ The

¹⁹⁴See the Chairperson, Wila D. Mung'omba's address to the President, His Excellency Mr Levy Patrick Mwanawasa, SC, in the Report of the Commission.

¹⁹⁵*CRC, Report of the Constitution Review Commission, 2005, 10.*

¹⁹⁶*CRC, Report of the Constitution Review Commission, 2005, 10.*, see also CONSTITUTION REVIEW COMMISSION, *Summary of Public Comments of the Interim Report and Draft Constitution and Reactions of the Constitution Review Commission* (Lusaka: Government Printer, 2005).

¹⁹⁷*CRC, Report of the Constitution Review Commission, 2005, 794.*

¹⁹⁸*CRC, Report of the Constitution Review Commission, 2005, 794.*

¹⁹⁹*CRC, Report of the Constitution Review Commission, 2005, Paragraph 26.2.1, 805.*

²⁰⁰*CRC, Report of the Constitution Review Commission, 2005, Paragraph 26.2.1, 805.*

²⁰¹*CRC, Report of the Constitution Review Commission, 2005, Paragraph 26.2.1, 805.*

²⁰²*CRC, Report of the Constitution Review Commission, 2005, 799.* The Commission reported that 2,166 petitioners were in favour of a Constituent Assembly adopting the Constitution, against 862 petitioners in favour of the National Assembly doing the adoption.

²⁰³*CRC, Report of the Constitution Review Commission, 2005, 797.*

Commission further observed that in order to bring the Constituent Assembly into operation, the following steps and measures among others were recommended that:²⁰⁴

(c) the Constituent Assembly should be given legal effect by an Act of Parliament laying down the processes/ procedures and allocating the necessary resources, and stating the composition and functions of the Constituent Assembly which would inter alia include:

(i) deliberating on the Report of the Mung’omba Constitution Review Commission and draft Constitution;

(ii) adopting the Constitution, subject to a national referendum;

(iii) referring the adopted Constitution to a national referendum;

(d) the result of the Constituent Assembly should be final and legally binding, subject to the outcome of the national referendum and implemented by resolution of the Constituent Assembly;

(i) the decision of the Constituent Assembly should be by consensus as far as possible. However, where consensus has not been obtained the matter should be resolved by voting and a motion should be carried if it is supported by at least two – thirds of the delegates voting. The chairperson may cast an extra vote to decide the matter.

In addition, the Commission recommended that:²⁰⁵ The Constituent Assembly should elect its own Chairperson and deputy; prepare and adopt its own rules of procedure; the quorum would be half the members; the Constituent Assembly would establish Committees to facilitate its work; the Assembly would hold its deliberations in public and not in camera, as well as publicise its deliberations. Further, the Commission recommended the establishment of a *Commission* for the Constituent Assembly. Among the recommended functions of the Commission would include being the Secretariat for the Constituent Assembly in liaison with the Electoral Commission of Zambia.

4.3 Establishment of the National Constitutional Conference

As has been stated, the Mun’gomba Commission submitted its final report on 29th December, 2005. However, between 2005 and 2007, there was a stalemate in the constitution-making process, mainly because of disagreements between the Mwanawasa government on the one hand, and the opposition political parties and civil society formations on the other.²⁰⁶ At the heart of the dilemma had been the need to ensure that this time around the constitution-

²⁰⁴ CRC, *Report of the Constitution Review Commission, 2005*, 805,808 -809.

²⁰⁵ CRC, *Report of the Constitution Review Commission, 2005*, 805,808 -809.

²⁰⁶ Melvin M. Mbao, "THE POLITICS OF CONSTITUTION – MAKING IN ZAMBIA: WHERE DOES THE CONSTITUENT POWER LIE," (Paper presented at a Conference on 'Fostering Constitutionalism in Africa,' organised by the African Network of Constitutional Lawyers, Nairobi, Kenya 18 – 20 April, 2007) 22.

making process was people-driven and not dominated by the executive.²⁰⁷ The Mwanawasa government had earlier on sent conflicting signals. Initially the government had favoured the adoption of the new Constitution by Parliament, citing technical, logistical and legal obstacles in following the process recommended by the Mun'gomba Commission.²⁰⁸ Key among the government's concerns were the costs and time constraints associated with preparations for a national referendum to decide on whether or not the Constitution should be adopted by a Constituent Assembly followed by approval of the draft in a national referendum and subsequent enactment by Parliament.²⁰⁹ But even as the government was grudgingly accepting the idea of a referendum, President Mwanawasa 'told the nation that.... he would vote against a Constituent Assembly'.²¹⁰ Without reaching broad consensus with the other stakeholders, the government released a roadmap for the constitution – making process, spanning a period of 269 weeks, (almost five years) over which all the necessary preparatory, administrative, technical and legal processes would be completed.²¹¹

On the other hand, civil society groupings under the broad umbrella of the Oasis Forum²¹² were adamant that a new Constitution could be adopted by a Constituent Assembly followed by approval in a national referendum in a comparatively shorter period. It followed that the civil society groupings also released their road map that provided for adoption of the Constitution by a Constituent Assembly followed by approval in a national referendum within 71 weeks,²¹³ equivalent to a period of about one year and nine months. These two versions of roadmaps were both released early in 2007. For over six months, there was little or no movement in the Constitution-making process.²¹⁴ However, in July 2007, 'following a meeting of political parties represented in Parliament under the aegis of the Zambia Centre for Inter-

²⁰⁷Mbao, "The Politics of Constitution – Making In Zambia," 22.

²⁰⁸Mbao, "The Politics of Constitution – Making In Zambia," 22.

²⁰⁹Mbao, "The Politics of Constitution – Making In Zambia," 22.

²¹⁰Mbao, "The Politics of Constitution – Making In Zambia," 23.

²¹¹Mbao, "The Politics of Constitution – Making In Zambia," 23.

²¹²The Oasis Forum is a membership organisation comprising, the Council of Churches in Zambia (CCZ), Evangelical Fellowship of Zambia (EFZ), Zambia Episcopal Conference (ZEC), Non – Governmental Organisations Coordinating Council (NGOCC) and the Law Association of Zambia (LAZ).

²¹³Mbao, "The Politics of Constitution – Making In Zambia," 24.

²¹⁴Mbao, "The Politics of Constitution – Making In Zambia," 24.

Party Dialogue, it was resolved that instead of a Constituent Assembly, a National Constitutional Conference would adopt the Constitution.²¹⁵ Therefore, pursuant to that decision, the National Constitutional Conference (NCC) Act,²¹⁶ was enacted and assented to by President Mwanawasa on 31st August 2007. This marked the first time in the history of constitution – making process in Zambia that the citizens were to be availed an opportunity to participate in the process of adopting their Constitution. In addition, it had taken 43 years since independence to reach this decision.

The Function of the NCC was to examine, debate, and adopt a draft Constitution, from the proposals made by the Mung’omba Commission Report and draft Constitution.²¹⁷ The Act provided that all questions before the Conference or any of its Committees were to be resolved by consensus, and that where consensus could not be achieved, the decisions of the Conference were to be determined by a two – thirds majority of the members of the Conference through secret ballot.²¹⁸ The Act further provided that the adopted draft Constitution (NCC Draft Constitution) was to be presented to a referendum if any of the proposals of the draft Constitution purported to amend part III or Article 79 of the Constitution or if the draft Constitution contained any provisions in respect of which there was no agreement.²¹⁹

4.3.1 Composition of the National Constitutional Conference

With regard to the composition of the NCC, this was provided for in section 4(1) of the Act and included among others the following: All members of the National Assembly; representatives from political parties; representatives from the church mother bodies; representatives from professional bodies; representatives from traditional healers; representatives of traditional leaders; representatives from both the private and public media; the Anti - Corruption Commission; the Electoral Commission; the Drug Enforcement Commission; the Human Rights

²¹⁵Mbao, “The Politics of Constitution – Making In Zambia,” 24.

²¹⁶Act Number 19 of 2007.

²¹⁷Act Number 19 of 2007, section 13 (1)(a)(b).

²¹⁸Act Number 19 of 2007, section 17(1).

²¹⁹Act Number 19 of 2007, section 13(1)(c).

Commission; representatives of Trade Unions and the Zambia Federation of Employers; representatives of both public and private universities and colleges; representatives of student unions from both public and private universities and colleges; representatives from the three arms of government, that is the Executive, the Legislature and the Judiciary; representatives from the Service Commissions; representatives from the Defence Forces; representatives from Non Governmental Organisations; representatives of eminent Zambians; representatives of senior citizens; representatives of women organisations; representatives of youth organisations; representatives of people with disabilities; representatives from the farmers' unions; representatives of freedom fighters; and representatives from every council in the country.

In terms of delegates that participated in the NCC, the NCC consisted of five hundred and forty-two (542) delegates from a cross section of the Zambian society, who were appointed by the Secretary to the Cabinet in accordance with section 4 of the NCC Act.²²⁰ The way this was done was that respective institutions nominated their representatives who were then appointed by the Secretary to the Cabinet as delegates to the NCC.²²¹ Where an institution was required to nominate two representatives, it was mandatory for one of the nominees to be a woman; and where an institution was required to nominate three or more representatives, it was mandatory for thirty per centum of the nominees to be women.²²²

It is important to state that there was variation in the composition of the NCC as provided in section 4 (1) of the Act, compared to the composition of the Constituent Assembly as recommended by the Mung'omba Commission.²²³ The composition provided in the NCC Act was regarded as skewed. It was in fact this skewed composition provided in the NCC Act that was one of the major reasons that put the Act at the centre of a heated national debate after

²²⁰NATIONAL CONSTITUTIONAL CONFERENCE, *Initial Report of the National Constitutional Conference* (Lusaka: Government Printer, 24th June, 2010), 23.

²²¹*NCC, Initial Report*, 26.

²²²*NCC, Initial Report*, 26.

²²³Compare the recommended composition of the Constituent Assembly in the Mung'omba Commission Report at pages 805 – 807 with the composition in section 4 (1) of the NCC Act.

the Act was enacted.²²⁴ The Act had been severely criticised by opposition political parties and some civil society groups.²²⁵

The Patriotic Front (PF), then the largest opposition in the country, with 44 Members of Parliament (MPs), and its leader Michael Sata, vehemently criticised the NCC Act. The basis of the criticism was that the NCC was to gobble colossal sums of public resources for a purpose which would not yield any public benefit as it was predicted that it will not be a people driven Constitution, due to its skewed composition.

As a result of this, the PF stopped its MPs from participating in the NCC.²²⁶ However, about twenty - one (21) MPs defied this directive, and participated in the NCC. These MPs were expelled from the Party as they were deemed to have rebelled against the Party. With regard to civil society organisations, one of the major critics of the NCC was the Zambia Episcopal Conference (ZEC).²²⁷ Among the major reasons for criticising the NCC Act was the composition of the NCC. According to ZEC's analysis, the composition of the NCC was such that the single largest constituent in the NCC were to be politicians.²²⁸ ZEC noted that out of the expected 502 delegates to the NCC, 158 were to be drawn from MPs; 72 were to be Councillors from local authorities, and 48 representatives were to be drawn from political parties affiliated to the Zambia Centre for Inter – Party Dialogue.²²⁹

In addition, ZEC noted that 59 delegates were to be drawn from government departments' related agencies.²³⁰ The net result, ZEC argued, was that they were going to be at least 337 politicians, and government related participants.²³¹ Furthermore, ZEC observed that the NCC Act provided for a good number of participants for which there was no *modus operandi* of how

²²⁴Matibini, "Constitution Making Process," 27.

²²⁵Matibini, "Constitution Making Process," 27.

²²⁶See Post Correspondent, "Mwila instructs PF cadres to beat up defiant MPs," *The Post*, December 18th, 2007.

²²⁷Matibini, "Constitution Making Process," 28.

²²⁸Matibini, "Constitution Making Process," 28.

²²⁹Matibini, "Constitution Making Process," 28.

²³⁰Matibini, "Constitution Making Process," 28.

²³¹Matibini, "Constitution Making Process," 28.

they would be chosen.²³² Examples of these were freedom fighters, senior citizens, eminent persons, some civil society organisations.²³³

ZEC proposed that there was need to deal with the *modus operandi* of appointing these categories of persons in order to minimise suspicion.²³⁴ The composition of the NCC, according to ZEC was worrying given that the NCC was given the powers to vary, confirm, add, or remove any provision of the Mung'omba Draft Constitution as the members considered appropriate.²³⁵ ZEC posited that it was not difficult to predict who would carry the vote, and alternatively who had the power to prevent NCC from taking a certain direction using the same vote.²³⁶ ZEC concluded accordingly, given the fact that the NCC was given the power to decide questions by a two – thirds majority through secret vote where consensus could not be achieved.

