



Institute for Security Studies

SITUATION REPORT

ZAMBIA'S CONSTITUTION- MAKING PROCESS

Addressing the impasse
and future challenges

Zambia's constitution-making exercise initiated in 2011 is at a critical crossroads because of ambiguities over the modes of validating the draft document, and eventually adopting and enacting the final constitution. Calls from civil society organisations and opposition political parties for the government to establish dialogue mechanisms on the future of the process have gone unheeded. Concerns that the government will eventually unilaterally endorse and adopt a contentious constitution are rife. Adopting such a constitution is expected to have dire implications for the country's security and political stability, particularly in the context of the next general elections in 2016. This situation report focuses on the challenges of Zambia's constitution-making exercise and recommends how the process can be managed to enhance its popular legitimacy while contributing towards political stability.

Zambia has faced a constitution-making crisis since 2011, which is likely to remain protracted in 2014. At the time of writing, it remained uncertain whether the crisis would end by 31 December 2013, which is the farthest deferral so far given by the Technical Committee on Drafting the Zambian Constitution (TCDZC) for releasing the final draft document to the public.¹ The TCDZC, which was appointed by President Michael Sata in November 2011 to draft the new Zambian Constitution, has already missed several deadlines for completing its work.²

Renewed uncertainty currently exists over the process of handing over and validating the draft constitution following an order by the government on 8 November 2013 that the TCDZC only sign and print ten draft copies for circulation. By implication, the handing over and validation of the constitution may not be public and is likely to be limited to government stakeholders in Zambia's ten provinces.³ A reported statement by the Zambian President on 30 November 2013 that the country 'did not need a new constitution', and that the current constitution only needed to be amended have further added fuel to these uncertainties.⁴ The constitution-making process in Zambia therefore faces an uncertain future.⁵ There are mounting concerns among Zambians that Zambia's ruling party, the Patriotic Front (PF), may be trying to influence and control the constitution-making agenda at the expense of long-term public interest.⁶

Civil society groups in Zambia have gradually expressed concerns about the modalities for validating and adopting the final draft constitution.⁷ The more recent of these was expressed in an advocacy campaign by a coalition of civil society organisations (CSOs) made up of more than 260 organisations across the country. In October 2013, these organisations released a statement that demanded 'an immediate release of the final draft to the public and the President simultaneously and a clear roadmap on the future of the process'.⁸ These calls are not new; yet, they are still not heeded. Since 2011, the coalition has consistently decried 'the lack of a legal framework to protect the process and the content of the draft constitution and its eventual adoption'.⁹ This is because the TCDZC was organised and given its mandate under the Inquiries Act,

a contentious piece of legislation in constitution-making that makes it the prerogative of the President and his cabinet to accept or reject recommendations of the TCDZC and to initiate a constitution bill that will enact the favoured final draft.¹⁰

Despite verbal assurances by government that the current process will be independent, there are no legal instruments that safeguard and protect the content of the draft constitution from political interference or manipulation.¹¹ The above objections to the handling of the constitution-making process also fuel concerns from CSOs that the process may not come to a logical conclusion by the end of the year and that the PF may swiftly adopt a contentious constitution (by enacting a constitution bill) just before Zambia's general elections in 2016.¹²

Zambia had four constitution reviews between 1972 and 2005. Three of these reviews proved to be wasted opportunities, as the executive sought to exercise tight control over the processes and no mechanism was in place to ensure popular support.¹³ This situation report therefore discusses the constitution-making process in Zambia, with a view to critically assessing its potential for promoting consensus on its legitimacy.

The report is divided into five sections. The first provides a brief historical background to Zambia's constitution-making phases. The second is a discussion on the triggers of constitution-making in Zambia since independence in 1964. In the third section, the report offers an overview of the current constitution-making process (2011 to 2013), highlighting recognised strengths and weaknesses. The fourth section surveys civil society proposals for the constitution-making exercise and their probability of influencing a different approach to the exercise by the Zambian government. The final section draws out probable challenges ahead for the process and makes recommendations on how the constitution-making exercise can enhance its popular legitimacy while contributing towards building social cohesion in Zambia.

HISTORY OF CONSTITUTION-MAKING IN ZAMBIA

The quest for a popular 'people-driven' constitution has historically been both laborious and elusive for Zambia. The country has one of the highest turnovers of constitution reviews in the Southern African Development Community (SADC) region, with six constitutional phases in its history since independence in 1964.¹⁴ These six constitutional phases mostly lacked popular support and by extension popular legitimacy, making the nexus between constitution-making and civic participation come under greater review in the ongoing review exercise from 2011 until today.¹⁵ Zambia's six constitutional reform phases are as follows:

