

**LLM (Human Rights and Democratisation in Africa) 2006**

**CONSTITUTION MAKING IN ZAMBIA: THE NEED FOR A NEW PERSPECTIVE**

Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

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**27 October 2006**

## DECLARATION

I, MBOLOLWA WAMUNYIMA, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University supervisor.

Signed:.....

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## **DEDICATION**

To my Children, Lubono, Limpo and Lushomo, for not having a mummy around for a whole year, and for whatever hardships you could have experienced as a result.

## **ACKNOWLEDGEMENT**

First and foremost, I thank God almighty in whom all things are possible, for my successful completion of the programme. Special thanks go to my husband Bob for his confidence and support in my academic endeavours. I would also like to thank him for a tremendous job done in taking care of our children, otherwise I would not have had a peace of mind to continue with the programme. This study was carried out under the supervision of Prof. Edward Kofi Quashigah of the Faculty of Law at the University of Ghana. I wish to thank him most sincerely for his diligent and valuable comments. Finally, my thanks go to the Centre for Human Rights, for giving me an opportunity to pursue a master's programme at the University of Pretoria, and especially to all the staff for their academic and administrative assistance.

## List of Acronyms

<b>ANC</b>	African National Congress
<b>CCPR</b>	International Covenant on Civil and Political Rights
<b>MMD</b>	Multi Movement Democracy
<b>NCD</b>	National Commission for Democracy
<b>NP</b>	National Party
<b>NRM</b>	National Resistance Movement
<b>UCC</b>	Uganda Constitutional Commission
<b>UFP</b>	United Federal Party
<b>UNCHR</b>	United Nations Commission on Human Rights
<b>UNIP</b>	United National Independence Party
<b>ZANC</b>	Zambia African National Congress

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the study

Since the 1960s when most African countries achieved independence, there has been a remarkable output of national constitutions in almost every state in Africa. However, most of the constitutions that are introduced at short intervals tend to be short-lived resulting in constitutional instability in the African continent.<sup>1</sup> In this regard, Nwabueze has stated that:<sup>2</sup>

It cannot be disputed that a major cause of the collapse of constitutional government in many of the new states was the lack of respect for the constitution among the populace, and even among the politicians themselves...

A constitution ideally should be an original act of the people.<sup>3</sup> Intrinsic in this postulation is the need for the people to directly play a role in its creation. Thus process, that is, how the constitution is created is equally as important as the content of the constitution, as a means of ensuring legitimacy of the constitution.

The question of legitimacy of the constitution is concerned with how to make a constitution command the loyalty and confidence of the people. A constitution should be generally understood by the people and acceptable to them. A constitution cannot hope to command the loyalty, respect, and confidence of the people otherwise.<sup>4</sup>

To achieve this, a constitution needs to be put through a process of popularisation with a view to generating public interest in it, and an attitude that everybody has a stake in it.<sup>5</sup> The people must be made to identify themselves with the constitution.<sup>6</sup> It is therefore important to involve the citizens in any constitution making exercise. A public participation programme assures the constitution of legitimacy. This will entail recognition by the people, that the resultant product is their constitution upon which they were consulted and which they endorsed; that it contains provisions from which they

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<sup>1</sup> C Anyangwe 'The Zambian Constitution and the principles of autochthony and supremacy' (1997) 29 *Zambian Law Journal* 1.

<sup>2</sup> BO Nwabueze *Ideas and facts in constitution making* (1993) 20.

<sup>3</sup> BO Nwabueze *The presidential Constitution of Nigeria* (1982) 1.

<sup>4</sup> As above 5.

<sup>5</sup> BO Nwabueze *Constitutionalism in emergent states* (1973) 24.

<sup>6</sup> Nwabueze (n 3 above) 5.

derive demonstrable benefits that are worth defending; and that it encourages in the governed and governors alike, a habit of compliance and respect for its provisions.<sup>7</sup>

Under international law, every citizen has the right either directly or through freely chosen representatives, subject to reasonable restrictions, to take part in the government of his or her country.<sup>8</sup> The United Nations has interpreted this to mean that people have a right to participate in the making of constitutions in their country.

This is illustrated in the case of *Marshall v Canada*,<sup>9</sup> brought before the United Nations Commission for Human Rights (UNCHR). In this case the leaders of the Mikmaq tribal society brought a complaint against the Canadian government alleging that the government, by excluding them from directly participating in a series of constitutional conferences, had infringed their right to take part in the conduct of public affairs of their country, contrary to article 25(a) of the International Covenant on Civil and Political Rights (CCPR), to which Canada is a state party. The UNCHR in its ruling stated as follows:

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

To reinforce this ruling, the UNCHR in one of its general comments seeking to interpret article 25 of CCPR, has stated that citizens participate directly in the conduct of public affairs when they choose or change their constitution.<sup>10</sup>

From the above it is clear that public participation in constitution making is recognised under international law. While it can be argued that general comments of international human rights committees are not binding under international law, they are nevertheless authoritative and have been used by parties to sway international human rights committees in a certain direction.

While public participation in constitution making is recognised under international law, its extent is not elaborated. This has resulted in governments pursuing constitution-making processes that, despite involving public participation, do not involve meaningful public participation. As shall be illustrated in this study, this is the dilemma faced in Zambia.

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<sup>7</sup> As above 29.

<sup>8</sup> Arts 13, 21 & 25 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights & the African Charter on Human and Peoples' Rights respectively.

<sup>9</sup> Human Rights Committee CCPR/C/43/D/205/1986 (3 December 1991).

<sup>10</sup> See General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service ( Art 25) 12/07/96. CPR/21/Rev 1/Add 7.

Zambia has experienced constitutional instability since independence.<sup>11</sup> It has had four constitutions since then, and is currently in the process of making its fifth. This will represent an average of a new constitution every eight years: one of the highest rates of constitutional change in Commonwealth Africa. This is an unimpressive record in so far as it is generally accepted that a constitution defines and limits the exercise of governmental power, and regulates major political activities in a country. It cannot therefore be frequently subjected to change like any other ordinary piece of legislation.

## **1.2 Statement of the problem**

The problem with the Zambian Constitutions is that, while the process of making them involves public participation, they nevertheless do not reflect the views of the people and thus lack legitimacy. This brings into question the constitution-making process pursued in the making of previous constitutions; the extent of public participation in those processes; and the prospects of a viable constitutional order emerging in Zambia. These are therefore the main issues addressed in this study. The argument is that Zambia's constitutional experience is unsatisfactory and hence the need to change the constitutional perspective which has influenced previous constitutions.

## **1.3 Research questions**

The study attempts to answer the following research questions:

- i. To what extent should the people of Zambia participate in the making of their constitution?
- ii. Are there any lessons that Zambia can draw from other countries, to enhance meaningful public participation in the making of its constitutions?