However, despite ZEC and other stakeholders raising these concerns and opinions as to what they deemed as defects with the NCC Act, the government refused to address their concerns. The government argued that the NCC Act could not be taken back to Parliament for amendment within six months of its being passed and after being assented to by the President. And that the Government had reached a very advanced stage in its preparation for the NCC which was irreversible.²³⁷

The failure by Government to address these concerns raised by the stakeholders as to what they perceived as defects with the NCC Act, saw about 54 delegates not participating in the NCC. These included among others: three (3) from the Zambia Episcopal Conference (ZEC); three (3) from the Council of Churches in Zambia (CCZ); three (3) from the Evangelical Fellowship of Zambia (EFZ); two (2) from the Non-Governmental Organisation Coordinating Council (NGOCC); six (6) from the Patriotic Front (PF) as members of the Zambia Centre for

²³²Matibini, "Constitution Making Process," 29.

²³³Matibini, "Constitution Making Process," 29.

²³⁴Matibini, "Constitution Making Process," 29.

²³⁵Matibini, "Constitution Making Process," 29.

²³⁶Matibini, "Constitution Making Process," 29.

²³⁷See Times Reporter, "Calls for amendments to the NCC Act rejected" *Times of Zambia*, November 23rd, 2007. See page 4, quoting Justice Minister George Kunda to the effect that Government had reached a very advanced stage in its preparations for the NCC which was irreversible and due to start in December 2007.

Inter-Party Dialogue; Twenty-three (23) MPs belonging to the PF; Six (6) from the Federation of Free Trade Unions and their affiliates;²³⁸

4.3.2 Sitzings of the National Constitutional Conference

The NCC commenced its sittings on 17th December, 2007,²³⁹ and ended on 29th April, 2010.²⁴⁰ The sittings were conducted at Mulungushi International Conference Centre, which was also its Secretariat. The Act mandated the Conference to hold its sittings only when Parliament was not in session.²⁴¹ Therefore, the Conference sat from 14:00 hours to 20:00 hours on Tuesdays, Wednesdays, and Thursdays. While on Fridays, the Conference sat from 09:00 hours to 13:00 hours. In addition, the NCC sittings were conducted in public. The Conference's deliberations were widely publicised. Thus public debates were conducted over the NCC deliberations; the Mung'omba Report, and the draft Constitution on various platforms, including media institutions. In terms of membership, the total membership that participated in the Conference was five hundred and forty – two (542).²⁴²

4.3.3 The Committees of the National Constitutional Conference

In order to enhance its work, the NCC Act gave the Conference powers to delegate its work to its Committees.²⁴³ In this regard, the NCC constituted eleven (11) Committees that debated the draft Constitution and made recommendations to the plenary of the NCC. Each article in the Mung'omba Draft Constitution was assigned as a term of reference for one of the eleven Committees.²⁴⁴ The Committees made recommendations in line with their terms of reference. But their resolutions only became binding once adopted by the plenary.²⁴⁵ There were also

²³⁸NCC, *Initial Report*, 26.

²³⁹NCC, *Initial Report*, 27.

²⁴⁰NCC, *Initial Report*, 30.

²⁴¹Act Number 19 of 2007, section 17.

²⁴²NCC, *Initial Report*, 23.

²⁴³Act Number 19 of 2007, section 16 (3).

²⁴⁴Act Number 19 of 2007, section 16 (3).

²⁴⁵Act Number 19 of 2007, section 16 (3).

three (3) house – keeping and technical Committees. These were the General purposes Committee, Disciplinary, and Drafting Committee.²⁴⁶

4.3.4 The National Constitutional Conference at Work

The NCC during its existence carried out its functions as provided under the Act. In adopting provisions into the NCC Draft Constitution, the NCC was mandated to vary, confirm, add or remove any provisions of the Mung’omba Draft Constitution and Report. It must be stated that the criticism regarding the composition of the NCC by the opposition and civil society continued to grow from inception of the NCC, throughout its existence, up to its dissolution. In fact, the criticism grew stronger when the NCC began varying the provisions of the Mung’omba draft Constitution and Report on contentious subjects, contrary to the Mung’omba Commission’s recommendations. These contentious issues were those relating to the election of the President, Vice – President, and the appointment of Cabinet Ministers, Deputy Ministers and Provincial Ministers.

The Mung’omba Commission on these issues recommended as follows: that a President be elected on a fifty percent plus one vote election threshold;²⁴⁷ that the Vice – President be elected as a running mate to a Presidential candidate,²⁴⁸ and that Cabinet Ministers,²⁴⁹ Deputy Ministers²⁵⁰ and Provincial Ministers²⁵¹ be appointed outside the National Assembly to enhance separation of powers. The Commission stated that these recommendations were in response to the majority submissions made by the petitioners to the Constitutional Review Commission. However, on the contrary, the NCC failed to abide by the majority of the Zambians’ wishes on these subjects as recommended by the Mung’omba Commission. Namely, that, as regards the election threshold of a President, the NCC could not decide either by consensus or a two –

²⁴⁶Act Number 19 of 2007, section 16 (3).

²⁴⁷*CRC, Report of the Constitution Review Commission, 2005, article 125(2).*

²⁴⁸*CRC, Report of the Constitution Review Commission, 2005, Article 144 (2).*

²⁴⁹*CRC, Report of the Constitution Review Commission, 2005, Article 147(1).*

²⁵⁰*CRC, Report of the Constitution Review Commission, 2005, Article 149 (1).*

²⁵¹*CRC, Report of the Constitution Review Commission, 2005, Article 148 (1).*

thirds majority vote in favour of the Mung'omba recommendation on this issue, hence referred the issue to the referendum.²⁵²

On the other hand, the NCC contrary to the Mung'omba recommendations, adopted in its draft Constitution (NCC draft Constitution), provisions providing for the appointment of a Vice – President by the President from among members of the National Assembly,²⁵³ as well as the appointment by the President of Cabinet Ministers,²⁵⁴ Deputy Ministers²⁵⁵ and Provincial Ministers²⁵⁶ from among members of the National Assembly. These provisions were adopted by the NCC contrary to the majority citizens' wishes as expressed by the citizens to the Mung'omba Commission. The NCC failed to include these provisions to be part of those subjects to be finally resolved by the citizens themselves through a national referendum, but instead settled them contrary to the people's wishes. What this meant was that the people would not have been given an opportunity to resolve these issues in a referendum as these subjects were not part of those subjects to be resolved by a national referendum. In addition, what this meant was that had the Constitution (Amendment) Bill, 2010 been passed, the new Constitution would have contained the same provisions on contentious subjects as they are in the current Constitution, of course with the exception of the election threshold for a presidential candidate, which was to be decided at the national referendum .

The manner in which contentious issues were treated by the NCC was in line with the wishes or interests of the executive arm of Government as expressed by the executive in its public comments on the Mung'omba Commission's Interim Report and draft Constitution, circulated to the public to make comments thereon within 90 days of publication. This is so because the executive arm was not in favour of a 50% plus one vote election threshold for a presidential

²⁵²See NATIONAL CONSTITUTIONAL CONFERENCE, *Summary of Resolutions of the National Constitutional Conference*, (Lusaka: Government Printers, June, 2010), 259.

²⁵³National Constitutional Conference, *The Draft Constitution of the Republic of Zambia*, (Lusaka: Government Printer, 18th June, 2010), article 128 (2).

²⁵⁴NCC, *Draft Constitution, 2010*, Article 130 (1).

²⁵⁵NCC, *Draft Constitution, 2010*, Article 132 (1).

²⁵⁶NCC, *Draft Constitution, 2010*, Article 131(1).

candidate.²⁵⁷ It instead recommended the retention of the current simple majority election threshold of a President.²⁵⁸

With regard to the Commission's recommendation that the Vice – President be elected by universal adult suffrage as running mate of a presidential candidate, the executive arm was not in favour of this recommendation.²⁵⁹ Instead, the executive arm recommended the retention of the current constitutional provision providing for the Vice – President to be appointed by the President.²⁶⁰ Finally, the executive arm was equally not in favour of the Commission's recommendation that Cabinet Ministers and Deputy Ministers be appointed outside Parliament.²⁶¹ This is so because, the executive arm recommended the retention of the current constitutional provisions that provide for the appointment of Ministers and Deputy Ministers from within Parliament.²⁶²

As a result of what has been stated above, doubts were raised whether indeed the NCC delegates were truly representatives of the majority Zambian citizens. At the same time, it tended to lend credence to the allegations made by ZEC and others regarding the composition of the NCC. Because the majority of the Zambians' position on these contentious issues had been persistently and consistently been made in line with the Mung'omba Commission's recommendations. This can be discerned from previous Constitutional Review Commissions Reports such as the Mwanakatwe and the Mvunga Commission. This being the case, it is inconceivable to imagine that true representatives of the people would have failed to decide these issues in favour of the people, given the opportunity availed through the NCC.

It is important to state that the constitution – making process can lose its legitimacy depending on the way a few contentious issues are treated. This is so especially where contentious issues are not adopted and the failure to adopt does not reflect the wishes of the majority. This

²⁵⁷ CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 113.

²⁵⁸ CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 113.

²⁵⁹ CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 134.

²⁶⁰ CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 134.

²⁶¹ CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 136.

²⁶² CRC, *Summary of Public Comments of the Interim Report and Draft Constitution, 2005*, 136.

happened in Kenya as shown in chapter one, where during the constitution – making process, a Parliamentary Committee amended provisions on contentious issues contrary to the manner they were adopted by the Constituent Assembly in line with the people ‘s wishes. That amendment rendered the constitution – making process a flaw and was a basis for the people’s disapproval of the draft in a referendum.

That situation was almost similar to the Zambian experience, where failure by the NCC to adopt contentious issues in the NCC draft Constitution in favour of the people rendered the whole NCC draft Constitution not to be expressive of the people’s wishes. This was despite the fact that aside the failure by the NCC draft Constitution to adopt contentious issues in favour of the wishes of the majority, the NCC draft Constitution contained a good number of progressive provisions that Zambians have yearned for, for years to be provided in the Constitution. These provisions could have for the first time enhanced the Zambian Constitution.²⁶³

It is therefore important to state that, this is the reason why *New Constitutionalism* or *Democratic Constitution – Making process* emphasises the adoption of a Constitution by a Constituent Assembly whose delegates are elected by the people. The idea is to avoid such suspicion. In addition, it is meant to ensure that the delegates to the Constituent Assembly are true representatives of the people. The South Africa experience as shown in chapter one, opted to elect delegates to the Constituent Assembly. The elections involved the citizens themselves. It is important to state that mistrust and suspicion that the constitution – making process may be amenable to manipulation by the Government leads to the crafted constitution lacking legitimacy. Therefore, it is important in the constitution – making process to eliminate all suspicion that the constitution – making process may be amenable to manipulation.²⁶⁴ After all, successful constitution – making processes are anchored on consensus as opposed to controversy.²⁶⁵

²⁶³See the Draft Constitution, 2010, and compare it with the current Constitution.

²⁶⁴Matibini, “Constitution Making Process”, 32.

²⁶⁵Matibini, “Constitution Making Process,” 32.

However, with regard to the NCC constitution – making process, it can be said that the process may have been manipulated through the skewed composition of the Conference, which consisted mainly of politicians, and government related participants as observed by ZEC. This may have been the reason for the failure of the NCC to adopt contentious issues according to the wishes of the people, hence rendering the NCC draft Constitution illegitimate. As has been shown, the NCC went ahead to carry out its functions of adopting a draft Constitution, despite the controversy regarding the composition of the NCC.

On 22nd June, 2010, the NCC through its Chairperson Mr. Chifumu Banda, SC, MP, announced the launch of the publication of the Initial Report and draft Constitution of the Conference. The Conference also produced a summary of the resolutions of the Conference. This was in conformity with the NCC Act which mandated the Conference to present its Initial Report and the initial draft Constitution to the public with the view to facilitate public debate and comments on the same,²⁶⁶ as well as to receive memoranda from members of the public for incorporation, where appropriate, in the final report and final draft Constitution.²⁶⁷

The activity to receive memoranda from the members of the public for incorporation in the final report and draft Constitution was given forty (40) days from 22nd June, 2010, which was the date of the launch, to 1st August, 2010.²⁶⁸ The NCC also organised public discussions as a forum for the public to give their comments and views on the initial report and initial draft Constitution to the Conference.²⁶⁹ Other avenues provided for submitting comments were by e-mail, by writing to the Secretariat and through facsimile.²⁷⁰

²⁶⁶Act Number 19 of 2007, section 23 of the Act, as amended.