- Phase one is the 1953 Federation of Rhodesia and Nyasaland (Constitution) Order that ushered in a Federation for ten years and gave impetus to the independence movements and Cha-cha-cha civil disobedience campaigns staged during the run-up to independence in Northern Rhodesia (1961).
- Phase two is the 1962 Constitution, whose promulgation was engineered and concluded by an unrepresentative executive.
- Phase three is the 1964 Independence Constitution, which provided for multi-party democracy with an executive president. It was designed to address the impending handover of the reins by the colonial administration but enshrined a rigid procedure for amendment, having been negotiated at the highest level with limited stakeholder involvement.
- Phase four is the 1972 Constitution, which ushered in the one-party state whose process was perniciously executive-driven. The executive-led reforms essentially removed so-called entrenched clauses in the constitution in particular, and expunged the referendum clause required for constitutional amendments that impinge on the Bill of Rights and major provision requiring parliamentary majority.
- Phase five is the 1991 Constitution, which re-introduced pluralism. The rushed process was mainly driven by the executive as a knee-jerk reaction to heavy civic demand for multi-partism.
- Phase six is the 1996 Constitution, which consolidated the country's embryonic multi-party system. This phase is acknowledged as the first genuinely broad-based consultative process, even though the executive through the cabinet intervened at the adoption of the constitution.
- The seventh phase, which is on going, started in 2005 under the administration of the then ruling Movement for Multiparty Democracy (MMD). The MMD initially presented a 14-step roadmap for constitutional reform spreading over 258 weeks, which was challenged by a CSO called the Oasis Forum, which in turn presented an alternative roadmap that spread over 71 weeks.¹⁶ This later created a deadlock in the process and the MMD failed to get majority support in parliament to pass amendments. The process was legally thwarted in March 2010 and revived by the newly ruling PF in November 2011.

More importantly, since 1964 and in subsequent constitutional review phases, Zambia's governments have all used the Inquiries Act to appoint constitutional review commissions.¹⁷ While the Inquiries Act can be used to establish commissions of inquiry on key and various matters that warrant investigation, it is a contentious piece of legislation in constitutional reviews. This is because,

in the case of constitutional review commissions, the Act empowers the president to determine the terms of reference of review commissions and have exclusive right of access to and control of commission reports.¹⁸

Under the Inquiries Act, the government reserves the power to accept or reject any or all recommendations from a constitutional review commission and make any

Civic groups wanted deliberations on the constitution by a constituent assembly or a national convention

other modifications. The accepted recommendations are published in a Government White Paper.¹⁹ Critically, the method of review and adoption of the constitution under this Act allows the government to override the wishes of the people. The approach of mandating constitutional reviews using the Inquiries Act has historically been criticised by review commissions themselves and by civil society at large for giving the sitting president a monopoly on the work of these commissions. This approach has therefore been a major source of contestation for all constitutional reviews in Zambia, including the ongoing one.²⁰

KEY TRIGGERS OF CONSTITUTION-MAKING IN ZAMBIA

In Zambia, constitution-making since independence in 1964 has been defined by a combination of democracy building, governance bolstering and regime security inclinations.²¹ For instance, the 1972 constitutional review led by the Chona Commission was largely driven by the regime's security concerns within the context of a split in the United National Independence Party (UNIP), which saw Vice President Simon Kapwepwe breaking away to form the United Progressive Party (UPP).²²

With the rising popularity of Kapwepwe and the UPP, Kenneth Kaunda, then president, pushed for a constitutional amendment to outlaw all political parties except for his UNIP, leading to the one-party regime from 1972 to 1991.²³ This process put emphasis on executive dominance over civic input and participation. Consequently, the 1972 review largely concluded a 'government-driven' self-preservation constitutional review exercise.²⁴

The one-party system was, however, challenged as the need for democratic reform became urgent. Zambia also experienced extreme economic difficulties during the late 1980s. Moreover, there was overwhelming public support for constitutional reforms that supported multi-party democracy. The view was that they would help

address economic governance and democratic deficits.²⁵ Kaunda then appointed the Mvunga Constitution Review Commission in 1990, promising a referendum on multi-party democracy. Although the government reached a compromise on the substance of the constitution with the nascent opposition, which led to a constitutional amendment that paved the way for the formation of political parties, fierce debates took place on the method of adopting the constitution.

Civic groups wanted deliberations on the constitution by a constituent assembly or a national convention.²⁶ On the other hand, the Mvunga Commission had concluded that 'there was no need for a constituent assembly since a legitimate and lawfully constituted national assembly was in place.'²⁷ The then emerging opposition, the MMD, and the labour movement rejected this view. The ruling UNIP and the MMD reached a compromise on a constitutional text at an inter-party dialogue in 1991.²⁸ The document agreed to at these talks was eventually enacted into law as the Constitution of Zambia Act, which came into force on 30 August 1991.²⁹ That constitution was viewed by political and civil society stakeholders as a transitional political arrangement, primarily geared to meet the immediate pressures of the time.

After winning the 1991 elections, the MMD initiated another constitutional review in 1993 since the 1991 constitutional order was 'transitional' and a constitutional review was among the political reforms that the MMD had promised in its election manifesto.³⁰ This exercise was also triggered by the MMD's desire to eliminate Kaunda and his vice president, senior Chief Inyambo Yeta, from contesting subsequent elections. This aim was achieved with the use of the parentage clause, which stated that presidential candidates must have both parents as Zambians by birth or descent, and a clause that barred chiefs from participating in active politics unless they relinquished their chieftaincy. These constitutional amendments in particular legally barred Kaunda from re-contesting the presidency on the grounds that his parents originated from Nyasaland (now Malawi). His efforts to challenge the decision in court failed, as he was declared stateless by the courts of law.