## **1.4 Scope of research**

This study focuses on the constitution-making process in Zambia, in particular the extent of public participation. It examines and analyses the constitutional development of Zambia from the pre-colonial era to the present time. It also looks at constitution making processes in other countries highlighting the lessons that Zambia can pick there from. While constitution-making practices from a few jurisdictions will be used in the study, the main comparative focus will be on South Africa.

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<sup>11</sup> Zambia attained independence on 24 October 1964.

## 1.5 Literature review

Many scholars have written on constitution making. Most of them acknowledge that the process of making a constitution is as important as the content of the final document, for the legitimacy of the constitution. Inherent in this is the essence of public participation in the making of a constitution. However, most of these writings do not elaborate on the extent of public participation at each stage of the making of a constitution. In particular, an analysis of Zambia's constitutional development from pre-colonial era to the present time, with emphasis on the extent of public participation, has not been examined. The following scholars have written on constitution making:

Ndulo<sup>12</sup> in his paper has written about the essence of public participation in constitution making in Africa. He briefly states Zambia's trend to adopt constitutions through constitutional review commissions. He however does not analyse the extent of public participation in constitution making in Africa or Zambia. He therefore does not examine or analyse Zambia's constitutional development from the perspective of examining the extent of public participation.

Hatchard, Ndulo and Slinn<sup>13</sup> using the Commonwealth countries of Eastern and Southern Africa, Zambia inclusive, analyse some of the key constitutional issues in the process of developing and strengthening the capacity to ensure the good governance of the people. One of the issues discussed is constitution making. While the relevance of public participation in the making of the constitution is discussed, its extent is not analysed.

Gyan<sup>14</sup> examines the making of the fourth Constitution of Ghana. He gives an over-view of the constitution-making process, but does not give an in depth analysis of the extent of public participation in the process. He instead elaborates more on the deliberations of the Consultative Assembly as regards the provisions of the Constitution. Nevertheless his book is instructive to this study.

Juma<sup>15</sup> in his paper acknowledges the participation of the broader population in constitution making, particularly through the engagement of the civil society. He however does not elaborate on this. His paper focuses more on the Kenyan Constitutional Review Commissions, elaborating on their responsibilities.

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<sup>12</sup> M Ndulo 'Constitution making in Africa' (1996) *Africa Notes*.

<sup>13</sup> J Hatchard et al *comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004).

<sup>14</sup> KA Gyan *The making of the fourth republican Constitution of Ghana* (1995).

<sup>15</sup> OD Juma 'Constitution making and democratisation: Trends in Africa - The Kenyan Case' (2004) 1 *East African Law Journal* 21.

Waiggo<sup>16</sup> in his paper discusses the constitution-making process in Uganda culminating in the 1995 Constitution. He however restricts his studies to Uganda and does not make reference to other jurisdictions. His paper is however instructive to this study.

Hart<sup>17</sup> in her paper focuses on the essence of public participation in constitution making and its recognition in international law. She outlines what constitutes public participation but does not elaborate further. In another paper<sup>18</sup>, she gives a brief over-view of the making of the current Constitution of South Africa. This will be instructive to this study as South Africa is used as a comparative study.

Anyangwe<sup>19</sup> in his article discusses, in relation to the Constitution of Zambia, the principles of constitutional autochthony and the supremacy of the constitution. He gives a brief over-view of constitutional instability in the African continent and the drafting style of Zambia's fourth Constitution, emphasising on its adoption. He does not trace and analyse Zambia's constitutional development. Nevertheless, his discussion on the adoption of the fourth Constitution of Zambia is instructive to this study.

Nwabueze<sup>20</sup> in his book examines and analyses the presidential Constitution of Nigeria. He gives a brief over-view of the need of the constitution to be adopted by the people, with emphasis on the Nigerian situation. While he does not give an in depth analysis of public participation in the making of constitutions, his book is still instructive to this study.

Davis<sup>21</sup>, Gross<sup>22</sup>, Murray<sup>23</sup>, and Koutnatzis<sup>24</sup> all examine the constitution-making process of the current South African Constitution. Their studies will be relevant to this study when examining the extent of public participation in the making of the current South African Constitution.

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<sup>16</sup> JM Waliggo "The main actors in the constitution making process in Uganda 1988-1995" A paper presented at the Africa Institute, Pretoria, South Africa 25-28 May 1997(unpublished).

<sup>17</sup> V Hart 'Democratic constitution making' United States Institute of Peace Special Report 107 (2003).

<sup>18</sup> V Hart 'Democratic constitution making: The South African experience' available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/hart.htm>. (accessed 8 October 2006).

<sup>19</sup> Anyangwe (n 1 above).

<sup>20</sup> Nwabueze (n 3 above).

<sup>21</sup> DM Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 81 *International Journal of Constitutional Law* 181.

<sup>22</sup> IAM Gross 'The constitution, reconciliation and transnational justice: Lessons from South Africa and Israel' (2004) 4 *Stanford Journal of International Law* 59.

<sup>23</sup> C Murray 'New right-new law: Legal information in negotiating beyond deadlock: From the Constituent Assembly to the Court' (2004) 32 *International Journal of Legal Information* 324.

<sup>24</sup> SLG Koutnatzis 'Social rights as a constitutional compromise: Lessons from comparative experience' (2005) 74 *Columbia Journal of Transnational Law* 80.

## **1.6 Research methodology**

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

## **1.7 Limitations of study**

Due to limited time and space of this study, it is not possible to explore the constitution-making processes implored in most of Africa. For that reason therefore, this study is confined to the constitution-making processes implored by Zambia and an assessment of constitution making in a few African jurisdictions that can provide an answer to the problem of constitution making in Zambia.

## **1.8 Outline of chapters**

This study constitutes five chapters.

Chapter one introduces the study.

Chapter two analyses the origins and nature of government and constitution.

Chapter three examines and analyses the constitutional development process in Zambia from the pre-colonial period to the current time.

In chapter four, the making of the current Constitution of South Africa is discussed and analysed.

Chapter five provides the conclusion and recommendations.

## CHAPTER TWO

### THE ORIGINS AND NATURE OF GOVERNMENT AND CONSTITUTION

#### 2.1 Introduction

In order to understand and appreciate the essence of public participation in the making of a constitution, there is need to understand the origins and nature of government and constitution. The two concepts, that is, 'government' and 'constitution' are inter-linked, as it is not possible to have one without the other. The chapter further in the analysis of the nature of a constitution outlines and discusses the stages in the constitution-making process. Cardinal in this process is a deliberate effort to ensure maximum participation of the people at all stages.