²⁶⁷Act Number 19 of 2007, section 23 of the Act, as amended.

²⁶⁸See National Constitutional Conference. "Public Announcements," accessed November 5th 2012, <http://www.ncczambia.org>

²⁶⁹"Public Announcements," National Constitutional Conference.

²⁷⁰See National Constitutional Conference. "NCC Launches Publication of the Report and draft Constitution," Accessed November 5th, 2012. <http://www.ncczambia.org>.

4.3.5 Dissolution of the National Constitutional Conference and failure of the National Constitutional Conference Draft Constitution to become law

It is important to state that despite the public giving their comments and views on the NCC Initial report and Initial draft Constitution, nothing of significance changed in the NCC final report and final draft Constitution from the initial drafts, as contentious issues remained unchanged, as well as other provisions.²⁷¹ The Conference was dissolved on August 31, 2010, and the term of office of the members expired.²⁷² In addition, the NCC Act was repealed on the same day.²⁷³ The Government then went ahead to prepare the Constitution Bill.²⁷⁴ The Bill was intended to enact into law those parts of the NCC final draft Constitution that did not require to be subjected to a referendum. The idea was that provisions referred to the national referendum²⁷⁵ were to be included in the enacted Constitution after they were resolved at the referendum. The Constitution Bill was presented to Parliament.

However, on Tuesday March 29, 2011, the Bill failed to pass through the Second Reading Stage in Parliament as it failed to garner the minimum two – thirds majority to pass.²⁷⁶ This was after only ninety three (93) MPs voted in favour of the Bill, out of the required 106 members. Twenty (20) MPs abstained from the voting.²⁷⁷ It is my opinion that the failure by the National Assembly to pass the NCC final draft Constitution into law can be attributed to the content of the draft. This was so because 20 MPs abstained from voting; a sign that they did not approve of the content of the document especially with regard to contentious issues.

²⁷¹ Compare the provisions of the initial NCC Draft Constitution (The Draft Constitution of the Republic of Zambia, 18th June, 2010) with the Constitution of Zambia (Amendment) Bill 2010.

²⁷² Act Number 19 of 2007, section 32(6) of the Act as amended.

²⁷³ Act Number 19 of 2007, section 34(2).

²⁷⁴ The Constitution (Amendment) Bill 2010. N.A.B No. 60 of 2010.

²⁷⁵ For subjects referred to the national Referendum, See NATIONAL CONSTITUTIONAL CONFERENCE, *Summary of Resolutions of the National Constitutional Conference*.

²⁷⁶ Lusaka Times. "Parliament fails to enact new Constitution," Accessed November 12th, 2012, [http:// www.lusakatimes.com](http://www.lusakatimes.com).

²⁷⁷ "Parliament fails to enact new Constitution," Lusaka Times.

Less than six months after the NCC draft Constitution failed to pass through the second reading stage in Parliament, general elections were held on 20th September, 2011, and Michael Chilufya Sata, emerged as the winner of the Presidential elections, and ascended to power. This marked the end of the NCC Constitution making process.²⁷⁸

4.4 Conclusion

It is important to state that the passage of the NCC Act was a milestone in the history of constitution – making process in Zambia. This is so because for the first time in the history of constitution – making process, the citizens, individually, and the majority of them through their MPs, their respective organisations, and associations were given an opportunity to participate in the adoption of their Constitution. This opportunity should have been used to craft that long desired legitimate, democratic and durable Constitution that Zambians have sought for a long time. However, as has been shown above, this opportunity was lost because the NCC failed to adopt a legitimate and acceptable draft Constitution; largely due to its skewed composition.

Therefore, it can be fairly stated that the NCC constitution – making process was manipulated by government. As has been stated, a Constitution crafted under such circumstances cannot be regarded as legitimate by the people; hence such a Constitution fails to be accepted by the people as well as it fails to be durable.

The next chapter will focus on the constitution – making process embarked by the PF Government through the TCDZC, and the prospects of evolving a durable Constitution.

²⁷⁸This is so in that on 16th November, 2011, President Michael Sata appointed the Technical Committee Drafting the Zambian Constitution, to undertake constitutional review process.

CHAPTER FIVE

THE TECHNICAL COMMITTEE ON DRAFTING THE ZAMBIAN CONSTITUTION

5.1 Introduction.

This chapter will focus on the constitution – making process embarked on by the TCDZC. The chapter will dwell into the processes and mechanisms, put in place by the TCDZC to ensure that it delivers a draft Constitution that represents the wishes and aspirations of the majority Zambians. At the end, the chapter will discuss the prospects of evolving a legitimate, democratic and durable Zambian Constitution from this process.

5.2 Appointment of the Technical Committee on Drafting the Zambian Constitution

On 16th November, 2011, President Michael Sata initiated the sixth phase in constitutional development in Zambia. This was done by his appointment of a Technical Committee of experts to draft and present a Constitution which would reflect the will and aspirations of the Zambians. The Committee was called the Technical Committee on Drafting the Zambian Constitution (TCDZC), headed by former Chief Justice Hon. Justice Annel Silungwe, SC.²⁷⁹ The TCDZC was appointed in response to public demands for a people – driven Constitution.²⁸⁰

As has been demonstrated in chapter four, the NCC constitution – making process lacked legitimacy, and failed to yield a new Constitution. Therefore, contending opposition parties in the September, 2011, general elections promised to deliver to the Zambians, a legitimate, democratic, and durable Constitution once elected into Government. The PF leader Michael Sata, won the Presidential elections, and the PF ascended to power. It is in response of the promise to deliver to the Zambian people, a legitimate, democratic, and durable Constitution that the TCDZC was appointed. The appointment of the TCDZC marked the first time in the

²⁷⁹The Committee was appointed by the President in exercise of the powers conferred upon him by Articles 33 and 44 of the Constitution of Zambia.

²⁸⁰The Technical Committee on Drafting the Zambian Constitution, *Report of The Technical Committee on Drafting the Zambian Constitution* (Lusaka: Government Printer, 30th April, 2012), 1.

history of independent Zambia, that constitutional reforms were initiated without first appointing a Constitution Review Commission under the Inquiries Act.²⁸¹

5.2.1 Terms of Reference

Among the Terms of Reference of the TCDZC were that in drafting the Constitution, the TCDZC was to refer to the Mvunga Constitution Review Commission;²⁸² review the 1991 Constitution of Zambia; the Mwanakatwe Constitution Review Commission Report, and the Draft Constitution, 1993; the Mung'omba Constitution Review Commission Report, and the Draft Constitution, 2005; the Zaloumis Electoral Technical Report, 2005; and the National Constitutional Conference Report, and the Draft Constitution, 2010.²⁸³ In addition, the TCDZC was empowered to identify key issues to be presented to the Provincial Constitutional Committees in all the ten provincial centres, and administratively support the ratification of the draft National Constitution by the Provincial Constitution Conventions.²⁸⁴

5.2.2 Methodology of Carrying out the Work of the Technical Committee on Drafting the Zambian Constitution

In terms of the methodology of carrying out its functions, the TCDZC was mandated to:

- (a) refer to the Mvunga Constitution Review Commission Report; the 1991 Constitution of Zambia; the Mwanakatwe Constitution Review Commission Report and the Draft Constitution, 1993; the Mung'omba Constitution Review Commission Report, and the Draft Constitution, 2005; the Zaloumis Electoral Technical Report, 2005; and the National Constitutional Conference Report, and the Draft Constitution, 2010;
- (b) review the Mung'omba Draft Constitution, 2005, and use it as a basis on which to develop the new National Constitution;
- (c) consult the following, and take into account their submissions:
 - (I) Local and international experts on Constitutional law and practice;
 - (II) Members of the public at all Provincial Centres, and incorporate in the National Constitution, the views of the people as resolved in the Provincial Constitution Conventions; and
 - (III) Sector groups;
- (d) draft a National Constitution based on its findings from the review process, and best international constitutional practices, and provisions of international Conventions on human rights;

²⁸¹Chapter 41 of the Laws of Zambia.

²⁸²Terms of Reference No. (a).

²⁸³Terms of Reference No. (b).

²⁸⁴Terms of Reference No. (k).

- (e) draft the Constitution of Zambia Bill, which shall set a commencement date for the new Constitution, deal with the transitional and other issues for the effective transition into a new constitutional regime under the third Republic to be enacted by Parliament and which Bill shall have the Constitution of Zambia annexed thereto.²⁸⁵

5.2.3 Gist of the Terms of Reference and Methodology of Carrying Out the Work of the Technical Committee on Drafting the Zambian Constitution

The gist of these terms of reference and methodology of carrying out the work of the TCDZC is that the TCDZC was to use the Mung'omba draft Constitution, and Report as the basis of drafting the Zambian Constitution, whilst taking into account the provisions of other draft Constitutions from previous constitution review processes since 1991. This meant that the TCDZC was not to receive new submissions from the public. This constitution – making process entailed that, the TCDZC had to craft and draft the Constitution, based on the above stated draft Constitutions and Reports. The draft was then to be submitted to local and international experts on constitutional law and practice,²⁸⁶ that the TCDZC was empowered to consult, for the experts to scrutinise, comment and make recommendations. In addition, the draft was also availed to the general public for their scrutiny, comments, and recommendations.

This exercise of scrutinising, making comments, and recommendations by the general public, was carried out through the various forums provided by the Constitution Consultative Process Guidelines, 2012.²⁸⁷ These forums were: the Community Consultative Forums; the District Consultative Forums; the Provincial Conventions; the National and Sector Groups Conventions; and by way of direct submission of comments and recommendations by any member of the public to the Secretariat of the TCDZC.²⁸⁸ All the comments and recommendations from the Community Consultative Forums, the District Consultative forums, and the Provincial Conventions, as well as comments and recommendations made by any member of the public to

²⁸⁵TCDZC, *Report of the Technical Committee*, 4 -5.

²⁸⁶The Technical Committee identified twelve (12) local and international experts on constitution law and practice. However, three (3) out of the twelve (12) indicated that they would not be available for the assignment - See TCDZC, *Report of the Technical Committee*, 6.

²⁸⁷The Technical Committee on Drafting the Zambian Constitution, *The Constitution Consultative Process Guidelines, 2012* (Lusaka: Government Printer, April 2012).

²⁸⁸TCDZC, *The Constitution Consultative Guidelines*, Guidelines 5 and 21.

the Secretariat of the TCDZC, were submitted to the Secretariat of the TCDZC, and to the National and Sector Groups Convention.²⁸⁹ Thereafter, all the comments and recommendations from the Community and District Consultative Forums, the Provincial Conventions, local and international experts on constitutional law and practice, the National and Sector Groups Convention, as well as comments and recommendations made by any member of the public to the Secretariat of the TCDZC, were forwarded to the TCDZC.²⁹⁰ This was done by the Secretariat of the TCDZC. The TCDZC was to then draft the final draft Constitution, taking into account all the comments and recommendations from these afore stated forums.²⁹¹ The final draft Constitution was then to be subjected to a National Referendum for adoption by the people of Zambia.²⁹²

All these processes were guided by the Constitution Consultative Process Guidelines, 2012. In addition, in line with the terms of reference of the TCDZC, the TCDZC was empowered to develop, and consider guidelines for these forums, that is, District Consultative Forums, Provincial Conventions, and National and Sector Groups Convention. In this regard, the TCDZC identified thirteen (13) thematic areas for consideration by these forums.²⁹³ The Guidelines also provided that a thematic group at these forums is to comprise not less than five persons selected from the delegates to such forums.²⁹⁴ The guidelines further provided that equitable consideration be given to persons of both gender in the election or nomination of persons to

²⁸⁹*The Constitution Consultative Guidelines*, Guidelines 8; 16(c); 19; 21(3); and 28(e).

²⁹⁰*The Constitution Consultative Guidelines*, Guidelines 41(1)(2).

²⁹¹*The Constitution Consultative Guidelines*, Guidelines 41(1)(2).

²⁹²*The Constitution Consultative Guidelines*, Guideline 41(3).

²⁹³*The Constitution Consultative Guidelines*, Annex 1, 50; The thematic areas were: 1. (a) Integrity and Sovereignty of the State (Preamble to Part III); (b) Amendment of Constitution (Part XX); and (c) General Provisions (Part XXI). 2. Citizenship (Part IV). 3. Bill of Rights (Part V). 4. Representation of the People (Part VI). 5. Executive (Part VII). 6. Legislature (Part VIII). 7. Judiciary (Part IX). 8. (a) Devolved Governance (Part X); (b) Provinces and Administration (Part XI); (c) Local Government (Part XII); and (d) Chieftaincy and House of Chiefs (Part XIII). 9. (a) Public Service and Commissions (Part XIV); and (b) Office of the Public Protector (Part XV). 10. Defence and National Security (Part XVI). 11. (a) Public Finance and Budget (Part XVII); and (b) Central Bank (Part XVIII). 12. Land, Property, Environment and Natural Resources (Part XIX). 13. Any other area.