In 1993, President Frederick Chiluba appointed the Mwanakatwe Constitution Review Commission to review the 1991 Constitution. The Commission was also requested by the President to recommend whether the constitution should be adopted by the national assembly or by a constituent assembly, by a national referendum or by any other method.³¹ After concluding its work, the Commission submitted its recommendations to the presidency.

First among these recommendations was that the constitution be adopted through a constituent assembly and a national referendum as opposed to a parliamentary vote process.³² The Commission argued that the adoption of the constitution by the legislature 'would be risky

because parliament was dominated by one party'.³³ The concern was that the last-mentioned method would compromise the legitimacy and durability of the constitution. The Mwanakatwe Commission further made recommendations on the composition of the constituent assembly, in particular that it should include 'all members of parliament (MPs), one representative from each district in Zambia; representatives from political parties not represented in parliament; CSOs, academia, civil and professional associations; traditional rulers; women's organisations; churches and other religious organisations'.³⁴

President Chiluba's MMD government rejected most of the Commission's recommendations.³⁵ In rejecting them, the government invoked the Inquiries Act, which consequently supplanted the recommendations of the Commission on the basis that the recommendations overstepped the mandate and terms of reference of the Commission under the Act. In May 1996, the government passed the Constitution (Amendment) Act and the Constitution of Zambia (Amendment) Bill 18 of 1996, which became the supreme law of the country. The 1996 Constitution was later amended to provide for a two-term limit for the presidency. However, just before the 2001 elections, Chiluba attempted to amend the constitution to allow him to run for a third term.

Various political and civil society groups vehemently opposed the campaign, as did some senior MMD members and officials. A green ribbon advocacy campaign was established by those opposed to the third-term drive and, under pressure, the Chiluba government dissolved the cabinet and appointed a new one, which then halted the campaign for the third-term constitutional amendment. The 2001 elections were thus held under the 1996 Constitution, which many perceived to be flawed because of the manner in which it had been adopted. President Levy Mwanawasa, who succeeded Chiluba, promised to re-establish 'a government of the people' and review the 1996 Constitution.³⁶

In 2003, President Mwanawasa appointed the Mung'omba Constitution Review Commission, again using the Inquiries Act to initiate the review process. The review was an attempt to respond to wide public condemnation of the 1996 Constitution. The review process by the Mung'omba Constitution Review Commission was, however, initially fraught with technical difficulties, alleged malpractices and financial challenges that eventually delayed it.

Another challenge was the deadlock in negotiations between civic groups and government over sufficient time frames for the review process and the mechanisms for adopting the ensuing constitution. As an attempt to break the deadlock, the Mung'omba Constitution Review Commission recommended that a compromise roadmap between government and civic stakeholders be established

and that this be done in a 'constituent assembly, a constitutional conference or any other popular body that would represent the views of the people'.³⁷ One of the reasons advanced for a constituent assembly or other popular body was that parliament was not representative enough of all the various social interests in the country. Further, there was a view that the formulation of a new

A green ribbon advocacy campaign was established by those opposed to the third-term drive

constitution should be more inclusive, broad based and gender representative and should encourage the participation of citizens to give the constitution-making process legitimacy.³⁸

Following the submission of the Mung'omba Constitution Review Commission to the government in 2005, the government established the National Constitutional Conference (NCC) through the National Constitutional Conference Act, No. 17 of 2007. The NCC is described as 'a forum for the examination, debate and adoption of proposal to alter the Constitution'.³⁹ The NCC submitted its draft constitution in August 2010. The 2010 draft constitution was presented to parliament in 2011. This was in line with the provisions of the NCC Act No. 17 of 2007, which demanded that non-contentious clauses be adopted by parliament while contentious ones, such as the 50%+1, be referred to the national referendum together with the Bill of Rights.

The 50%+1 clause for electing the president relates to Clause (1) of Article 75 of the Zambian constitution, which provides that elections to the office of the president be conducted directly on the basis of a majoritarian system, where the winning candidate must receive not less than 50%+1 votes of the valid votes cast.

However, the Bill failed as new demands were advanced on the floor of the House by the opposition United Party for National Development (UPND) for it to support the Bill. Among the demands advanced was that the Constitution Bill should incorporate the 50%+1 clause and the presidential running mate clause, which provides that the vice president candidate runs on the presidential candidate's ticket in an election.⁴⁰

The MMD government refused the above demands and the move failed. More importantly, the move was contrary to the Commission's recommendations on the mode of adoption of the constitution through the national assembly, which argued that contentious issues such as the 50%+1 clause be referred to the national referendum and not a

parliamentary vote, the latter undermining the sovereign will of the people.⁴¹ It is against this background and the fact that the country was still using the widely condemned 1996 Constitution that the ruling PF resumed the constitution-making process after winning the 2011 general elections.