#### 2.2 The origins and nature of government

The origins of government are attributable to the intrinsic nature of mankind as a self-centred, selfish and ruthless being. In this state of nature, each person is mindful only of his personal needs.<sup>25</sup> His aspirations and indeed the entire populations' aspirations remain focused on the myopic and self-serving purposes of satisfying immediate personal needs. In the premises, mankind cannot achieve any meaningful development commensurate to his potential. Thus society can only be characterised by anarchy and survival of the fittest.<sup>26</sup>

John Locke espoused a contrary theory. According to his theory, man is a rational being capable of rational thought and emotional relationships with fellow human beings. Due to this rational and emotional nature of mankind, relations in the human race are intimate.<sup>27</sup> Locke however states that because all human beings under the state of nature have perfect freedom to order their actions, and dispose of their possessions and person as they think fit, within the law of nature, this does not mean that they have the liberty to destroy themselves or any creature within their possession.<sup>28</sup> He therefore saw the need for human beings to enter into a social contract with the state, under which the state provides protective services to its citizens.<sup>29</sup>

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<sup>25</sup> JCA Gaskin (ed) *Thomas Hobbes leviathan* (1998) 54.

<sup>26</sup> As above.

<sup>27</sup> J Locke *The state of nature* (1923) 217.

<sup>28</sup> CB Mcpherson (ed) *John Locke second treatise of government* (2004)12.

<sup>29</sup> As above.

It is obvious that the truth lies in between these postulations. The self-serving, selfish and ruthless characteristic of mankind, however unpalatable, can never be denied. Even in this day of enlightenment and advancement, this character has been manifested in civil wars and looting.<sup>30</sup>

To attain any meaningful development essential in sustaining the human race, mankind had to shed off some of its liberty to create the government. According to Lenin, a government is a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, and that it has split into irreconcilable antagonisms that it is powerless to dispel.<sup>31</sup> He further illustrates the role of government in the following words:<sup>32</sup>

... But in order that these antagonisms, these classes with conflicting economic interests might not consume themselves and society in fruitless struggle, it became necessary to have a power, seemingly standing above society that could alleviate the conflict and keep it within the bounds of order.

This can be compared to Karl Marx' theory which states that:<sup>33</sup>

The state is an organ of class rule, an organ for the oppression of one class by another. It is the creation of 'order' that legalises and perpetuates this oppression by moderating the conflict between classes.

Although the terms 'state' and 'government' overlap empirically, in concept they are quite distinct.<sup>34</sup> Recent literature has defined the state as a set of associations and agencies claiming control over defined territories and their populations, with its main components being decision making structures (executives, parties, and parliaments); decision enforcing institutions (bureaucracies, parastatal organisations, and security forces); and decision mediating bodies (primarily courts, tribunals, and investigating commissions).<sup>35</sup> Government on the other hand, is the specific occupants of public office who are in a position to make binding decisions at any given time.<sup>36</sup>

The essential functions of governments are to protect the citizenry from external and internal aggression, and to provide common social amenities for the well being of society. With the growth in both complexity and scale of governmental functions, the institution of government pervades human life and regulates almost every facet of human life from the cradle to the grave.

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<sup>30</sup> An example of this is the June 1990 food riots in Lusaka Zambia, which virtually brought the country to a stand still resulting in destruction and loss of property.

<sup>31</sup> Institute of Marxism and Leninism *Lenin selected works* (1977) 266.

<sup>32</sup> As above.

<sup>33</sup> S Avineri *The social and political thought of Karl Marx* (1968) 209.

<sup>34</sup> N Chazan et al *Politics and society in contemporary Africa* (1999) 39.

<sup>35</sup> As above.

<sup>36</sup> As above.



To achieve compliance with the various regulations laid by the government, the government requires coercive power. It is essential for government to enforce its laws by the use of force, threats, or other sanctions to cower citizenry into obedience. Without this coercive power, government cannot be effective, and all its laws will be relegated to mere pious incantations of aspirations.

The combined effects of the omnipotent essential for the role given to government by humanity and the ever growing coercive powers exercised by men in the ruling class has relegated human society to arbitral rule, according to momentary whims and caprices of the rulers. In the classical exposition of Karl Marx, government has become an instrument of oppression.<sup>37</sup>

### 2.3 The origin and nature of a constitution

The unfortunate position that society found itself in, labelled the dark ages, was characterised by revolutions. The revolutions against these ruling classes recognised the need for a basic law in an identifiable document or group of documents called the constitution, embodying a selection of the most important rules about the governing of the country.<sup>38</sup>

A constitution defines and limits the powers of the government inter se and with the individual.<sup>39</sup> It vests power and function in various government authorities to achieve their respective set objectives. Any purported exercise of power beyond expressly conferred power is *pro tanto* void.<sup>40</sup> This brings into issue the concept of constitutionalism. De Smith defines constitutionalism as follows:<sup>41</sup>

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

It is clear from the definition of the two terms above, that is, 'constitution' and 'constitutionalism' that the idea of constitutionalism ought to be provided for in the constitution itself. It however does not follow that a state that has a constitution practices constitutionalism. A state may have a constitution that does not embody the idea of constitutionalism.

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<sup>37</sup> Avineri (n 33 above).

<sup>38</sup> S De Smith & R Brazier *Constitutional and administrative law* (1989) 3.

<sup>39</sup> Hatchard (n 13 above) 12.

<sup>40</sup> BO Nwabueze *Constitutionalism in Commonwealth Africa* (1974) 2.

<sup>41</sup> SA de Smith *The new Commonwealth and its Constitutions* (1964) 106.

While the traditional goal of a constitution is to address the issue of power, in recent times this has been extended to include other functions. One such function is to shape the organisation and development of a society both for the present and for future generations.<sup>42</sup> This is achievable through the promotion and protection of social and economic rights of the citizenry. The preamble of the 1995 Ugandan Constitution is a good illustration of this. It reads as follows:<sup>43</sup>

WE THE PEOPLE OF UGANDA COMMITTED to building a future by establishing a socio-economic and political order through a popular and durable national constitution... DO HEREBY... solemnly adopt, enact and give to ourselves and our posterity, this Constitution of Uganda.

Similarly, the Ghanaian Constitution obliges the state to take all necessary action to ensure that the national economy is managed in such a way as to ensure maximisation of the rate of economic development in the country, including securing the social welfare of the citizenry.<sup>44</sup>

The draft Constitution of Zambia<sup>45</sup> has also gone beyond the traditional goal of addressing the issue of power as it seeks to oblige the government to address the economic and social problems being faced by the people. This is not provided for in the current Constitution.<sup>46</sup>

## **2.4 Creating a constitution**

As stated above, cardinal in the constitution-making process is a deliberate effort to ensure maximum participation of the people at all stages.