²⁹⁴*The Constitution Consultative Guidelines*, Guideline 17 (2); 30 (2) and 39 (2).

each forum's thematic groups.²⁹⁵ One of the key functions of a thematic group was to consider submissions relating to the thematic area of that particular thematic group.

The terms of reference also provided that the TCDZC was to facilitate ten (10) Provincial Conventions.²⁹⁶ The gist of all the terms of reference, as well as the methodology of carrying out the work of the TCDZC was to ensure that the constitution – making process was essentially people – driven and reasonably inclusive.²⁹⁷ This mode of constitution – making process provided for wide spread participation by virtually every citizen.²⁹⁸ In addition, the scope of the terms of reference was sufficiently broad to cover relevant issues and areas to facilitate the preparation of a Constitution that reflects the aspirations of the Zambian people. Therefore, the intention was to produce a Constitution that would stand the test of time.²⁹⁹

In addition to the terms of reference and methodology of the TCDZC ensuring the achievement of a people driven Constitution, the Constitution Consultative Process Guidelines, 2012, also made provisions aimed at ensuring the achievement of a people driven Constitution. In this regard, the Guidelines provided for a very wide and broad platform on which the general public could make comments and recommendations on the first draft Constitution, as will be shown below. In addition, the Guidelines were such that in essence, it was the general public that adopted the final Constitution by way of making comments, and recommendations on the first draft Constitution, through the wide and broad public constitution consultative processes, as well as providing that the final adoption of the draft Constitution is to be by the general public through a national referendum. Further, the Guidelines provided for the Community, and District Consultative Forums to regulate their own proceedings.³⁰⁰ As regards the Provincial Conventions and the National and Sector Groups Conventions, the Guidelines provided for the

²⁹⁵*The Constitution Consultative Guidelines*, Guidelines 31 and 40.

²⁹⁶Terms of Reference No (k).

²⁹⁷See the Terms of Reference of the Technical Committee and the Methodology of Carrying out the Work of the Technical Committee.

²⁹⁸See the Terms of Reference of the Technical Committee and the Methodology of Carrying out the Work of the Technical Committee.

²⁹⁹See the Terms of Reference of the Technical Committee and the Methodology of Carrying out the Work of the Technical Committee.

³⁰⁰*TCDZC, Constitution Consultative Guidelines*, Guidelines 9 and 20.

procedures to be followed at these proceedings.³⁰¹ For instance, Division 4 of the Guidelines outlined matters of procedure; manner of conducting the proceedings at the Provincial Conventions, and the National and Sector Groups Conventions, such as the manner of conducting debates at these forums, determination of matters, powers of the chairpersons, the quorums of these forums, conduct of delegates at these forums etc.

Furthermore, the Guidelines provided the people and their organisations with an opportunity to nominate or elect the delegates to these public consultation forums, that is, the District Consultative Forums, the Provincial Conventions, and the National and Sector Groups Conventions.³⁰² The Guidelines provided that this was to be done by each respective organisation where a delegate was representing an organisation or institution.³⁰³ However, the Guidelines provided that where a delegate to these forums was not representing any specific organisations or institution, such a delegate was to be nominated by a District Facilitator.³⁰⁴ In the case of a District Consultative Forum; by a Provincial Facilitator³⁰⁵ in the case of a Provincial Convention.

In the case of the National and Sector Groups Conventions, almost all the delegates were representatives of organisations or institutions and were nominated or elected by their respective organisations or institutions.³⁰⁶ There were only a few delegates that were not representatives of any organisations or institutions at the National and Sector Groups Convention, and these related to retired public servants as follows: former Speakers of the National Assembly, former Chief Justices, former retired Bank of Zambia Governors, and former retired Auditor – Generals.³⁰⁷

³⁰¹*TCDZC, Constitution Consultative Guidelines, Division 4.*

³⁰²*TCDZC, Constitution Consultative Guidelines, Guidelines 12; 24(1)(a); and 35(1), respectively.*

³⁰³*TCDZC, Constitution Consultative Guidelines, Guidelines 12; 24(1)(a); and 35(1), respectively.*

³⁰⁴*TCDZC, Constitution Consultative Guidelines, Guideline 12 (1) (b).*

³⁰⁵*TCDZC, Constitution Consultative Guidelines, Guideline 24 (1) (b).*

³⁰⁶*TCDZC, Constitution Consultative Guidelines, Guideline 35 (1).*

³⁰⁷*TCDZC, Constitution Consultative Guidelines, Guideline 34(1) (L).*

With regard to NGOs that participated in the National and Sector Groups Convention, these had to apply to the Sub – Committee of the TCDZC which considered whether they formed part of the composition outlined in Guideline 34, and where they did, the Sub – committee ensured that the NGOs nominated their representatives.³⁰⁸ The Guidelines also provided for equitable consideration of persons of both gender in the election or nomination of persons to these forums. That is, the District Consultative Forums, the Provincial Conventions, as well as the National and Sector Groups Conventions.³⁰⁹ The names of the nominated persons to these forums were forwarded to the TCDZC, for appointment by the Chairperson of the TCDZC. The names were forwarded by a District Facilitator in the case of a District Consultative Forum, a Provincial Facilitator in the case of a Provincial Convention, and by the Sub – Committee of the TCDZC in the case of the National and Sector Groups Conventions.³¹⁰

In order to ensure that the selection process of the delegates to the National and Sector Groups Convention was transparent, the Guidelines made provision allowing organisations dealing with the same or similar subject areas to jointly select persons to represent them.³¹¹ In addition, the Guidelines provided that delegates to the District Consultative Forums and the Provincial Conventions, with the exception of Members of Parliament, had to be residents or present in the district or province for them to be eligible for appointment as delegates to these forums.³¹²

In addition, the Guidelines allowed for admission of observers to attend a District Consultative Forum, a Provincial Convention, as well as the National and Sector Groups Convention who did not participate in the deliberations or vote.³¹³ The Guidelines further provided for the appointment of Rapporteurs at District Consultative forums, Provincial Conventions and the National and Sector Groups Conventions.³¹⁴ According to the TCDZC, Rapporteurs were present

³⁰⁸TCDZC, *Constitution Consultative Guidelines*, Guidelines 33 (1)(2)(3).

³⁰⁹TCDZC, *Constitution Consultative Guidelines*, Guidelines 12(3); 24(3); and 35(3), respectively.

³¹⁰TCDZC, *Constitution Consultative Guidelines*, Guidelines 12 (5); 27 (3); and 33 (4), respectively.

³¹¹TCDZC, *Constitution Consultative Guidelines*, Guideline 34 (2).

³¹²TCDZC, *Constitution Consultative Guidelines*, Guidelines 11(2) and 23 (2).

³¹³TCDZC, *Constitution Consultative Guidelines*, Guidelines 18 (1); 22 (2); and 32 (3), respectively.

³¹⁴TCDZC, *Constitution Consultative Guidelines*, Guidelines 15; 27; and 37 respectively.

at each of these consultative forums. The Guidelines also provided for the organisation and facilitation of a District Consultative Forum, a Provincial Convention, as well as the National and Sector Groups Convention.³¹⁵ As has been stated, all these provisions and many others, in the Guidelines, were intended to ensure the achievement of a people driven Constitution.

5.3 The Technical Committee on Drafting the Zambian Constitution at Work

The TCDZC began its work on 1st December, 2011.³¹⁶ On 30th April, 2012, the TCDZC, through its Chairperson, Honourable Justice A. Silungwe, SC, launched the publication of the first draft Constitution, and the first draft Report of the TCDZC.³¹⁷ The Chairperson on this same day also officially launched the start of the public consultations on the constitution – making process, as well as launched the official website of the TCDZC.³¹⁸ The launch of the publication of the first draft Constitution, and the first draft Report also marked the beginning of the public consultations on the constitution – making process.³¹⁹ This was in line with the terms of reference, and methodology of carrying out the work of the TCDZC as earlier observed. At this juncture, it is necessary to analyse briefly how this constitution consultative process was undertaken at these forums.

5.4 COMMUNITY CONSULTATIVE FORUMS

A community consultative forum was the lowest level in the district at which comments on the first draft Constitution were made, these were a village, school, church, township, ward,

³¹⁵TCDZC, *Constitution Consultative Guidelines*, Guidelines 13, 14 and 15; 25, 26 and 27; and 36, 37 and 38, respectively.

³¹⁶TCDZC, *Report of the Technical Committee*, 6.

³¹⁷See “The official launch of Public Consultations on the Constitution – Making Process,” Accessed on March 5th, 2013. <http://zambianconstitution.org..>

³¹⁸The website is <http://zambianconstitution.org>.

³¹⁹TCDZC, *Constitution Consultative Guidelines*, Guideline 15; 27 and 37 respectively; The Constitution Consultative Process Guidelines, 2012, define the term ‘*Constitution Consultative Process as:*’ the process of scrutinising, making comments and recommendations on the First Draft Constitution. In this regard, the term ‘public consultation’ in this work retains this meaning.

association, chamber of commerce or joint meetings of these structures.³²⁰ A Community Consultative Forum was organised by various stakeholders that included the following:

church groups, traditional councils, political party structures, neighbourhoods, residence development committees, social clubs, school clubs, associations, neighbourhood health committees, community – based organisations, work places, learning institutions, civil society facilitators, and any other institutions or organisations based and operating in any particular community.³²¹

A Community Consultative Forum was self – organised whereby communities organised themselves without the facilitation of the TCDZC, and scrutinised and made comments and recommendations on the first draft Constitution and the Report.³²² However, the TCDZC ensured that mechanics were put in place, for effective consultation of the citizens at community level.³²³ These mechanics included the provision of facilities such as boxes to collect comments that were placed at every National Assembly Constituency Office or District Commissioner’s offices. Others were the creation by the TCDZC of a website, face book page and twitter page for members of the public to send their comments and recommendations on the first draft Constitution and the Report.

The Community Consultative process began with the launch of the first draft Constitution and Report by the TCDZC on Monday, 30th April, 2012.³²⁴ This process marked the start of the Constitution consultative process in which individuals and groups of individuals made comments on the provisions of the first draft Constitution and Report. The Community Consultative forums were open to every individual, group or organisation in the community.³²⁵ As per the Guidelines, these forums were self - organised by various stakeholders that included the church, traditional councils, political party structures etc. At these forums, communities scrutinised, commented and made recommendations on the first draft Constitution and the Report. The comments and recommendations from Community Consultative forums were as per the Guidelines, submitted to a district collection centre by a Community Consultative Forum

³²⁰TCDZC, *Constitution Consultative Guidelines*, Guideline 2 and 6(1).

³²¹TCDZC, *Constitution Consultative Guidelines*, Guideline 6 (3).

³²²TCDZC, *Constitution Consultative Guidelines*, Guideline (61).

³²³TCDZC, *Constitution Consultative Guidelines*, Guideline 7.

³²⁴ See Technical Committee on Drafting the Zambian Constitution, “Public Announcements,” Accessed March 5th, 2013. <http://zambianconstitution.org>.

³²⁵TCDZC, *Constitution Consultative Guidelines*, Guideline 6 (2).

Facilitator for consideration in formal gatherings at the District Consultative forums.³²⁶ In total, eighty two (82) District Consultative forums were held at which the comments and recommendations from these informal consultative processes were discussed.³²⁷

The period of time allocated for this informal consultative process was initially forty days. However, the feedback that the TCDZC received after the first draft Constitution was made public indicated that stake holders, including members of the general public, needed more time to study the contents of the first draft Constitution and Report.³²⁸ In response to the public outcry for more time, the TCDZC extended the time frame for stakeholders and members of the public to comment on the first draft Constitution, from forty to ninety days. That was from Monday, 30th April, 2012, to 31st July, 2012.³²⁹

This ninety days period was again extended by a further one and a half months period, from 31st July, 2012, to 17th September, 2012, for the same reasons of public demands and concerns for more time to study and comment on the two documents. Therefore, the Community Consultative process lasted for over four (4) months, from 30th April, 2012, which was the date of the launch of the first draft Constitution and Report, to 17th September, 2012, when the Community Consultative Process was officially closed by the TCDZC.³³⁰ At the time of writing, the TCDZC was still compiling the total statistics regarding the total number of comments and recommendations received through this process.³³¹

5.5 SUBMISSION OF COMMENTS BY MEMBERS OF THE PUBLIC

The Guidelines made provision for any person to make comments on the first draft Constitution as follows:³³²

³²⁶TCDZC, *Constitution Consultative Guidelines*, Guideline 8.