CURRENT CONSTITUTION-MAKING PROCESS: 2011–2013

In its 2011 party manifesto, the PF committed itself to 'establish in consultation with stakeholders, a committee of experts to review the recommendations of all previous constitutional review commissions in order to draft and present a constitution which will reflect the will and aspirations of the people for submission to a referendum and subsequent enactment only, by the national assembly'.⁴² Phase seven of Zambia's constitution-making process was (re) started on 16 November 2011 when the new President Michael Sata appointed the TCDZC with a mandate to review the recommendations of all previous constitutional review commissions, in order to 'draft and present a constitution that reflects the will and aspirations of Zambians'.⁴³

The original terms of reference (TOR) for the TCDZC were to:

- (a) Refer to the Mvunga Constitution Review Report; Review the 1991 Constitution of Zambia, the 1993 Mwanakatwe Constitution Review Commission Report and Draft Constitution, the 2005 Mung'omba Constitution Review Report and Draft Constitution, and the 2010 National Constitution Conference Report and Draft Constitution – with a view to drafting a constitution that:
 - (i) Reflects the values and aspirations of the people of Zambia
 - (ii) Sets a constitutional democracy and a culture of constitutionalism for Zambia.
 - (b) Identify key issues to be presented to the provincial constitutional committees in all centres and facilitate debate of the key issues in all ten provincial centres and administratively support the ratification of the draft national constitution by the provincial constitution conventions; and provide for any other constitutional or democratic issues that will promote and enhance democratic good governance.
 - (c) Draft a national constitution that ensures the separation of powers among the various state organs, including the executive, legislature and the judiciary so as to create checks and balances between them and to ensure accountability; and ensure that excessive and unfettered powers are not given to any particular state organ, commission or constitutional functionary.⁴⁴
- (i) Ensure that the national interest prevails over regional or sectoral interests;
 - (ii) Be accountable to the people of Zambia and recognise the importance of confidence building, engendering trust and developing a national consensus for the ratification process;
 - (iii) Not deny or interfere with anyone's right to attend the provincial constitution conventions and the right to personal liberty, freedoms of expression and conscience during the deliberations;
 - (iv) Ensure that the outcome of the drafting process faithfully reflects the wishes of the people of Zambia and will bring about a national constitution that will stand the test of time, exalt and effectively entrench and promote good governance, the rule of law and promote legal and institutional protection of fundamental human rights and freedoms;⁴⁵
 - (v) Draft the Constitution of Zambia Bill, which shall set a commencement date for the new constitution, deal with 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.⁴⁶

According to the TCDZC's 2012 report, the scope of the above TORs is 'sufficiently broad to facilitate a people driven and reasonably inclusive' constitution-making process.⁴⁷ Notably also in its report is an assertion that the TCDZC would be guided by best international practices and international conventions on human rights in its work. However, the TCDZC has never made these international standards public, nor has it dovetailed existing international approaches to constitution-making and their applicability for Zambia's ongoing constitution-making phase.⁴⁸ Indeed, best international practices in constitution-making recognise specific principles and considerations of participatory constitution-making that embrace, among others, a structure and blueprint for the process, including how consensus will be built and how disputes will be resolved; mechanisms for the validation of the draft constitution; and lastly how it will be adopted, including what the timelines will be.⁴⁹

Main challenges to the process

The guarantee by the PF that the entire process would be concluded within a 90-day period from the initial appointment of the TCDZC on 16 November 2011 was never fulfilled. Rather, the TCDZC's work started in April 2012 and included hosting forums in all Zambia's 72 districts; provincial conventions, which were held between November 2012 and February 2013; and a National Constitution Convention (NCC), held at the end of April 2013.⁵⁰ Following the completion of the NCC, however, it

The principles that were to be followed in the process include to:

emerged that no clear roadmap had been drawn up for the process after the TCDZC completed its work by the initial 30 June 2013 deadline, in spite of appeals from civic groups to make the process clear.⁵¹

Calls from civil society groups for a roadmap to the post-April 2013 NCC process and on the question of a national referendum to adopt the constitution have since mostly been ignored by government. Significantly, the PF election manifesto had stated that the constitution would be submitted to a referendum and enacted subsequently only by the national assembly. What this essentially means is that the enactment of the constitution would be by virtue of a bill, as is the legal norm. But the process of validating the draft to be sent for parliamentary enactment and the modes of how the constitution would be submitted to a referendum are ambiguous in the PF manifesto. In its preliminary action plan, the TCDZC had scheduled a referendum for June 2012, anticipating that its work would be completed by October 2012 after the enactment of Constitution Bill 2012 by parliament.

On the question of a referendum, additional concerns exist that Zambia's institutional and financial readiness for a referendum is lacking, and that the format of the referendum and the methods of appointment of a referendum commission as provided in the Referendum Act remain undefined.⁵² The above ambiguities also raise concerns that the PF majority in parliament, with about 77 out of 158 seats (inclusive of eight nominated parliamentarians), will eventually be used to endorse and enact a constitution favourable to the executive. If this happens, elements of the draft that are not favourable to the ruling party could be jettisoned. Indeed, the PF in parliament does retain the power to alter whatever has already been agreed to during the 2013 NCC because of its majority.