### **2.4.1 Interim body**

It is imperative at the outset to have an interim body to conduct the preliminary and administrative functions of constitution making.<sup>47</sup> As its main function is to obtain the views of the public on the content of the constitution, it is not advisable to commence the process without such a body, or else the whole consultation exercise may be futile. Since it is an interim body it does not matter how it is appointed, suffice it to say that consideration must be given to expertise rather than patronage.

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<sup>42</sup> Hatchard (n 13 above)12.

<sup>43</sup> The Constitution of the Republic of Uganda, 1995.

<sup>44</sup> Art 36 of the 1992 Constitution.

<sup>45</sup> Zambia through the Mungomba Constitutional Review Commission came up with a draft constitution in December 2005. When approved this will be Zambia's fifth constitution.

<sup>46</sup> The Constitution of Zambia (Amendment) Act 18 of 1996.

<sup>47</sup> Examples include the Constitution of Kenya Review Commission, the National Commission for Democracy of Ghana, the Uganda Constitutional Committee and the Constitutional Review Commissions of Zambia.

## 2.4.2 Agenda

A workable agenda is indispensable to the constitution-making process. An agenda reflects the strength of the resolve to create a constitution. It also creates order of process that ensures comprehensibility and attainability simultaneously.

The agenda must outline procedures that promote and ensure maximum public participation in the process. At the same time it must be attainable and mindful of budgetary constraints.<sup>48</sup> Neither of these virtues can be sacrificed at the expense of the other.

The agenda must at the outset create a credible and transparent process. Any process perceived to be doubtful must be eradicated forthwith. Sectarian and myopic political goals should not infiltrate the agenda. The aspirations of the people unhindered by any political pride must remain paramount in the whole process.

A sound agenda will ensure that all other procedures are achievable and seek to ensure maximum participation. Due to the magnitude of the responsibility, the people should play a role in arriving at an agenda. The Ugandan Constitutional Commission (UCC), in the making of the 1995 Constitution of Uganda, recognised the importance of the agenda emanating from the people themselves, if the resultant constitution was to be regarded as a people's constitution. The Commission organised district seminars through out the 34 districts of Uganda with the aim of obtaining the people's views of what should constitute the agenda.<sup>49</sup> Similarly, the National Commission for Democracy (NCD), in the making of the current Constitution of Ghana, held public seminars in all the country's ten regional capitals with the aim of obtaining the views of the people on the content of the agenda.<sup>50</sup>

## 2.4.3 Research and analysis

Constitutional development is a highly technical matter. It cannot be concluded effectively without thorough research and analysis. Without research and analysis, all procedures may be futile and fail to encapsulate the aspirations of the people.

Research and analysis should focus first on existing legislation. It is imperative to abide by laws in force otherwise we may be creating a dangerous precedent which might denude statutes of support

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<sup>48</sup> These have been relegated by several commentaries on the South African process, but budget plays a ceiling effect on any ambition.

<sup>49</sup> Waliggo (n 16 above) 8.

<sup>50</sup> Gyan (n 14 above) 7.

and respect by the people.<sup>51</sup> Existing legislation being an expression of the aspirations, culture, and avowed political and economic destination of a people remains instructive on all these values. Research and analysis can easily distil the values that permeate a legal system for inclusion in the new order.

Research on international treaties with binding obligations on the state is very important. A mere change of a constitution would not absolve a nation of its international obligations.<sup>52</sup> A new constitution should therefore not invite contravention of existing international obligations.

An important matter to be researched on and critically analysed is the historical development of a legal system. A nation's history however unpopular remains part of its heritage. Unless a deliberate effort is made to identify aspects to be discarded and aspects to be maintained, a legal system can remain perpetually bound by its history, inexplicably replicating itself.<sup>53</sup>

#### **2.4.4 Civic education**

Civic education should be designed to crystallise the need for a new constitution. The need should not be the preserve of a government with a few enlightened people. The people must appreciate the need for a new constitution.<sup>54</sup> The depth and resourcefulness of the research and analysis will provide materials for the civic education. Again the legal and political history of a country will determine the substance of a civic education program.<sup>55</sup>

A civic education program must make people feel part of the process of constitutional development. The people must be engaged in discussion. It must raise awareness about the constitution-making process and constitutional issues to stimulate useful submissions.<sup>56</sup>

A civic education program can be conducted in various ways. The following are examples: public meetings<sup>57</sup>; televised debates; internet website and newsletters. Whichever method chosen can only be successful if it is able to engage the people into discussion. Its effect in raising awareness must be assessed during the process.

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<sup>51</sup> An extreme example is that of Nyerere who jettisoned the independence Constitution of Tanganyika.

<sup>52</sup> JG Starke *International law* (1989) 254.

<sup>53</sup> The current Constitution of Ghana retained certain positive aspects introduced during the Provisional National Defence Council administration; notably the district assembly concept, decentralisation and the public tribunal idea.

<sup>54</sup> The UCC was very effective in creating political awareness and justifying the need of a new constitution. All sub-counties of Uganda were visited by the UCC and they proceeded to actively sensitise the public.

<sup>55</sup> The pre-independence legal order still replicates itself in contemporary constitutions.

<sup>56</sup> MV Moosa Speech to the South African Constitutional Development Program (13 February 1997).

<sup>57</sup> The 1973 Chona Constitutional Review Commission of Zambia used predominantly this method.

A perceived weakness of the making of the 1995 Ugandan Constitution, as regards civic education, was the deliberate effort on the part of the UCC to advise people against multi party politics in favour of the revolutionary no-party system. In Museveni's view, Africa was not ready for political parties due to lack of class structures in society. So by deliberately advocating for this no-party system, the UCC lost a lot of credibility and opened itself to severe criticism as being a mere mouth piece for the National Resistance Movement (NRM) government.<sup>58</sup>

#### **2.4.5 Cultivation of Political will**

Every society has core political players. Each political player has some mandate which will determine its area of specific interest within the constitution. These must be identified and placated to assure the nation of political preparedness to accept the resultant constitution as an act of the people.<sup>59</sup>

Research and analysis will easily identify the core political players and their respective areas of interest. Core political players will vary from society to society. Generally core political players, among others, include: interest groups; ethnic groups; trade unions; political parties; students; women; experts; or traditional rulers.

In order to secure sustainable political will it is important at this stage to negotiate with the core players on the rules of the constitutional development process.<sup>60</sup> Core players are more likely to uphold and respect a constitution if they participated in the formulation of the rules of the process. The core players must play a role in identifying the values and principles which underpin the entire process. The political history of a country breeds certain attitudes like mistrust which, if not resolved at this stage by formulation of sound principles, may operate to undermine the constitution created.