³²⁷Source: Secretariat of the Technical Committee Drafting the Zambian Constitution, New Government Complex, Lusaka.

³²⁸Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³²⁹Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³³⁰Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³³¹Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³³²TCDZC, *Constitution Consultative Guidelines*, Guidelines 21 (1) (a) (b) (c).

- 1) (a) In writing, addressed to the Secretary or by depositing the comments in a comments box placed at the offices of the Technical Committee or a National Assembly Constituency office or District Commissioners' office;(b) in a form set out in Annex 4 of the Constitution Consultative Process Guidelines, 2012, which form was to be deposited in a comments box located at a National Assembly Constituency office or District Commissioner's office; or (c) electronically through the Technical Committee's website, face book page or twitter page.
- 2) A district facilitator shall compile and analyse, the comments deposited in the comments box referred to in paragraph (1), and transmit, in a template set out in Annex 5, the comments, to a district consultative forum for consideration.
- 3) The Secretariat of the Technical Committee shall ensure that comments addressed to the Secretary or made under paragraph 1(c) are compiled, analysed and transmitted to the National and Sector Groups Convention for consideration.

The submission of comments by members of the public as provided under Guideline 21 (1) (a) (b) (c) above, together with the Community Consultative Forums, constituted the informal consultative process in the TCDZC's Constitution consultative process. These processes were the initial stages in the TCDZC's Constitution consultative process in which individuals and groups of individuals made comments on the provisions of the first draft Constitution and Report.

In terms of the manner in which comments made through this forum were handled, the comments made under Guideline 21 (1) (a) and (b), were compiled and analysed by a District Facilitator within each respective district where they were received, and then transmitted to respective District Consultative forums where the comments were discussed by these formal gatherings.³³³ The submissions or comments received by the TCDZC through its website, face book page or twitter page were compiled, analysed and transmitted by the Secretariat of the TCDZC to the National and Sector Groups Convention for consideration.³³⁴ In all, the period of submitting comments on the first draft Constitution and Report through this channel, lasted for four (4) and a half months, from 30th April, 2012, to 17th September, 2012. With regard to the total number of comments and recommendations submitted through this channel, the TCDZC was at the time of writing still compiling these statistics.

³³³Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³³⁴Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

5.6 DISTRICT CONSULTATIVE FORUMS

According to the TCDZC, District Consultative Forums were held in eighty two (82) districts across the country, with the exception of the newly created districts. The District Consultative forums were held on a three – day basis.³³⁵ The first round of three(3) days District Consultative forums were successfully held in all districts of Central and North – Western Provinces from Monday, 17th to Thursday, 20th September, 2012.³³⁶ The second round of three(3) days District Consultative forums comprising Lusaka, Copperbelt, Eastern and Southern Provinces took place within the period starting from Wednesday, 3rd to Friday, 12th October, 2012.³³⁷ While the third and final round of the three (3) days District Consultative forums comprising Luapula, Muchinga, Northern and Western Provinces started on Monday, 29th October, 2012, and ended on 3rd November, 2012.³³⁸ These forums performed their functions as per the Guidelines, which functions were:³³⁹

examining, and deliberating on the clauses of the First draft Constitution; considering the comments and recommendations from the community consultative forums; scrutinising, commenting, and making recommendations on the First draft Constitution; submitting a report with comments and recommendations to the provincial convention for consideration and final adoption as part of the province’s Validation Report;³⁴⁰ and electing three persons, excluding the chairperson, that represented each district consultative forum at a provincial convention.

In terms of nomination and appointment of delegates to these forums, this was as per the Guidelines as put above, and the composition of the delegates were as per the Guidelines and this was as follows:³⁴¹ District Commissioner; Heads of all government departments within the District; two councillors from within the District; two representatives of the judiciary within the District; members of Parliament in the District; two representatives of each registered political party within the District; two representatives of each religious umbrella body present in the

³³⁵“Public Announcements,” Technical Committee on Drafting the Zambian Constitution.

³³⁶“Public Announcements,” Technical Committee on Drafting the Zambian Constitution.

³³⁷“Public Announcements” Technical Committee on Drafting the Zambian Constitution.

³³⁸“Public Announcements,” Technical Committee on Drafting the Zambian Constitution.

³³⁹TCDZC, *Constitution Consultative Guidelines*, Guideline 16.

³⁴⁰The Term ‘*Validation*’ under the interpretation part of the Constitution Consultative Process Guidelines, 2012, means ‘scrutinising and commenting on the draft Constitution.’ Therefore, ‘Validation Report’ herein retains accordingly, that same meaning.

³⁴¹Source: Secretariat of the Technical Committee Drafting the Zambian Constitution; Guideline 11 (1).

District; one representative from each umbrella body of trade unions present in the District; two representatives of the Zambia Federation of Employers present in the District; two representatives of the District Chamber of Commerce; two representatives of the District business Association; two student representatives from tertiary institutions within the District; two persons representing the youth of the District.

The other delegates were: two representatives of women's groups in the District; one representative from each thematic non – governmental organisation present in the District; one representative from each association of persons with disabilities present in the District; two representatives of the District agriculture association; two representatives of senior citizens present in the District; two former freedom fighters resident in the District; two representatives of pensioners within the District; the Mayor or Council Chairperson of the District Council; four persons of standing committees of local authorities within the District; two representatives of the cultural and arts association within the District; two representatives of the media present in the District; two representatives of Traditional Healers Association of Zambia present in the District; two representatives of marketeers within the District; and two children between the ages of fourteen and eighteen years resident in the District.

According to the TCDZC, the manner of carrying out the functions of a District Consultative forum was such that, upon assembling, the delegates converged into a plenary session for orientation on the Guidelines, and other pertinent issues such as procedures to be followed etc. After the plenary sessions, the delegates divided into thematic groups as per the Guidelines.³⁴² Following the division of delegates into thematic groups, it followed that each thematic group then: examined, and deliberated on the clauses of the First draft Constitution relating to its thematic area; considered the comments and recommendations from the Community Consultative forums relating to the respective thematic areas; and finally, each thematic group then commented and made recommendations on the first draft Constitution relating to its

³⁴²This was as provided by Guideline 17 that provided for the establishment of District Consultative Forums thematic groups whose functions were to: Comment on, and discuss the thematic area for that group; consider the comments and recommendations from the community consultative forum relating to the thematic area; and consider any submission relating to the thematic area for that group.

thematic areas. The recommendations adopted by each thematic group were adopted by the thematic group following debates and deliberations and the adoption was by way of consensus in some instances or by way of voting through an open or secret vote on a simple majority basis.³⁴³

However, the recommendations adopted by each thematic group did not become binding until after being subjected to further debate and deliberation, as well as adoption by the plenary sessions. It followed that some recommendations as made by a thematic group were either accepted, rejected, or amended before being adopted by the plenary session. Where recommendations were amended, justification for the amendment was given. Adoption by the plenary sessions of these recommendations was by way of consensus or through open or secret vote on a simple majority basis.

Finally, the comments and recommendations as adopted by the plenary sessions were then consolidated, and confirmation given by the plenary sessions of the consolidated list of the recommendations adopted, including the justification given for their adoption. The recommendations were then submitted as per the Guidelines, by a District Facilitator to a provincial centre and the Secretariat of the TCDZC as a District Consultative Forum's recommendations.³⁴⁴ All in all, eighty two (82) district consultative forums were held across the country. These District Consultative Forums were conducted over a period from 17th September, 2012, to 3rd November, 2012. At the time of writing, the TCDZC was still compiling the statistics regarding the total number of delegates that participated in all the eighty two (82) District Consultative Forums, as well as the total number of recommendations received from these forums.

³⁴³*TCDZC, Constitution Consultative Guidelines*, Guideline 20, made provision for a district consultative forum to regulate its own procedure, and it is from this provision that district consultative forums regulated their procedures regarding the manner of adopting recommendations.

³⁴⁴*TCDZC, Constitution Consultative Guidelines*, Guideline 19.

5.7 PROVINCIAL CONVENTIONS

The Provincial Conventions were held in all the ten (10) provincial headquarters of Zambia. These conventions were held on a six (6) days basis.³⁴⁵ The first round of six (6) days Provincial Constitution Conventions comprising Central, Copperbelt and North – Western Provinces took place in Kabwe, Kitwe, and Solwezi, respectively, from Monday, 3rd to Saturday, 8th December, 2012.³⁴⁶ The second round of six (6) days Provincial Constitution Conventions comprising Northern, Luapula, Muchinga, and Western Provinces took place in Kasama, Mansa, Mpika and Mongu, respectively, from Monday, 14th to Saturday, 19th January, 2013.³⁴⁷ The third and final round of six (6) days Provincial Constitution Conventions comprising Lusaka, Eastern, and Southern Provinces took place from Monday, 28th January, to Saturday, 2nd February, 2013, in Lusaka, Chipata and Livingstone, respectively.³⁴⁸

According to the TCDZC, these forums performed their functions as per the Guidelines, which functions were:³⁴⁹

examining, and deliberating on the clauses of the first draft Constitution; considering the report of the Technical Committee; considering the comments and recommendations from the district consultative forums; scrutinising, making comments and recommendations on the first draft Constitution; submitting a Province’s Validation Report with comments and recommendations to the Secretariat of the Technical Committee for consideration and onward transmission to the National and Sector Groups Conventions, by the Technical Committee; and electing four persons, excluding the Chairperson, that represented the Province at the National and Sector Groups Convention.

According to the TCDZC, nomination and appointment of delegates to the Provincial Conventions was as per the Guidelines, as demonstrated above. The composition of the delegates was also as per the Guidelines and this was as follows:³⁵⁰ Provincial Permanent Secretary; four provincial heads of Government departments; district consultative forum chairpersons; district consultative forum facilitators; district consultative forum lead Rapporteurs; three delegates from each district consultative forum; three representatives of traditional leaders resident in the province; one representative from each religious mother

³⁴⁵Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁴⁶Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁴⁷Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁴⁸Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁴⁹TCDZC, *Constitution Consultative Guidelines*, Guideline 28.

³⁵⁰TCDZC, *Constitution Consultative Guidelines*, Guideline 23 (1).

body present in the province; one representative from each of the trade union mother bodies present in the province; two representatives of the Zambia Federation of Employers present in the province; one representative of each registered political party in the province; two youths who were out of school and resident in the province; two student representatives from tertiary institutions within the province; two representatives of women's groups within the province.

The composition continued as follows: one representative from each thematic non – governmental organisation present in the province; one representative from each association of persons with disabilities present in the province; one representative from each professional association present in the province; six representatives of the private sector resident in the province; two representatives of senior citizens present in the province; two representatives of the academia present in the province; two representatives of the Local Government Association of Zambia present in the province; two representatives of the Traditional Healers Association of Zambia present in the province; Members of Parliament for the province; one representative of freedom fighters resident in the province; and two children between the ages of fourteen and eighteen years resident in the province.

According to the TCDZC, the manner in which a Provincial Convention conducted its functions was that the process began with the assembling of the delegates into a plenary session for orientation on the Guidelines and other pertinent issues. Thereafter, the delegates split into thematic groups as provided by the Guidelines.³⁵¹ It followed that each thematic group then examined, and deliberated on the clauses of the first draft Constitution and Report relating to its thematic area. In addition to this, each thematic group also considered the comments and recommendations from the district consultative forums relating to its thematic area. Finally, each thematic group then made its comments and recommendations on the first draft Constitution and Report, taking into account the comments and recommendations from the district consultative forums relating to the thematic area.

³⁵¹TCDZC, *Constitution Consultative Guidelines*, Guideline 30 provided for the establishment of Provincial Conventions thematic groups whose functions were to: comment on, and discuss the thematic area for that group; consider the comments and recommendations from the District Consultative Forum relating to the thematic area; and consider any other submissions relating to the thematic area of that group.

The recommendations adopted by each thematic group were adopted by each thematic group after debates and deliberations and this was by way of consensus in some instances and by way of voting through open or secret ballot on the basis of simple majority in others. However, the recommendations adopted by each thematic group did not become binding until after being subjected to further debate and deliberation, as well as adoption by the plenary sessions. It followed that some recommendations as made by a thematic group were either accepted, rejected, or amended before being adopted by the plenary session. Adoption by the plenary sessions of these recommendations was by way of consensus or through open or secret vote on a simple majority basis.