Moreover, as with previous review commissions, the TCDZC was also established under the provisions of the Inquiries Act, which give the president the final say over the draft. However, when the government appointed the TCDZC, it denied that it used the Inquiries Act but rather Article 44(g) of the constitution, which states that '...the president shall have power subject to this constitution to appoint such persons as are required by this constitution or any other law to be appointed by him.' Later, the Minister of Justice admitted in parliament that the President had used the Inquiries Act to appoint the TCDZC, hence the order for the TCDZC to submit the final document to the presidency before the general public.⁵³

Other serious legal and procedural challenges include:

1. *The question of the legal framework:* The government through the representation of the Minister of Justice has rejected the need for a legal framework to protect constitution-making from political manipulation and interference, arguing that the American, Indian and

South African constitutions, which Zambia seeks to emulate, did not have legal frameworks.

2. *Constitutionality of the TOR:* The fact that the TCDZC also seemingly has been given the mandate to draft the Constitution of Zambia Bill to then be enacted by parliament as the revised and final constitution of Zambia is in contradiction to Article 79 (3) of the current constitution. This section requires that a national referendum be instituted once part III of the constitution, which provides for legal limitations on the exercise and protection of rights, is altered or tampered with.
3. *Potential overriding of the process under the Inquiries Act:* As in previous constitution-making exercises, the Act gives the president the monopoly over the process. Article 44 (6) of the current constitution further provides for the president's power to override the national assembly and this would apply to the adoption and enactment of the constitution.
4. *The question of contrived participation:* Participation has been limited to the public consultations spearheaded by the government at drafting stages only. Public debate and dialogue following the draft exercise have been exclusively at the behest of the TCDZC and the mechanisms for the draft's endorsement by the public are lacking. Attempts by civil society to engage citizens in public debate on the constitution have been met with stern warning of arrests from the Minister of Justice, who has cautioned against any person(s) engaged in such an activity without express permission from the TCDZC. This additionally disenfranchises the public and its ability to prepare for the eventualities of the process.
5. *Lack of transparency in the TCDZC budget and in the overall constitution-making process:*⁵⁴ Budgetary transparency on the constitution-making process from 2011 has been poor. The recently released 2014 estimate from the Electoral Commission of Zambia is, however, useful for making projections on the viability of constitutional and referendum-related processes between 2014 and the general elections in 2016. The concern is that the 2014 budget is insufficient for referendum processes and the ensuing elections in 2016 may be given priority.

CIVIL SOCIETY INVOLVEMENT AND RESPONSES

Civil society participation from the initiation of the constitution-making exercise in 2011 was for the most part undertaken in good faith.⁵⁵ The Constitution Consultative Process Guidelines (2013) and The Terms of Reference for the Technical Committee Principles (2011) were considered adequate by most civil society stakeholders in providing a framework that groups can use to work toward consensus, influence the contents of the constitution throughout the

process, improve public ownership of the constitution, and lay the foundations for democratic and participatory governance and a culture that respects the rule of law.

However, despite the good faith from civic groups, the very fact that the TCDZC was mandated under the Inquiries Act was inevitably going to cause friction between CSOs and the government on its handling of the exercise. It was

The consortium also proposed that a ‘consensus roadmap’ be developed between the TCDZC and the NCC stakeholders as the best mechanism to undergird the process

for this reason that a consortium of over 200 CSOs came up with the Basic Minimum Principles for the Constitution in May 2013. These principles can be interpreted as a baseline on which CSOs will either accept or reject the final contents of the draft constitution.

Under these principles, the consortium called for the immediate enactment of a law to protect the process and contents of the constitution and called for clarity on the adoption and enactment process, with a clearly defined timeframe for adopting the constitution through a national referendum in accordance with Zambia’s Referendum Act.⁵⁶ The consortium also proposed that a ‘consensus roadmap’ be developed between the TCDZC and the NCC stakeholders as the best mechanism to undergird the process. The consortium recommended that the referendum be held no more than 12 months after the TCDZC’s report on the final constitution was handed to the presidency and the public to allow for legitimate national consensus and procedural credibility. In this regard, it underlined that the government should subsequently:

- Appoint commissioners to the Referendum Commission, which is a permanent body established by the (Referendum) Act and that will prepare the country for a national constitutional referendum
- Set the date for the constitutional referendum and budget for it accordingly in the 2014 budget
- Ensure that the referendum is held on one question only regarding the whole constitution and not on parts of the constitution
- Explore as an alternative to the above, in particular, the possibility of amending the Referendum Act (see above) in the next sitting of the national assembly from September 2013 to ensure that the role of organising

and holding a referendum is vested in the country’s electoral commission

The consortium further recommended that alterations or amendments to the constitution should require special procedures that involved special majorities, particularly a referendum for the Bill of Rights and a 2/3 or 50%+1 clause for other constitutional changes. On the enactment of the constitution, the consortium held that the Constitutional Bill be presented to the national assembly and that a Constitution Bill be enacted by parliament without any alterations or changes to the final version.⁵⁷ The other recommendations focused on the substance of the draft document, in particular that the government should uphold the protection of and respect for all social, cultural, economic, political and civil rights; the provision for equality before the law and the rule of law; a guarantee of the separation of powers; commitment to the decentralisation and devolution of power; and assurance of the establishment of independent and impartial constitutional offices.⁵⁸