#### **2.4.6 Consulting the public**

The agenda should provide for the body that will undertake the consultation. The body that starts the process must remain an interim one because its functions are restricted to the constitution-making exercise, and not thereafter. Once the constitution is made the body becomes redundant and devoid of any functions.

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<sup>58</sup> J Oloka-Onyango 'A constitutional transition in Museveni's Uganda: New horizons or another false start?' (1995) 39 *Journal of African Law* 30.

<sup>59</sup> The UCC did not have this as an agenda item. Some effort however minor was made when the NRM government brought in a new local governance level called the Resistance Councils. See Resistance Committees (Judicial Powers) Statute 1 of 1988.

<sup>60</sup> For illustrative discussion see para 4.3 in chapter four of this study.

It is imperative that the people have a say in the composition of this body. The maintenance of trust and transparency in the entire process is crucial. The best approach is for the body to secure its mandate by direct election by the people, because it remains accountable to the people. The Consultative Assembly established in the making of the current Constitution of Ghana composed representatives of identifiable groups and institutions, and appointees of government. However, the people of Ghana were never consulted on its establishment and composition.<sup>61</sup>

In addition, most common concerns about a constitution revolve around power centres. The power given to the executive is especially paramount because it is usually very wide and general, leaving much to discretion. It is unlikely in the extreme that a consultative body picked by the executive will serve to limit executive powers.

Thus in the Kenyan case of *Timothy Njoya v Constitution of Kenya Review Commission and the National Constitutional Conference*,<sup>62</sup> Justice Ringera concluded that the National Constitutional Conference had failed the test of being a body with a peoples mandate to make a constitution, as the majority of its membership constituted un-elected members. He however went on to state that this was not to say that it was not permissible to have some un-elected members, as it is necessary to have expertise in such matters as public affairs and administration, constitutional law and practice, or legislative drafting, including representatives of interest groups such as women, children or the disabled.

The constitution-making process itself must be systematic and organised.<sup>63</sup> The consultative body must set out a framework to direct the public on the range of relevant issues to be raised, otherwise the submissions from laypersons may not relate to the constitution at all. In the end, the entire costly exercise of consultation would be reduced to mere window dressing.

Due to the complexity of the exercise, it is very important that the consultative body consults constitutional experts widely. Experts bring in immense technical knowledge on the significance of particular provisions. They also have invaluable experiences of constitutions in other jurisdictions. This would assist the process immeasurably. Consultation is conducted by the following means: public hearings; submissions; debates; and internet website.

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<sup>61</sup> NA Kotey 'The Supreme Court and conflict resolution in Ghana' in M Oquaye (ed) *Democracy and conflict resolution in Ghana* (1995) 278.

<sup>62</sup> No 82 of 2004.

<sup>63</sup> BM Kgosietsite ANC speech (2 August 1994).

There is no useful guide as to how many submissions would constitute adequate consultation. In some countries this process took seven years.<sup>64</sup> However, as indicated in the discussion on agenda, the process cannot continue infinitely. There is a limit as to what resources can be allocated to the process. Although this may not be a very popular view, a review of submissions in different jurisdictions shows agreement on key issues. Over consultation may therefore not be very useful because it may produce numerous but similar submissions, which individually have low importance to a constitution.

After completion of the consultative process, the consultative body must be divided into groups. Each group is assigned a particular aspect of the intended constitution.<sup>65</sup> This creates specialisation and fosters expertise in specified areas creating a more balanced result. The various groups report back to the main consultative body. The consultative body will then synthesise the various reports into a single document.<sup>66</sup> To be sure that the synthesised document reflects the will of the people requires that it be circulated to the public. The public must be at liberty to make further recommendations on the document.

#### **2.4.7 Adoption**

One of the rules to be set out in the agenda is who adopts the draft constitution. The process must be distinguished from enactment. The former means legitimisation of a draft constitution as reflective of the will of the people.<sup>67</sup> Enactment refers to a constitutional bill passing through parliament to become law.

The ideal method of legitimising a draft constitution is if it is adopted by the people either in a referendum, or through a constituent assembly.<sup>68</sup> A constituent assembly is a body popularly elected and mandated by the people to adopt a constitution on their behalf.<sup>69</sup> If the substantive content of a constitution is freely agreed and adopted by the people through a constituent assembly, then it is their act.

Since a constituent assembly can reflect the popular will of the people, only in an approximate sense, it is necessary that its mandate in this respect should be specifically conferred through an

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<sup>64</sup> Uganda. In my view the period was inordinate.

<sup>65</sup> In the making of the current Constitution of Ghana the Consultative Assembly was divided into the following committees: Committee on Powers of Government; Committee on State Policy; Committee on Rights of the People; and Committee on Public Services.

<sup>66</sup> Gyan (n 14 above) 31.

<sup>67</sup> Nwabueze (n 3 above) 4.

<sup>68</sup> The current Constitution of Ghana was adopted by a constituent assembly and thereafter submitted to a national referendum for approval.

<sup>69</sup> Nwabueze (n 2 above) 8.

election organised for that purpose, and at which the people are made clearly to understand that they are voting to authorise the adoption on their behalf of a constitution.<sup>70</sup> Thus if a constituent assembly is to adopt the constitution, it must be as diverse as possible. It must include the various core political players in jurisdiction.<sup>71</sup> It is however impractical for every player in the political arena to be included in the process.

A consultative assembly, on the other hand, is a body normally appointed by the president, whose main function is to solicit views from the public on the content of a new constitutional order, and proceed to produce a report on its findings and a draft constitution.<sup>72</sup> A consultative assembly's powers are usually delimited by terms of reference. The report and draft constitution, depending on the agenda of the constitution-making process, may be submitted for approval to the president, a constituent assembly, or a national referendum.<sup>73</sup> Where the report and draft constitution is submitted to the president, the president is at liberty to choose which recommendations are acceptable to him or her.<sup>74</sup> As a consultative assembly is not popularly elected by the people, it is not a genuine reflection of the popular will of the people.

Again the danger of relying on a government to adopt a constitution is obvious. A government has no real incentive to preserve what limits its powers. This has been experienced in a number of countries where large numbers of submissions relating to limitation of presidential powers were rejected by the government.

#### **2.4.8 Enactment**

As alluded to above, enactment is the formal passing of the constitutional bill through the national assembly to make it law. Recourse has to be made to the existing legal framework. The constitutional bill must be presented to parliament and passed pursuant to existing legal framework in order to attain procedural legitimacy.

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<sup>70</sup> Nwabueze (n 3 above) 1.

<sup>71</sup> The Human Rights Commission in South Africa criticized the Constituent Assembly, in the making of the current South African Constitution, for being exclusive rather than inclusive, when negotiations were at a later stage restricted between ANC and the NP. It is noted however that each political party has a following. The exclusivity although admitted is diluted by the following behind each core player.