Finally, the comments and recommendations as adopted by the plenary sessions were then consolidated and confirmation given by the plenary sessions, of the consolidated list of the recommendations adopted, including the justification given for their adoption. The comments and recommendations were then submitted as per the Guidelines, by a Provincial Facilitator to the Secretariat of the TCDZC as a Provincial Convention's recommendations.³⁵² These ten Provincial Conventions were held over a period from 3rd December, 2012, to 2nd February, 2013.³⁵³ At the time of writing, the TCDZC was still compiling the statistics with regard to the total number of delegates that participated in all the ten Provincial Conventions, as well as the total recommendations received through this process.

5.8 NATIONAL AND SECTOR GROUPS CONVENTIONS

The Guidelines as shown above made provision for the establishment of the National and Sector Groups Conventions. These conventions were in essence two separate conventions, that is, the Sector Groups Convention and the National Convention. The Sector Groups Convention was the first to be held, followed by the National Convention as the last one in the consultative process.

³⁵²TCDZC, *Constitution Consultative Guidelines*, Guideline 28 (e).

³⁵³"Public Announcements" Technical Committee on Drafting the Zambian Constitution.

5.8.1 The Sector Groups Convention

The Sector Groups Convention was held in Lusaka for three (3) days from Wednesday 3rd to Friday 5th April, 2013, at the Mulungushi International Conference Centre (MICC). The Convention was officially opened by the Chairperson of the TCDZC, Honourable Justice Annel Silungwe, SC. The rationale or objective of the Sector Groups Convention was to avail an opportunity to professionals and experts from various sectors, to provide their professional views and expertise from a sectoral point of view, on specific parts of the first draft Constitution and Report. The first draft Constitution was divided into ten specific parts also known as sectors, by the TCDZC, for the purposes of the Sector Groups Convention as per the Guidelines. The Sector Groups Convention was therefore designed to avail an opportunity to professionals and experts from various sectors, to provide their professional views and expertise from a sectoral point of view, on these specific parts of the first draft Constitution and Report. The Sector Groups Convention therefore, was in this regard, a specialised and distinguished gathering of professionals (technocrats) and subject experts who were grouped into ten sector groups according to their area of specialisation and expertise. The TCDZC identified these particular sector groups, as well as the relevant professionals and experts to these sector groups as per the Guidelines.

The ten (10) sector groups corresponding with the ten specific parts known as sectors into which the first draft Constitution was divided were: (i) General Principles; (ii) Human Rights – Civil and Political Rights; (iii) Human Rights – Economic, Social and Cultural Rights; (iv) Representation of the People; (v) Government Structures and Functions; (vi) Public Finance and Accountability; (vii) Public Service, Defence and National Security; (viii) Devolved Governance and Traditional Leadership; (ix) Land, Environment and Natural Resources; and (x) Constitutional Offices and Commissions.³⁵⁴ A total of about 200 delegates were drawn from

³⁵⁴Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

different sectors and organisations, for this convention, and were split into these ten sector groups.³⁵⁵

The delegates to all the ten sector groups of the Sector Groups Convention were drawn by the TCDZC from within the composition and wide spectrum of sectors provided by the Guidelines for the holding of the National and Sector Groups Convention.³⁵⁶ These included government ministries and agencies, non – governmental organisations and religious mother bodies. Others were professional associations, the private sector, trade unions, academia, political parties and individual experts.³⁵⁷ As stated above, the delegates to this convention emanating from non – governmental organisations were nominated by the sub – committee of the TCDZC, and appointed by the TCDZC. While the delegates emanating from institutions or organisations, not being non – governmental organisations, were nominated by their respective organisations or institutions, and appointed by the TCDZC. Individual delegates were appointed by the TCDZC. These delegates were placed into their respective sector groups by the TCDZC in accordance with their profession or expertise. The respective Sector Groups to which a delegate was appointed became more or less the thematic area for that particular Sector Group. According to the TCDZC, careful consideration had been taken in the identification of delegates to the Sector Groups Convention, to ensure equal representation of all sectors.³⁵⁸ In addition, a number of approaches were adopted in identifying suitably qualified persons to serve on the different sectors.³⁵⁹

In terms of the manner in which the proceedings of the Sector Groups Convention were conducted, the process began with the assembling of delegates into a plenary session just for purposes of orientation on issues such as the provisions of the Guidelines and other relevant pertinent issues. This was done to ensure that the groups were properly guided and that they

³⁵⁵Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁵⁶Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.; see also Guideline 34 (1) for the Composition of the National and Sector Groups Convention.

³⁵⁷Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁵⁸This was said by the TCDZC National Convention Coordinator Reuben Lifuka. See Charity Moonga, “Constitution – making process reaches critical stage,” *Times of Zambia*, April 1, 2013.

³⁵⁹Moonga, “Constitution – making process reaches critical stage.”

stuck to their respective tasks. Immediately after, the delegates split into their respective sector groups, which in this case can be termed as their respective thematic areas.³⁶⁰ It then followed that each sector group then began performing its functions as per the Guidelines,³⁶¹ which were: examining, and deliberating on the clauses of the first draft Constitution and Report relating to each sector group; considering the submissions from the local and international experts relating to each sector group; considering the comments and recommendations from the Provincial Conventions as well as the consolidated comments compiled by the Secretariat of the TCDZC under Guideline 21(3),³⁶² relating to each sector group; and after considering the first draft Constitution and Report, comments and recommendations from the experts and Provincial Conventions, comments and recommendations received under Guideline 21 (3), submitting a Sector Groups Convention Validation Report with comments and recommendations to the TCDZC, for input into the final draft Constitution.

It is worth noting that each sector group adopted its recommendations after debates and deliberations, and this was by consensus in some cases, and through a vote in others where consensus was not achievable. The voting was by way of open or secret vote on a simple majority basis. It is equally worth noting that each sector group's recommendations became binding as final recommendations of that particular sector group, without the recommendations having been subjected to further debates and deliberations, as well as adoption by the plenary session, as was the case at district, provincial, and national consultative forums. It followed that each sector group had to confirm the consolidated list of its adopted recommendations including the justification given for their adoption. Thereafter, all the recommendations adopted by all the ten sector groups were collected and consolidated and

³⁶⁰TCDZC, *Constitution Consultative Guidelines*, Guideline 39 of the Constitution Consultative Process provided for the establishment of Sector Groups Convention thematic groups whose functions were to: comment on, and discuss the thematic area of that group; and consider any other submissions relating to the thematic area of that group.

³⁶¹TCDZC, *Constitution Consultative Guidelines*, Guideline 38.

³⁶²TCDZC, *Constitution Consultative Guidelines*, Guideline 21(3) is the provision that provided for submission of comments on the first draft Constitution by any member of the public, in writing addressed to the Secretary of the TCDZC or by depositing comments in a comments box that was placed at the offices of the TCDZC or a National Assembly Constituency Office or District Commissioner's office; or electronically through the TCDZC's website, face book page or twitter page.

submitted to the TCDZC as the Sector Groups Convention's recommendations. The Sector Group Convention was officially closed by Deputy Chairperson of the TCDZC Dr Julius Sakala on Thursday, April 5, 2013.

5.8.2 The National Convention

The National Convention was held in Lusaka for nine (9) days from 10th to 18th April, 2013, at MICC. The National Convention marked the last stage in the Constitution consultative process. The convention was officially opened by Honourable Minister of Home Affairs, Mr Edgar Lungu, MP, in his capacity as acting President, as President Michael Sata was out of the country in China for an official visit. The Convention was attended by about five hundred (500) delegates representing (20) identified sectors of the Zambian society.³⁶³ According to the TCDZC, the National Convention performed its functions as per the Guidelines, which functions were:³⁶⁴

examining, and deliberating on, the clauses of the first draft Constitution; considering the report of the Technical Committee; scrutinising, making comments and recommendations on the first draft Constitution; considering the Province's Validation Report; considering the consolidated comments compiled by the Secretariat of the TCDZC, which comments were sent to the Secretariat by members of the public electronically through the TCDZC's website, face book page or twitter page; and submitting a National Convention Validation Report with comments and recommendations to the TCDZC, after considering the first draft Constitution and Report, comments and recommendations from the experts and Provincial Conventions, as well as comments and recommendations received under Guideline 21 (3), for input into the final draft Constitution.

According to the TCDZC, the nomination and appointment of delegates to the National Convention was as per the Guidelines as demonstrated above. The composition of the delegates to the National Convention was also as per the composition outlined by the Guidelines, and was as follows:³⁶⁵ (a) representatives of the Executive as follows: (i) ten Cabinet Ministers; (ii) Secretary to Cabinet; and (iii) Deputy Secretary to the Cabinet; (b) representatives of the Legislature as follows: (i) Chairpersons of Portfolio Committees; (ii) the Clerk of the National Assembly; and (iii) one Parliamentary Legal Counsel; (c) representatives of the Judiciary as follows: (i) two Supreme Court Judges; (ii) two High Court Judges; two Magistrates; two Local Court Magistrates; and one Chief Administrator; (d) representatives of the public

³⁶³Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁶⁴TCDZC, *Constitution Consultative Guidelines*, Guideline 38.

³⁶⁵TCDZC, *Constitution Consultative Guidelines*, Guideline 34(1).

service as follows: (i) Secretary to the Treasury; (ii) all Permanent Secretaries, except provincial Permanent Secretaries; (iii) One representative of each of the four service commissions; (iv) one representative of each of the security and defence wings; (v) Twenty representatives of statutory bodies and government departments; (vi) six representatives of constitutional offices; (vii) one representative of the Citizenship Board; (viii) One representative of the Decentralisation Secretariat; (ix) Three representatives of the Electoral Commission of Zambia; and (x) one representative of the Zambia Institute of Public Policy and Applied Research;

Others were: (e) representatives of civil society as follows: (i) Twenty representatives of non – governmental organisations; (ii) Fourteen representatives of professional bodies, specialised unions and associations; (iii) Eight representatives of media bodies and associations; (iv) Ten representatives of students’ unions; and (v) ten representatives of religious umbrella bodies; (f) representatives of academia as follows: (i) Two representatives from each public or registered private university; (ii) one representative of the National Institute of Public Administration; (iii) One representative from the Zambia Institute for Diplomacy Studies; and (iv) One representative of the Zambia Institute of Advanced Legal Education; (g) representatives of traditional leadership as follows: (i) Four representatives of the House of Chiefs; and (ii) Clerk of the House of Chiefs;

The composition further included: (h) political representatives as follows: (i) Two representatives of each registered political party; and (ii) one representative of the Zambia Centre for Inter – Party Dialogue; (i) The composition, further included: representatives of industry as follows: (i) two representatives of the Zambia Federation of Employers; (ii) Two representatives of the Chamber of Commerce; (iii) Two representatives of the Chamber of Mines; (iv) Two representatives of the Zambia Association of Manufacturers; (v) Two representatives of the Zambia Chamber of Small and Medium Business Association; (vi) Two representatives of the Bankers’ Association of Zambia; (vii) Fourteen representatives of workers unions; (viii) One representative of the Zambia Cooperative Federation; and (ix) Two representatives of the Zambia National Farmers Union; (j) representatives of provinces as

follows: (i) chairpersons of provincial conventions; (ii) Four representatives elected by each provincial convention; and (iii) One facilitator from each provincial convention;

The composition further more included: (k) representatives of Local Authorities as follows: (i) Mayor of the City of Lusaka; and (ii) Two representatives of the Local Government Association of Zambia;(i) retired public servants as follows: (i) former Speakers of the National Assembly; (ii) former Chief Justices; (iii) former retired Bank of Zambia Governors; and (vi) former retired Auditor Generals; and (m) members of the Technical Committee Drafting the Zambia Constitution but these had no voting rights.

It is worth noting that with the exception of NGOs, and disability groups, all other representatives were as per the Guidelines nominated by their respective organisations. For NGOs and disability groups, applications were invited from national level structures and the decision on final representatives was made by the sub – committee appointed by the TCDZC. It is also worth noting that delegates and organisations that participated in the Sector Groups Convention were not eligible for appointment to the National Convention, except for the elected representatives.³⁶⁶ This was done to avoid the TCDZC consulting basically the same groups that may have been represented from district, right up to the Sector Groups Convention.³⁶⁷

In terms of the manner of conducting the proceedings of the National Convention, the process began with the assembling of the delegates into a plenary session. Thereafter, the delegates split into eleven (11) thematic groups as provided by the Guidelines.³⁶⁸ It followed that each thematic group then examined, and deliberated on the clauses of the first draft Constitution and Report relating to its thematic area. In addition, each thematic group also considered: the

³⁶⁶Source: Secretariat of the Technical Committee Drafting the Zambian Constitution; the elected representatives that participated in the Sector Groups Convention as well as the National Convention were as follows: Ten (10) Chairpersons of Provincial Conventions; Ten (10) Vice – Chairpersons of Provincial Conventions; Forty (40) elected representatives from Provincial Conventions; ten (10) Facilitators from Provincial Conventions; and Forty (40) representatives of Sector Groups Convention.