The Oasis Forum also drafted what was called a Private Member’s Bill in June 2013, which was to be presented to parliament to protect the contents and process of the constitution-making process.⁵⁹ While usually a private member’s bill is a law introduced into a legislature by a legislator who is not acting on behalf of the executive branch, the aim of the move by the Oasis Forum was to compel the opposition parties in parliament to sponsor a law that protected future constitution-making.

At its conference, the Forum also agreed that there was no legal framework and/or a clear roadmap for the adoption of the new constitution and that an urgent need existed to guarantee that the content of the final draft constitution met the basic minimum requirements of an ideal constitution. The Oasis Forum resolved that ‘Government immediately appoint a referendum commission and provide in the 2014 national budget funds for the national referendum; the entire final Constitution should be subjected to a referendum on the basis of a “yes” or a “no” vote; that once the draft Constitution has been subjected to a vote and accepted by the people during the referendum, it be enacted by parliament without any alterations’.⁶⁰ The government has since rejected the proposals presented in the Private Member’s Bill, labelling it unnecessary and an additional controversy to an ‘otherwise smooth and advanced stage’.⁶¹

At the time of writing (November 2013), a civil society consortium had formed an alliance to define a coordinated advocacy strategy for the successful promotion of the above principles and demands. The consortium had initially organised a public gathering on 4 October 2013 and sent a letter to the TCDZC demanding that the TCDZC still outline a clear roadmap and legal framework for the

process; release the final draft constitution immediately and simultaneously to the president and the public; that the consortium's May 2013 'Basic Minimums' are adhered to in the final draft; and that the government immediately constitute a referendum commission to oversee the remainder of the country's constitution-making process.⁶² Thus far, the TCDZC has merely acknowledged receipt of the letters and has rhetorically committed itself to doing its best in crafting a durable constitution.⁶³

CHALLENGES AHEAD

Developments since 2011 on the constitution-making exercise increasingly signal a 'government-driven' rather than a people-driven process. As a consequence, many Zambians may not fully embrace the ensuing constitution and civic groups and opposition parties may deem the process illegitimate and therefore incomplete at worst. Therefore the debate around what should be contained in the constitution and how to adopt it should be accommodated by government, which additionally helps to address the following probable challenges to the process:

- *Mediating government/TCDZC – civil society relations and communication:* Discussions have been abstruse, with the government being evasive about the future handling of the process on the one hand and civil society advocating for seemingly futile legal options to alter the status quo on the other.
- *Handing over of the draft to the presidency and the public:* Whether these submissions are simultaneous is unclear following the recent standoff between the TCDZC and the Ministry of Justice about the order that the TCDZC only print ten copies for handover to the Appointing Authority, the President. The time for public scrutiny and comments on the draft constitution before executive approval is paramount to the legitimacy of the process. However, the Ministry of Justice has additionally warned that any defiance of this directive will be considered a direct defiance of the orders of the President. This matter remains unresolved.
- *Validation of the text of the final draft by the public:* The methods and processes of ratifying the constitutional text by the public are yet to be elaborated.
- *Consensus on the mode of adoption:* The variance between recommendations from CSOs and government about constitutional adoption measures needs to be resolved. In particular, the issue of the referendum and how it will be convened needs to be resolved. This could be given greater priority.
- *Dispute resolution and the future role of the TCDZC:* If political parties or the general public are divided on some issues, the mechanisms for resolving them are not clear. In addition, questions on the future role of

the TCDZC are pending. Whether the TCDZC may be dissolved after submitting its final draft and its role in the event of conflict over the draft document's contents are unclear.

CONCLUSION AND RECOMMENDATIONS

Zambia still lacks a credible constitution-making process that is buttressed by the ideas of popular consensus and nation building. The current phase of constitution-making largely resembles past elite-driven processes, where the ruling executive had a monopoly over content, adoption and enactment. As such, the success of the exercise now hinges on how widely accepted the method of its validation and adoption is.