<sup>72</sup> Hatchard (n 13 above) 29.

<sup>73</sup> In Zambia the trend in the making of all its constitutions has been for the Consultative Assembly to submit its report and draft Constitution to the President; in the making of the 1995 Constitution of Uganda the Consultative Assembly submitted its report and draft Constitution to a Constituent Assembly for approval; and in the making of Ghana's current Constitution the Consultative Assembly submitted its draft Constitution to a national referendum for approval.

<sup>74</sup> For an illustrative discussion see chapter three of this study.



## **2.5 The role of civil society and the state in the making of a constitution**

Civil society and the state are major key players in the constitution-making process, as their role in the process will determine the extent of public participation.

### **2.5.1 Civil Society**

Civil society is a group of individuals or citizens who associate for the purpose of advancing or protecting their interests.<sup>75</sup> These groups are in their diverse forms, sectors and interests. The very growth of social movements or civil society is a consequence of associational life, motivated by the need to enforce the rights and freedoms of citizens, while negotiating responsibilities and obligations in return.<sup>76</sup>

Non Governmental Organisations (NGOs), like religious organisations, the media, trade unions, professional associations, neighbourhood associations, and pressure groups with political or social agendas are all part of civil society.<sup>77</sup> Civil society reflects the people in a society who wish to protect and enforce their social contract with government.<sup>78</sup> Their rights to associate and belong to associations are identified and protected by the constitution.

The level to which civil society is involved in the whole process of constitutional reform will determine whether or not the reviewed constitution will reflect the needs and aspirations of the various sectors of society generally, and will usher in a constitution that is legitimately acceptable to the people who will identify with it and own it.

What then is the role of civil society in the process? Civil society has a strong positive role to play in the development of a constitution, as their loyalty and commitment to the people stems from genuine conviction as a result of open exchange of information, persuasion and rational choice.<sup>79</sup> Civil society has the moral responsibility to empower the ordinary man and woman in society to tell their story. The question that now arises is at what stage of the constitution-making process is this done? The answer to this is at the beginning of the process, during the process, and after the process.

#### ***At the beginning of the Process***

At the beginning of the constitution-making process, civil society must help to build up capacity of the people to become informed and decisive actors in determining their own multiplicity of agenda. In this

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<sup>75</sup> J Pearce Development *NGOs and civil society* (2000) 125.

<sup>76</sup> As above.

<sup>77</sup> P Burnell & P Culvert (eds) *civil society in democratisation* (2004) 9.

<sup>78</sup> As above.

<sup>79</sup> As above.

context, civil society's goal would be to generate a high level of public participation in the development of the agenda for constitutional reform that is capable of ensuring that the government serves as an instrument of the people, and is accountable to them.<sup>80</sup> This may inevitably come into direct conflict with the status quo. However, if the constitution is a covenant that binds the citizenry on the one hand to be loyal to the polity, discharge its obligations and responsibilities, as well as periodically give legitimacy to the state, the role of civil society to openly engage the people and the state should be recognised by the state itself.

### ***During the process***

During the constitution making process, civil society must keep the citizens interested in the process and constantly engage the citizens and the state in constitutional discourse. The media takes on an added responsibility in steering public opinion and allowing active participation of various sectors of society.

After the body that is spearheading the process makes available to the public its report and draft constitution, by normally placing them on sale, civil society should not go to sleep. Civil society groups must immediately mobilise the public to action and engage them in debate; immediately study and analyse the contents of the report, with regards to the people's submissions; create strategic alliances with each other to create a solid front; unequivocally support issues that underpin the peoples needs and aspirations; identify lacunas and loopholes in the draft constitution, and bring out controversial areas or issues for further dialogue with the people, the state, and the body spearheading the process; and make timely and adequate submissions on the report and draft constitution.

After its submissions, civil society must now take up the mantle to ensure a smooth legitimisation process. If a constituent assembly or a referendum is to be part of the legitimisation process then massive civic education and mobilisation of the citizens becomes essential to avoid apathy in the remaining part of the process. Thus civil society must play a crucial part in the formation of the legitimisation bodies or forum.

### ***After the process***

Education is not only a right, but also central to enjoying other rights and freedoms enshrined in the constitution. Given the proximity of civil society to the citizenry, it is only natural that civil society groups are leading actors in civic education after the process. The people need to have a good

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<sup>80</sup> O Oko 'Consolidating democracy on a troubled continent: A challenge for lawyers in Africa' (2000) 33 *Vanderbilt Journal of Transnational Law* 617.

understanding of the constitution in order to derive a benefit or exercise a duty. Civil society's challenge is therefore to lead society in the transition from 'development' to 'rights'.

### **2.5.2 The state**

The role of the state in the development of a constitution is crucial. The state as agent of the people should react to the needs of the people. If the need is to have a new constitution to suit the needs of society at that particular point of history, then the state must arise to the challenge.

As a major player in society and the agent of the people, with a major responsibility of minimising conflicts in society, the state must at all times maintain peace, national unity, and the integrity of the country. It should also safeguard the well being of the people. This becomes more pronounced during a constitution-making process, as without this the efforts for inclusion and freedom of expression could face insurmountable obstacles.<sup>81</sup>

The state should through out the process engage the people constructively on constitutional matters and take part in civic education, or provide the facilities to civil society to carry out civic education. The state should not in any way intimidate the people in the manner in which they participate in the constitution review process. Thus the state should act as a facilitator of the process.

Being a major player in the constitutional review process, the state must take an active role in establishing the organs for constitutional reform and the necessary legal framework. However, it must not be seen to be driving the process and imposing its ideas and wants.

It is imperative that the state establishes meaningful dialogue with civil society through out the process. The most significant point of cooperation between the state and civil society is that of providing civic education to the general public during the review process. Another point of cooperation is that of engaging the public in constitutional discourse. It is imperative that both parties disseminate as much information as is possible during the process. This information should be relevant and timely.

Finally the state must ensure a smooth transition from one constitutional order to the next.

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<sup>81</sup> W Piotrowski 'Democracy and constitutions: One without the other?' (2005) 38 *Connecticut Law Review* 8.

## 2.6 Conclusion

There can be no guarantee that a constitution developed using the procedure herein outlined would create the essential limits on government. In the case of the resultant 1995 Constitution of Uganda, despite the people being the core players in all the stages of its creation, political party activity was barred for five years after its promulgation. In the words of Barya, all mainstream political thought for the period 1986 to 2000 were to emanate from the NRM. Fifteen years of political monopoly would serve to destroy all remnants of party activity in the country.<sup>82</sup> One can say however, that the above process is the best method of creating a constitutional constitution because the people, who have the incentive to create one, have played a key role at all stages. If a constitution, replete with capricious powers results, the people can only blame themselves.