³⁶⁷Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

³⁶⁸TCDZC, *Constitution Consultative Guidelines*, Guideline 39 provided for the establishment of the National Convention thematic groups whose functions were: Commenting on, and discussing the thematic areas for that group; and considering any other submissions relating to the thematic area for that group.

submissions from the experts relating to its thematic area; the comments and recommendations from the Provincial Conventions relating to the thematic area; as well as the consolidated comments compiled by the Secretariat of the TCDZC received under the stated Guideline 21(3) relating to the thematic area.

Finally, each thematic group then made its comments and recommendations on the first draft Constitution and Report relating to its thematic area, taking into account the comments and recommendations from experts, provincial conventions, as well as those received under Guideline 21(3) relating to the thematic area. The recommendations adopted by each thematic group were adopted after debates and deliberations, and this was by way of consensus in some instances and by way of voting through an open or secret vote on a simple majority basis in others. However, the recommendations as adopted by each thematic group did not become binding until after being subjected to further debate and deliberation, as well as adoption by the plenary session.

It followed that some recommendations as made by a thematic group were either accepted, rejected or amended before being adopted by the plenary session. Adoption by the plenary session of these recommendations was done by consensus in some instances and by voting secretly or openly on a simple majority basis in others. Finally, the comments and recommendations adopted by the plenary session, were then consolidated and confirmation given by the plenary session of the consolidated list of these recommendations including the justification given for their adoption. The comments and recommendations were then as per the Guidelines, submitted to the TCDZC as the National Convention recommendations, for input into the final draft Constitution.³⁶⁹

The National Convention was officially closed by Justice Deputy Minister, Honourable DR. Ngosa Simbyakula on 18th April, 2013. The TCDZC had earlier on assured the nation that it would

³⁶⁹TCDZC, *Constitution Consultative Guidelines*, Guideline 38 (g).

immediately sit to work on the final draft Constitution which would be released simultaneously to President Sata and the public on June 30, 2013.³⁷⁰

5.9 Final Draft Constitution

On 29th April, 2013, the TCDZC announced that it had on that same day started the process of drafting the final draft Constitution. The TCDZC further stated that it had split into groups to draft the final draft Constitution from the recommendations made from: the District Consultative forums, the Provincial Conventions, local and international experts, the Sector Groups Convention, and the National Convention.³⁷¹ This development was in line with the Guidelines that provide that the TCDZC should upon receipt of recommendations from the above stated constitution consultative processes, draft the final draft Constitution based on the recommendations from these consultative processes.³⁷² Further, the Guidelines provide for subjecting the final draft Constitution to a National Referendum for ratification by the people of Zambia.³⁷³ At the time of writing, the TCDZC had not yet released the final draft Constitution, as it had just begun the drafting of the same.

5.10 Criticism of the Technical Committee on Drafting the Zambian Constitution's Constitution – Making Process

The major criticism with regard to the current constitution - making process has been mainly on two aspects. The first relates to the absence of a legislative framework for the process. There is no legislation that has been enacted to guide and regulate the current constitution – making process. The process is just regulated by the Terms of Reference of the TCDZC; the Constitution

³⁷⁰During the official opening of the Sector Groups Convention on 3rd April, 2013, Chairperson of the TCDZC Honourable Justice Annel Silungwe in his official opening speech assured the delegates that the final draft Constitution will be simultaneously submitted to President Sata and the general public by June 30, 2013.

³⁷¹TCDZC begins process of drafting the final draft Constitution, 19:00 hours TV main news, Zambia National Broadcasting Corporation (ZNBC), 29th April, 2013.

³⁷²TCDZC, *Constitution Consultative Guidelines*, Guideline 41 (1) (2).

³⁷³TCDZC, *Constitution Consultative Guidelines*, Guideline 41 (3); in line with this provision, the Government through the Minister of Justice, Honourable Wynter Kabimba, SC, assured the nation that the country will hold a referendum at the end of the constitution – making process. The Minister said the format that the referendum will take will depend on the structure of the final draft Report. The Minister said this during the launch of the Report on the Study on Political Governance in Zambia at Inter – Continental Hotel in Lusaka on April 3, 2013.

Consultative process Guidelines, 2012; and Rules of Procedure adopted by the TCDZC.³⁷⁴ Secondly, criticism has been levelled against the failure by the TCDZC to meet its time frames in implementing its activities. This has resulted in delays in releasing the first draft Constitution, delays in commencing, and concluding various constitution consultative processes such as the district consultative forums, as well as the final draft Constitution.³⁷⁵

5.11 Prospects of Achieving a Legitimate, Democratic and Durable Constitution

The TCDZC's Constitution – making process has been structured in such a way that it has provided for a very broad and widespread participation by the citizens in the process. In fact, this constitution – making process is the first one of its kind in Zambia that has allowed for a very broad based and widespread citizen participation in the constitution – making process. Not even the NCC constitution – making process was as broad based and widespread in terms of citizen participation as has been the TCDZC's constitution – making process. Therefore, the PF Government should be commended for this milestone. This approach to constitution – making is in line with the modern theory to constitution – making known as *New Constitutionalism*. New Constitutionalism recognises that a legitimate Constitution is mainly achieved or attained when the constitution – making process allows for the general public to participate or social inclusion in the constitution – making process. In addition, this method was used in Kenya to craft the current Kenyan Constitution, which has been widely acknowledged by many Kenyans as being legitimate and democratic. It is hoped that even in the Zambian experience, the process will lead to the achievement of that long awaited and desired, legitimate, democratic and durable Constitution.

³⁷⁴One of the major critics has been the Zambia Episcopal Conference (ZEC) that stated that the constitution – making process needs a legal instrument that safeguards and protects its content - See Roy Mwaba, "Constitution – making process needs legal protection – ZEC" *The Post*, January 30th, 2012.

³⁷⁵For instance, according to a statement released by the Technical Committee on its website on Saturday, 17th March, 2012, the Technical Committee stated that the final draft Constitution would be ready in September, 2012. However, giving a Ministerial Policy Statement on the 2013 estimates of revenue and expenditure for the Ministry of Justice in Parliament, Justice Minister, Wynter Kabimba, SC, stated that the final draft Constitution was expected to be submitted to Government by June, 2013.

As has been stated elsewhere, the prospects of achieving a legitimate and durable Constitution this time around are therefore indeed high. This was unlike the NCC constitution – making process that was dominated mainly by politicians, MMD Government agents and supporters, rather than being dominated by citizens as demonstrated in chapter four. However, in order to achieve the desired legitimate and durable Constitution, the TCDZC must be honest, truthful, and faithful in incorporating the comments and recommendations of the Zambian people into the final draft Constitution. This will ensure that the final draft Constitution reflects the wishes and aspirations of the Zambian people. The first draft Constitution has already scored a milestone by ensuring that its provisions on contentious issues³⁷⁶ are in line with the people’s wishes as submitted to the Mung’omba Commission.

In addition, the first draft Constitution has also introduced many new subjects that have never been provided for in the Zambian Constitution,³⁷⁷ such as increased rights in the Bill of Rights and enhancement of the existing ones.³⁷⁸ The first draft Constitution also contains provisions curtailing the enormous executive powers of the President to declare States of emergencies;³⁷⁹ President’s power of restriction and detention under emergencies;³⁸⁰ President’s power to veto legislation;³⁸¹ and the President’s power to dissolve the National Assembly.³⁸² The first draft Constitution has also made provision for the establishment of a Constitutional Court,³⁸³ among others. According to the TCDZC, the above aforementioned provisions in the first draft Constitution have been retained almost as provided by the first draft Constitution, by the consultative forums from the District Consultative Forums to the National

³⁷⁶See Technical Committee Drafting the Zambian Constitution, *First Draft Constitution of the Republic of Zambia* (Lusaka: Government Printer, 30th April, 2012), Articles 99(3); 107(3); and 120 (2).

³⁷⁷See TCDZC, *First Draft Constitution of the Republic of Zambia*, and compare it with the current Zambian Constitution.

³⁷⁸TCDZC, *First Draft Constitution*, Part V.

³⁷⁹TCDZC, *First Draft Constitution*, Articles 111; 112 and 113.

³⁸⁰TCDZC, *First Draft Constitution*, Article 71.

³⁸¹TCDZC, *First Draft Constitution*, Article 130.

³⁸²TCDZC, *First Draft Constitution*, Article 152 (4)(5)(6)(7).

³⁸³TCDZC, *First Draft Constitution*, Article 162 (1)(b).

Convention.³⁸⁴ These provisions if enacted into law will greatly enhance the Zambian Constitution for the first time.

Further, in order to achieve the desired legitimate and democratic Constitution, the Government should maintain its demonstrated political will of delivering a people inspired Constitution this time around. This, the Government must do, by ensuring that it does not turn down the wishes of the Zambian people through manipulating the final draft Constitution. Furthermore, the Government should ensure that a National Referendum is eventually held. The referendum should, if necessary, include the contentious subjects that will still remain unresolved after the final draft Constitution. In addition, holding the referendum will provide that necessary legitimising effect to the new Constitution; which legitimising effect is necessary and cardinal in ensuring legitimacy of the final Constitution.

5.12 Conclusion

The Constitution – making process embarked on by the TCDZC ensured that the process provided for participation by the general public. This being the case, the prospects of achieving a legitimate, democratic and durable Constitution this time around appear high. However, a legitimate, democratic and durable Constitution will only be achieved if there is honesty, truthfulness and faithfulness on the part of the TCDZC, in the implementation of the aspirations of the people of Zambia. Another measure is that of political will by Government not to manipulate the final draft Constitution as stated above. Finally, Government should ensure that a referendum is held this time around. The next chapter will address the conclusions, research findings and recommendations of this study.

³⁸⁴Source: Secretariat of the Technical Committee Drafting the Zambian Constitution.

CHAPTER SIX

CONCLUSIONS, RESEARCH FINDINGS AND RECOMMENDATIONS

6.1 Introduction

This chapter will address the research findings, recommendations and conclusions of this study. The research findings are basically a summary of the reasons why Zambia has failed over the years to have a legitimate, democratic and durable Constitution as outlined in the research. As regards recommendations, these basically relate to what should be done in order for Zambia to have a legitimate, democratic and durable Constitution. The conclusions are mainly a summary of the research, research findings and recommendations.

6.2 RESEARCH FINDINGS

6.2.1 Constitution – Making Processes Responsible for Zambia’s Failure to Achieve a Legitimate, Democratic and Durable Constitution

It has been demonstrated in this paper that Zambia’s failure to achieve a legitimate, democratic and durable Constitution is attributable to the constitution – making processes that Zambia has employed over the years to craft its successive Constitutions. It has been demonstrated that all successive Zambian Constitutions (that is the 1964, 1973, 1991, and 1996 Constitutions) have been imposed on the citizenry. This is so in that as demonstrated, all successive Zambian Constitutions have been crafted without the citizens participating in the adoption and final ratification of provisions that have ended up finding expression in successive Constitutions, as demonstrated.

As a result of this, successive Zambian Constitutions have been imposed on the people as people’s wishes and aspirations on fundamental issues have not found expression in successive Zambian Constitutions as demonstrated. This thereby made successive Zambian Constitutions fail to be legitimate, democratic and durable. Therefore, the first research question, as to why the 1964, 1973, 1991, and 1996 Constitutions failed to be durable has been answered.

Still on the issue of Constitution – making process, it has been demonstrated that even the failure by the NCC Constitution – making process to result into enactment of a legitimate, democratic and durable Constitution is attributable to the process. This is so because it has been demonstrated that the NCC constitution – making process was believed to have been manipulated by the then MMD Government through the skewed composition of the conference as demonstrated. It has been demonstrated that the composition of the NCC consisted mainly of politicians, and government related participants as was observed by ZEC. It has been suggested that it is because of this skewed composition that may have led the NCC fail to adopt into the final draft Constitution, contentious issues in accordance with the people’s aspirations. It has been demonstrated that a legitimate, democratic and durable Constitution is mainly achieved when the process is free of suspicion of manipulation by Government.

In addition, the citizens at large must participate in the constitution – making process as well as the adoption and ratification of the final draft without any manipulation by the Government and politicians. Therefore, where the constitution – making process is suspected of being manipulated by Government, as well as being dominated by politicians and government related representatives, rather than the citizens at large, it fails to yield a Constitution that is regarded as legitimate, democratic and durable. This was the experience in Kenya as well, as demonstrated above.