As the above analysis demonstrates, the interests of CSOs and the government have diverged remarkably on both validation and adoption and as in past processes, the impasse on these is likely to compromise national ownership of the processes – which may lead to the rejection of the final draft altogether. The literature on constitution-making suggests that open conversations between all the members of a political community are more likely to produce legitimate constitutional outcomes than when legal and constitutional elites dominate the process.⁶⁴

Therefore, it is important that on the completion of the work of the TCDZC, subsequent constitution-making processes be anchored in mechanisms that promote its popular acceptance and legitimacy. The Zambian government under the PF can additionally use the constitution-making process to promote trust through consensus building among all key stakeholders, by not strongly and rigidly invoking provisions of the Inquiries Act that preclude civic input into the process in relation to the validation of the draft constitution. By so doing, the PF-led government could address fears that it is tampering with the ongoing constitutional exercise and that reforms are essentially aimed at entrenching the PF rule, undermining human rights guarantees and essentially subordinating the legislative branches of government to its exclusive authority.⁶⁵ Consideration of the following recommendations is therefore worthwhile:

1. *Instituting a framework for constitutional dialogue between the TCDZC, government and civic groups that facilitates rather than constricts discussions on the future handling of the process:* This will minimise suspicion that the contents of the revised draft are tampered with by the PF and will promote consensus.
2. *Preparation of an action plan for the process of handing over and validation of the draft constitution:* This could clarify how the final draft constitution, the Draft Constitution of Zambia Bill, 2013, and the Final

Report of the Technical Committee will be distributed. The structure and processes of validating the draft constitution could be elaborated from this action plan.

3. *Establishing an implementation roadmap for the draft constitution:* This ought to include a roadmap to the referendum and modes of adoption of the final constitution. The above framework could be drawn up in consultation with a qualified majority from the constituent assembly/NCC. The other alternative would be to prepare a roadmap through the legislature that would give clarity on the implementation path and the issue of the referendum.

ABOUT THE AUTHOR

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NOTES

- 1 See the announcement on this by the TCDZC in Delphine Zulu, Draft ready before December 31st, *Times of Zambia*, 24 July 2013. The announcement (by the TCDZC that the constitution would be ready 'before December 2013') follows another media briefing on 20 July 2013, where the Chairperson of the Technical Committee on Drafting the Constitution Annel Silungwe confirmed that the drafting team had finished its work and that proofreading of the document was the only outstanding task. The draft constitution was yet to be made public at the time of writing (20 December 2013).
- 2 The delays and extensions of the Technical Committee's work are well captured on the website of the Technical Committee on Drafting the Zambian Constitution (TCDZC) at <http://zambianconstitution.org/home/35-press-release/104-final-draft-constitution-ready-for-printing-.html> (last accessed 18 December 2013).
- 3 See TCDZC Press Release, Technical Committee resolution on the handover of the final draft Constitution, Lusaka, Zambia, 8 November 2013.
- 4 President Sata's comments cited in the Zambian Watchdog, 'Zambia does not need new constitution – says Sata', 30 November 2013, at <http://www.zambianwatchdog.com/zambia-does-not-need-new-constitution-says-sata/> (last accessed 18 December 2013).
- 5 Author interview with Mr Heiner Naumann, Resident Director of the Friedrich-Ebert Stiftung (FES) Zambia on 15 April 2013. Mr Naumann also highlighted that the uncertainty was partly attributed to ruling party's propensity for political dominance and growing 'personalisation' of the party by the ruling executive.
- 6 See CSOs Consortium, Press Statement on the Constitution Review Process, 15 November 2013, Cresta Golf View Hotel, Lusaka, Zambia (unpublished).
- 7 These reservations were by various delegates attending the constitution-making convention which the author attended. The convention took place from 12–18 April 2013 at Mulungushi International Conference Centre, Lusaka, Zambia and the author observed most of the proceedings.
- 8 See Statement made by a consortium of CSOs at the Public Assembly on the Constitution held at the Freedom Statue, Lusaka, Zambia, 4 October 2013.
- 9 D Zulu, Another month for constitution committee, 15 June 2013, *Times of Zambia*, <http://www.times.co.zm/?p=18511> (accessed 29 August 2013).
- 10 See Constitution Review Commission, 2005, 124.
- 11 Author interview with Mary Mutupa, Governance Programme Officer at Actionaid Zambia, Mulungushi International Conference Centre, Lusaka, Zambia, 16 April 2013.
- 12 As above.
- 13 See M Chipenzi, Zambia's protracted constitution-making process: what does the future hold, unpublished paper presented at the Institute for Security Studies Seminar, 25 July 2013.
- 14 See the record of Zambia's constitutions and constitution review commissions from 1964 at the website of the National Constitution Convention of Zambia, at <http://www.ncczambia.org/draftconstitution.php> (accessed 1 August 2013).
- 15 Author interview with Dr Neo Richard Simutanyi, Executive Director of the Centre for Policy Dialogue, Lusaka, Zambia, 18 April 2013.
- 16 The Oasis Forum is a civil society consortium made up of the Council of Churches in Zambia, Law Association of Zambia, Non-Governmental Organisations Coordinating Council and the Zambia Episcopal Conference.
- 17 See Report of the National Commission on the establishment of a One-Party Participatory Democracy in Zambia (1972) (the Chona Commission); Government White Paper 1 of 1972; Report of the Mvunga Constitutional Review Commission (1991); Government White Paper 1991; Report of the Mwanakatwe Constitutional Review Commission (1995). See also the Inquiries Act, Cap 41 of the Laws of Zambia.
- 18 L M Mbao, The politics of constitution-making in Zambia: where does the constituent power lie? Draft paper presented at the African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi April 2007, 2.
- 19 As above.
- 20 See The Constitution Review Commission, *The 2005 report of the Constitution Review Commission*, Zambia, 2005, 30.
- 21 The 1964 independence constitution was a 'compromise' constitution between the colonial power Britain and the major political actors. At the time it was notably characterised by little civil society input. A strong argument for replacing the 1964 Constitutional Order was based

on removing Westminster/British laws to focus more on socialist inclinations from Eastern Europe.