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<sup>82</sup> See J Barya *The making of Uganda's 1995 Constitution: Achieving consensus by law* (2000).

## CHAPTER THREE

### CONSTITUTIONAL DEVELOPMENT IN ZAMBIA

#### 3.1 Introduction

Chapter two has, in the analysis of the functions and nature of a constitution, attempted to formulate an ideal constitution-making process that involves maximum public participation. Unfortunately, the process used in the making of Zambia's Constitutions, although involving public participation to some extent, does not involve maximum participation of the people. In order to effectively analyse the extent of participation of the Zambian people in the making of their constitutions, it is necessary to examine where the country has been, where it is, and where it ought to be heading, as regards constitutional development. In other words, to understand the present and influence the future, the past needs to be understood. This chapter therefore examines and analyses the constitutional development process in Zambia, from the pre-colonial era to the present time.

#### 3.2 The pre-colonial era

While pre-colonial Africa, including Zambia, did not have written constitutions, this is not to say that constitutionalism did not exist.<sup>83</sup> Pre-colonial African societies, operated under certain principles of constitutionalism devised to achieve the main aim of constitutionalism, that is, limitation of power of the leaders.<sup>84</sup>

The leader's decisions concerning the community were not normally made arbitrarily, but were subject to discussion and consensus. For instance, in Zambia, the king of the Barotse<sup>85</sup> did not make any decisions without the advice of the Council called *kuta*.<sup>86</sup> The Council was divided into three sub-councils that stood for different interests. The most important of these sub-councils was called the *Katengo*.<sup>87</sup> This was the Council of the mass of the nation, called the 'Council of the many'. It consisted a large number of petty princes, councillors and headmen who were widely dispersed through the nation, and therefore knew better the people's wishes and feelings.<sup>88</sup> Representatives of all the three sub-councils had to be present when a matter of national interest was to be decided. The king was expected to adhere to the advice of the Council.<sup>89</sup>

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<sup>83</sup> EK Quashigah 'Legitimate governance: The pre-colonial African perspective' in EK Quashigah & OC Okafor (eds) *Legitimate governance in Africa: International and domestic legal perspectives* (1999) 50.

<sup>84</sup> As above.

<sup>85</sup> Barotse is located in the Western province of Zambia.

<sup>86</sup> E Colson & M Gluckman *Seven tribes of British Central Africa* (1951) 48.

<sup>87</sup> As above 51.

<sup>88</sup> As above.

<sup>89</sup> As above 48.

In addition, the philosophical notion of social contracts between the rulers and the citizens, mentioned in chapter two, existed. This was depicted in the very manner in which the king of the Barotse people was installed. At the installation of a king, the officiators always stressed: “You, heir, remember that you do not rule alone, but by the power of the people. Wisdom does not come from one man, but from many men.”<sup>90</sup> To his supporters they said: “you will be weak and lost without a leader. Strengthen him, and you strengthen yourselves.”<sup>91</sup>

Thus decisions in pre-colonial Zambia were not made to suit the whims of the rulers but to satisfy the aspirations of the people.<sup>92</sup> It was through this method that the foundation of the ruler’s legitimacy as a government actually lay.<sup>93</sup>

### **3.3 The constitutional framework during colonialism**

The work of explorers and missionaries in the nineteenth century opened the way for colonisation of Zambia.<sup>94</sup> It was through them that Europe became aware and interested in Central Africa where Zambia is located.

The first significant constitutional development in Zambia was the Royal Charter of Incorporation of the British South Africa Company (1889), of which Cecil Rhodes was the leader.<sup>95</sup> Through this Charter, the Company was given power to obtain territories by treaties from its native chiefs, to administer the areas so obtained, and to engage in all forms of economic activity.<sup>96</sup> Thus through treaties and concessions, obtained from African chiefs, the Company extended its sway over most of what is now Zambia, but was then known as Northern Rhodesia.<sup>97</sup>

By 1900, British rule had been formulated by two orders, the North-Western Rhodesia Barotseland Order-in-Council of 1899 and the North-Eastern Order-in-Council of 1900.<sup>98</sup> The territories were joined in 1911 as Northern Rhodesia.<sup>99</sup> Company rule lasted until 1 February 1924 when the Order-in-Council of that year established colonial office rule under a governor.<sup>100</sup>

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<sup>90</sup> As above 20.

<sup>91</sup> As above.

<sup>92</sup> As above.

<sup>93</sup> As above.

<sup>94</sup> JW Davidson *The Northern Rhodesian Legislative Council* (1946) 14.

<sup>95</sup> M Ndulo & R Kent ‘The Constitutions of Zambia’ (1998)30 *Zambia Law Journal* 1.

<sup>96</sup> Davidson (n 85 above) 15.

<sup>97</sup> As above.

<sup>98</sup> LH Gann *The birth of a plural society: The development of Northern Rhodesia under the British South Africa Company 1894-1914* (1958) 7.

<sup>99</sup> Ndulo (n 95 above) 1.

<sup>100</sup> As above.

Up to the very end of the colonial history of Northern Rhodesia, democratic self government did not exist. Northern Rhodesia was a protectorate with the basic documents of the constitution being the Northern Rhodesia Order in Council, 1924; the Northern Rhodesia (Legislative Council) Order in Council, 1924; and the instructions passed under the Royal sign Manual and signet to the Governor of Northern Rhodesia.<sup>101</sup> Attention was not directed at explicitly establishing a constitutional framework but an administrative structure. Thus, Moris and Read have observed that: "The colonial territories might be termed administrative states. The structure of the administrative hierarchy was in fact the constitution."<sup>102</sup>

These constitutional arrangements decreed by the British Government, and enacted through orders-in-council were designed to preserve the colonial rule with the cooperation of the white settler community and the acquiescence of the Africans.<sup>103</sup> They were also authoritarian with the governor and his predecessors setting the agenda and wielding most powers.<sup>104</sup> The Zambian people did not play any part in their formulation. The traditional constitutional devices that make up the foundation of constitutionalism namely, separation of powers, checks and balances and other hallmarks of constitutionalism were missing.<sup>105</sup> It was the belief of the British that good governance in their colonies did not depend on constitutionalism, but on the wisdom of good men.<sup>106</sup>

An attempt to introduce constitutionalism was only embarked upon shortly before Zambia attained independence. This was done through haste efforts being made by the colonialists to extend fundamental rights and freedoms to the natives, and to replace authoritarian state structures with a democratic constitution.<sup>107</sup> However this came too late into the picture, as at independence the culture of un-constitutionalism had firmly taken root.