Therefore, the failure by Parliament to enact the NCC final draft Constitution has been attributed to the manner contentious issues were dealt with. It has been suggested that some MPs may have been discontented by the failure of the NCC to adopt contentious issues into the final draft Constitution in keeping with the aspirations of the citizenry. This is so, as demonstrated, that a threshold of 106 MPs were required to pass the final draft into law. Yet, only 93 MPs voted in favor of it, while 20 MPs abstained from voting.

Therefore, it follows that the failure by the NCC constitution – making process to result into enactment of a legitimate, democratic and durable Constitution is yet again attributed to the

process. Therefore, the second research question as to why the NCC constitution – making process failed to result into enactment of a Constitution that was going to be legitimate, democratic and durable has been answered.

6.2.2 Widespread Participation by the People in the Constitution - Making Process inevitably leads to achievement of a Legitimate, Democratic and Durable Constitution

It has been demonstrated that a new theory in constitution – making process known as New Constitutionalism or Democratic Constitution - Making Process has evolved. This theory has been applied in many countries, and has in each and every country where it has been applied inevitably resulted into achievement of Constitutions that have been regarded as legitimate, democratic and durable by the majority of the citizens in those countries. In this study, examples have been drawn from the South African and Kenyan experiences.

It has further been demonstrated that every mode of New Constitutionalism or Democratic Constitution – Making Process must embrace the three tenets of New Constitutionalism. It has been shown that it is because of embracing these three basic tenets that New Constitutionalism leads to achievement of a legitimate, democratic and durable Constitution. These three basic tenets of New Constitutionalism are: (i) widespread participation by the people in the constitution – making process including adoption and ratification by the people of the final draft Constitution; (ii) personal security of the individual during the constitution – making process; and (iii) freedom of speech and assembly of the individual during the process.

It has been demonstrated that the TCDZC's constitution – making process has strived to embrace the phenomenon of New Constitution and its basic tenets. This is so in that the process provided for widespread participation by the people in the process through the wide and various constitution consultative processes as demonstrated. In addition, it was through these consultative processes that the people were afforded the opportunity to adopt provisions that should find expression into the final draft Constitution.

However, since the TCDZC's constitution – making process is still on – going, the answer on whether it will result into enactment of a legitimate, democratic and durable Constitution still remains. Therefore, the answer to whether the TCDZC's constitution – making process will result into enactment of a legitimate, democratic and durable Constitution is dependent on whether the provisions adopted by the people at the various constitution consultative processes are crafted into the final draft Constitution. In addition to this, the achievement of a legitimate, democratic and durable Constitution will be dependent on whether the people will be allowed to approve or ratify the final draft Constitution by way of a referendum before the Constitution is enacted into law. Therefore, it follows that if the referendum will be conducted, the third research question on whether the constitution – making process embarked by the TCDZC will result into enactment of a legitimate, democratic and durable Constitution has been answered.

6.2.3 Lack of Legal Frame work to Guide, Regulate and Protect Constitution – Making Processes

This study has demonstrated that Zambia's Constitutions have been crafted following constitution – making processes that have lacked guiding legislation for the processes in terms of providing the road maps as well as asserting the people's right to adopt and ratify the final draft Constitution before it is enacted into law. This is because, with the exception of the 1964 Independence Constitution, the rest of the Constitutions that Zambia has had, have been enacted using the Inquiries Act cap 41 of the laws of Zambia.

The Inquiries Act is not a legislation that is exclusively for constitution – making. However, this legislation is meant to regulate any public inquiry that the President may wish to inquire into. Besides the Inquiries Act, no other legislation exists to regulate and guide constitution – making processes in Zambia. As a result, resort has been had to the Inquiries Act.

However, the Inquiries Act has had its share of problems with regard to constitution – making processes. In fact, it has been demonstrated that it is actually because of the use of the Inquiries Act that Zambia has failed to achieve a legitimate, democratic and durable

Constitution. One of the major problems of the Act has to do with it giving wide discretionary powers to the President to accept, reject or modify constitutional proposals submitted by the people to a constitutional review commission as demonstrated above. By so doing, the people's right to adopt and ratify provisions of the final draft constitutions has always been usurped by the President and his Cabinet as demonstrated above. This situation has resulted in failing to have the people's aspirations on fundamental issues expressed in successive Constitutions and thereby making successive Constitutions to be imposed on the people.

6.3 RECOMMENDATIONS

6.3.1 Recommendations Relating to the Current Constitution – Making Process

As regard the current constitution – making process, the prospects of achieving a legitimate, democratic and durable Constitution appear high as demonstrated above. However, to achieve a legitimate, democratic, and durable Constitution, it is recommended that the TCDZC must incorporate the recommendations of the majority of the citizenry into the final draft Constitution. This will ensure that the final draft Constitution reflects the wishes and aspirations of the majority citizenry. In addition to this, the Government should ensure that it does not manipulate the final draft Constitution being formulated by the TCDZC. Furthermore, the Government should ensure that a National Referendum is conducted. The referendum will give the citizenry the opportunity to approve the final draft Constitution. Approval of the final draft Constitution by the citizenry through a national referendum will ensure legitimacy of the final draft Constitution. Finally, Parliament should not fail to enact the final draft Constitution into law if the same will be popularly approved.

6.3.2 Future Constitution – Making Processes

As regards future constitution – making processes, it is recommended that the Constitution to be enacted should expressly vest, constituent authority, in the people. That is, the Constitution should provide that whenever need for a complete review of the Constitution arises, the people themselves are the ones to be vested with power to adopt, and approve the final draft

Constitution through a national referendum. The TCDZC's first draft Constitution contains a provision to this effect,³⁸⁵ though the current Zambian Constitution has no enforceable provision to this effect. A Constitutional provision to this effect will effectively put to an end the adoption of future Constitutions through Government White Papers.

In addition, a provision to this effect will effectively make the holding of a national referendum an inevitable exercise, each time a complete review of the Constitution is necessary. Vesting constituent authority in the people seems to be one sure way of ensuring formulation of a legitimate, democratic, and durable Constitution. Attainment of a legitimate, democratic, and durable Constitution, when constituent authority vests in the people seems to be guaranteed even in the absence of political will on the part of government to deliver a legitimate, democratic, and durable Constitution.

As demonstrated in this study, the history of constitution – making in Zambia has shown that previous Governments have lacked political will to deliver a legitimate, democratic, and durable Constitution. It has also been shown how the people's wishes and aspirations on fundamental issues submitted to previous Constitution Review Commissions were always overturned by Government through White Papers. It is because of this past experience that it is recommended that the power to adopt, and approve the final draft Constitution through a national referendum should be vested in the people, through an enforceable constitutional provision.

6.3.3 LEGISLATIVE FRAMEWORK

In addition, it is recommended that the Constitution to be enacted should require the enactment of a legislative framework for future constitution – making processes.³⁸⁶ The legislative framework will regulate and guide future constitution – making processes. This way,

³⁸⁵Technical Committee Drafting the Zambian Constitution, *First Draft Constitution of the Republic of Zambia* (Lusaka: Government Printer, 30th April, 2012), Article 5 and Part XX.

³⁸⁶Enactment of a legislative framework will effectively put to an end the use of the Inquiries Act to initiate constitution review as has been the case in the past as shown above. As shown above, the use of the Inquiries Act to review Constitutions in Zambia has been the major cause of the constant constitutional instability the country has faced.

the road maps of future constitution – making processes would be clear and certain. The current constitution – making process as stated above, lacks a legal framework to regulate and guide the process. As a result of this, the process has been vehemently criticised,³⁸⁷ as demonstrated above. In the current constitution – making process, the people’s hope of achieving a legitimate, democratic and durable Constitution is dependent on the PF Government’s political will to deliver a legitimate Constitution.

Among some of the key objectives of the legislative framework should be providing for the establishment of a Constitution Review Commission whenever need for complete review of the Constitution arises. The legislation should provide for nomination by the President of the members of a Constitution Review Commission, to be ratified by the National Assembly. This will reduce the suspicion that members of a Constitution Review Commission serve the interests of the President and his Government. The 1991 Constitution Review Commission, as shown above, was suspected by MMD of serving President Kaunda and UNIP interest. The legislation should also spell out the mandate of the Constitution Review Commission to include conducting and facilitating civic education in order to stimulate public discussion and awareness on constitutional issues. The Constitution Review Commission should be required to collect and collate the views of the people, by, *inter alia*, visiting every constituency.

The legislation should also make provision for widespread public participation, and social inclusion in the constitution – making process. It is because of lack of such legislation in the current constitution – making process, that the TCDZC has had to put the requirement of public consultations in the Constitution Consultative Process Guidelines, 2012. The legislation should also vest the power of determining the terms of reference of a Constitution Review Commission in the Commission itself. This will remove this power from the reigns of the executive, as has been the case to date, where the President under the Inquiries Act, determines the terms of reference of a Constitution Review Commission.

³⁸⁷The lack of a legislation to regulate and guide the current constitution – making process has seen the Oasis Forum propose to sponsor a Private Member’s Bill in Parliament. According to the Forum, the Bill is intended to protect the content of the final draft Constitution currently being crafted by the TCDZC. See: Post Correspondent, “There is no need for a Private Member’s Bill, says Kabimba,” *The Post*, June 10th, 2013.

6.3.4 FINAL ENACTMENT

It is recommended that the new Constitution should provide for the enactment into law by Parliament of a popularly adopted and ratified draft Constitution, by one third of the members of the National Assembly. This will ensure that Parliament does not frustrate the people's wishes to have a popularly adopted and ratified draft Constitution become law. The current Constitution provides that a draft Constitution can only be enacted into law by a two thirds majority of all the members of the National Assembly.³⁸⁸ A great deal of emphasis should be placed on having a greater majority of the citizenry approve the final draft Constitution through a national referendum, by for instance, not less than fifty percent of all the eligible voters. This is where the emphasis should be laid, rather than on a two thirds Parliamentary majority.

Finally, it is hoped that the country will this time around, achieve a legitimate, democratic, and durable Constitution. The country has over the years failed to achieve such a Constitution, due to the absence of full participation by the citizenry, especially at the adoption and approval level. Given that the current constitution – making process allowed for full participation by the majority of the citizenry, it is hoped that the resultant Constitution will be a legitimate, democratic and durable one. It is further hoped that mechanisms will be put in place as recommended above, which will ensure the crafting of legitimate and democratic Constitutions in future.

6.4 CONCLUSIONS

It has been demonstrated that Zambia's failure to craft a legitimate, democratic, and durable Constitution to date is attributable to the constitution – making processes that Zambia has employed to craft successive Constitutions. These Constitution – making processes, have not

³⁸⁸See Article 79(1) (2) of the Constitution of Zambia Act No. 18 of 1996.

previously allowed widespread participation by the citizens in the constitution – making processes.

The participation of the citizens has always been limited to submitting proposals to Constitution Review Commissions. The important role of adopting and approving the final draft Constitution was always left to the executive. That is, the President and Cabinet, through Government White Papers, followed by enactment by Parliament. As a result, the wishes and aspirations of the majority of the citizens on fundamental issues submitted to successive Constitutional Review Commissions, have not found expression in the Constitutions. As a result, successive Zambian Constitutions have been imposed on the citizenry.

It has been demonstrated, that the formulation of the 1973, 1991, and 1996, Constitutions was done with limited public participation. The 1964 Independence Constitution was drafted without the involvement of the citizenry. This was so because the 1964 Independence Constitution was prepared in London at a Constitution Conference that was attended only by politicians. Therefore, it can be safely stated that imposing of successive Constitutions on the citizenry, has been the cause of the constant constitutional instability the country has experienced. This is because these Constitutions imposed on the citizenry have lacked legitimacy, and moral authority from the citizenry. It has also been demonstrated that a legitimate and democratic Constitution can only be attained if the Constitution reflects the wishes and aspirations of the majority of the citizens. This in turn can only be achieved if the citizenry is provided with a platform for participation in the Constitution - making process, including of course, the adoption and approval of the Constitution.

Constituent authority or the power to adopt and approve the Constitution vests in the citizens. Even *New Constitutionalism or Democratic Constitution Making*, recognises this concept. That it is the citizens that must adopt and approve the final Constitution. Therefore, in conclusion, it can be said that the root cause of constitutional instability in Zambia has been identified to be the manner or mode of constitution - making employed in the past. Past constitution – making

processes limited the people's participation, and more importantly did not allow for the citizenry to adopt and approve the final Constitution.

This resulted in successive Constitutions being imposed on the citizenry. As a result, these successive Constitutions lacked legitimacy and moral authority from the citizenry. Hence failed to be durable. It is for this reason that in recent constitution – making processes, as demonstrated in this study, there has been great deal of emphasis laid on participation by the public, in order to secure a legitimate, democratic, and durable Constitution.

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