- 22 L Zima, The origins and spread of one party states in Commonwealth Africa and their impact on personal liberties; a case study of the Zambian model, in J Hatchard, M Ndulo, and P Slinn (eds), *Comparative constitutionalism and good governance in the Commonwealth: an Eastern and Southern African perspective*, Cambridge: Cambridge University Press, 2004, 86.
- 23 As above, 88.
- 24 See United National Independence Party, The Constitution of the United National Independence Party, 1981, United National Independence Party, Lusaka, Zambia. 2000.
- 25 G Erdmann and N Simutanyi, *Transition in Zambia: the hybridization of the Third Republic, democratic transition and consolidation in Africa*, Konrad Adenauer Foundation, Occasional Papers, Zambia, 2003, 4-8.
- 26 See summary of the Mvunga Commission Report and the Mung'omba Constitutional Review Commission Report, as quoted in S Mwale, 'Zambia's Constitutional Review: What sort of principles and issues? Jesuit Centre for Theological Reflection (JCTR), Policy Brief, 2005.
- 27 As above.
- 28 The 'compromise' is revealed in the text of the 1991 Constitution, in particular clauses on: the removal of Article 4 of the 1973 Constitution, which restricted formation of parties to one; fundamental human rights and freedoms, which in general terms corresponded with those contained in the 1964 and 1973 constitutions; Directive Principles of State Policy and Duties of a Citizen; and an executive with wide, though greatly reduced and more circumscribed, powers.
- 29 See L M Mbao, The politics of constitution-making in Zambia: where does the constituent power lie? Draft paper presented at the African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi April 2007, 13.
- 30 Movement for Multiparty Democracy, MMD Campaign Manifesto, 1991.
- 31 Report of the Mwanakatwe Constitutional Commission, Lusaka (1995), cited in the Mung'omba Commission Report, 2005.
- 32 As above, 494.
- 33 See Mwanakatwe Report cited in Mung'omba Report, 2005, 494.
- 34 As above.
- 35 See Government White Paper on the Mwanakatwe Commission Report, 1995.
- 36 The late President Mwanawasa is quoted in M Lunkoto, Zambia: the long road to constitution-making process, *Times of Zambia*, 27 October 2007, <http://allafrica.com/stories/200710280057.html> (accessed 15 November 2013).
- 37 See Interim Report of the Mung'omba Constitutional Review Commission and Final Report, 496.
- 38 As above.
- 39 See this description on the website of the National Constitution Conference- Zambia at <http://www.ncczambia.org/aboutthenc.php> (last accessed 16 December 2013).
- 40 The running mate clause or provision is meant to give security of tenure to the office of the vice-presidency and to avoid costly presidential by-elections in the event of a sudden presidential vacancy.
- 41 See Interim Report of the Mung'omba Constitutional Review and Final Report, 2005, 496.
- 42 Patriotic Front 2011– 2016 Manifesto, 42.
- 43 Report of the Technical Committee on Drafting the Zambian Constitution, 30 April 2012.
- 44 This is also available on the website of the TCDZC, under *Terms of reference for Technical Committee on Drafting the Zambian Constitution 2011*, <http://zambianconstitution.org/terms-of-reference-.html> (accessed 2 August 2013).
- 45 Terms of Reference (a) (–h), 4.
- 46 As above, 5.
- 47 Report of the Technical Committee, 2012, 5.
- 48 Author interview with Boniface Cheembe, Executive Director of the Southern African Centre for the Constructive Resolution of Disputes (SACCORD), 18 April 2013, Lusaka, Zambia.
- 49 ³⁹ Federalization and constitution-making as an instrument of conflict resolution, *Demokratizatsiya* 12(4) (2004).
- 50 YEZI Consulting & Associates, *Political governance study in Zambia*, a study commissioned by Diakonia–Zambia, Lusaka, Zambia, March 2013, 33.
- 51 Action Aid Press Statement, New Constitution to be adopted through a national referendum, 16 April 2013, Lusaka, Zambia, (unpublished).
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- 57 See Civil Society Consortium, *Basic minimum principles of the Constitution*, May 2013.

58 As above.

59 See Oasis Forum Communiqué, May 2013, at <http://webcache.googleusercontent.com/search?q=cache:m1S6nnJz-eUJ:www.ngocc.org.zm/index.php/about-ngocc+&cd=2&hl=en&ct=clnk&gl=za> (Last accessed 6 December 2013) and *Civil society resolutions on basic minimum principles on the Constitution*, May 2013, Protea Chisamba Hotel, Lusaka, Zambia, (unpublished).

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