### 3.4 The independence Constitution

The 1964 independence Constitution of Zambia was the product of negotiations between the departing colonial power and African elites. These negotiations were held in May 1964 at Lancaster House in the United Kingdom.<sup>108</sup> The ordinary people of Zambia had no input whatsoever in the

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<sup>101</sup> Davidson (n 94 above) 22.

<sup>102</sup> HF Moris & JS Read 'Indirect rule and the search for justice' in F Reyntjens *Authoritarianism in Francophone Africa from the colonial to the post colonial state* (1989) 60.

<sup>103</sup> SV Mubako 'Zambia's single party constitution: A search for unity and development' (1973) 5 *Zambia Law Journal* 67.

<sup>104</sup> TM Callaghy *The state-society struggle: Zaire in comparative perspective* (1984) 219-220.

<sup>105</sup> A Thomson *An introduction to African politics* (2004) 21.

<sup>106</sup> P Ocheje 'Exploring the legal dimensions of political legitimacy: A 'rights' approach to governance in Africa' in E K Quashigah & O C Okafor (eds) *Legitimate governance in Africa : International and domestic legal perspectives* (1999) 175.

<sup>107</sup> As above 177.

<sup>108</sup> Mubako (n 103 above).

constitutional negotiations. The representatives to Lancaster House were not elected but merely identified as core players. As such, the leaders who represented the country in the constitutional talks were not accountable to the people.

The interests of the African leadership were limited to acquisition of political power through political independence. The leaders were inspired by events in other African countries like Ghana, Tanzania and Kenya who had secured political independence. Nkrumah, the inspiration behind most African liberation struggles, expressed the desire for independence in great style: "Seek ye first thy political kingdom and everything else shall be added unto thee."<sup>109</sup> It was thus, current political opinion that with the advent of independence, and the attendant self-determination, the people of Zambia would be able to resolve their problems and enhance their standard of living.

The independence Constitution clearly revealed the predominant interest of the colonial authority to safeguard the interests of the white settlers.<sup>110</sup> Due to colonial rule's disregard for legitimisation and concentration of interest on the white settlers, the settlers acquired immense material wealth. It was therefore in the colonial government's political interest to safeguard its nationals abroad.<sup>111</sup>

As a result, the Constitution that resulted from the negotiations at Lancaster House broadly reflected the colonial government's aspirations. The Constitution had an entrenched bill of rights.<sup>112</sup> The bill of rights provided that every person in Zambia, regardless of race, place of origin, political opinion, colour, creed, or sex was entitled to fundamental rights and freedoms. These included the right to life, liberty, security, and the freedom of property, conscience, expression and assembly.<sup>113</sup> The freedom of property was particularly very well entrenched. The judiciary was independent from the executive, and the executive had very little power to enforce its aspirations on the people. The Constitution also provided for the procedure to amend or alter the constitution. In order to amend the Constitution, the amendment bill had to be supported by not less than two-thirds of all the members of the National Assembly.<sup>114</sup> Where the amendment bill concerned any of the fundamental rights and freedoms, the bill had to be submitted to a national referendum for approval.<sup>115</sup>

At independence, Zambia had four political parties: African National Congress (ANC), United Federal Party (UFP), United National Independence Party (UNIP), and Zambia African National

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<sup>109</sup> K Nkrumah *Consciencism: Philosophy and ideology for de-colonisation* (1964) 105.

<sup>110</sup> BO Nwabueze *Presidentialism in Commonwealth Africa* (1975) 4.

<sup>111</sup> As above.

<sup>112</sup> Chapter III of the Constitution of 1964.

<sup>113</sup> Arts 13-25.

<sup>114</sup> Art 72(1).

<sup>115</sup> Art 72(3).



Congress (ZANC). Given its majority in parliament, UNIP formed the government with its leader, Kenneth Kaunda becoming the first president.

### 3.5 The one-party Constitution

There is complete discord as to the origins of the inspiration for the one-party system in Zambia. Shimba attributes it more to the experiences of francophone Africa.<sup>116</sup> Nwabueze attributes it to the communist regimes of China and the Soviet Union.<sup>117</sup>

In addition, the 1960s witnessed immense growth in scholarship by African leaders. Enlightened leaders like Nkrumah and Nyerere wrote volumes on a new brand of socialism christened 'African Socialism'.<sup>118</sup> For Kaunda and his stalwarts, they were keen to follow what the enlightened leaders outlined.<sup>119</sup> For this reason Zambia's path to one party rule, resembles closely the occurrences in other African countries such as Ghana and Tanzania.

#### 3.5.1 The justification for one-party system

Kaunda expressed his desire to introduce the one-party system as early as March 1964. He however indicated that this would only happen with the consensus of the Zambian People.<sup>120</sup> The desire for a one-party system was re-iterated by Kaunda in 1967 at the annual UNIP conference. The party's stand on a one-party system was summed up as follows:<sup>121</sup>

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

The most cogent argument advanced by Zambian protagonists of the one-party system was that Zambia was fragmented due to the number of ethnic groupings. The country has 73 ethnic groups. It was felt that a nation with such intrinsic factionalism could not be united for purposes of economic development with plural politics.<sup>122</sup>

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<sup>116</sup> L Shimba 'The origins of the one-party state in Commonwealth Africa' in M Ndulo (ed) *Law in Zambia* (1984) 125.

<sup>117</sup> Nwabueze (n 110 above).

<sup>118</sup> Thomson (n 105 above) 111.

<sup>119</sup> Kaunda's inspiration to socialist philanthropy was manifest in his various articles. See KD Kaunda '*Humanism in Zambia and a guide to its implementation*' (1967).

<sup>120</sup> Shimba (n 116 above) 127.

<sup>121</sup> Proceedings of Annual General Conference of UNIP held at Mulungushi Lusaka 14-20 August 1967.

<sup>122</sup> Shimba (n 116 above) 130.

The argument further postulated that opposition parties not national in character sought refuge in creating pockets of support in regional ethnic groups where political leaders came from, and that political competition would create tension amongst the various tribes, leading inevitably to civil strife and destruction of the state.<sup>123</sup>

This postulation suffers from a major set back. It assumes erroneously that all ethnic strife emanates from political party competition. Ethnic strife could easily emerge in a one-party system, if that party is dominated by one tribe. It could also arise if development projects are concentrated in a few regions. The differences would be accentuated in a one-party system because the oppressed, constitutionally have no political vehicle to advance their interests, making violence the only option available.

It was also argued that Zambia being adjacent to minority white ruled countries, Rhodesia, South West Africa, Angola and Mozambique was always at the risk of military invasion from the volatile white settler regimes. The argument is bolstered by evidence of actual invasions into Zambia by these foreign forces, resulting in loss of lives and property. It was felt that opposition parties would be tempted to forge links with the foreign forces to subvert the nation.<sup>124</sup>

It is difficult to see how infiltration by foreign forces could be stemmed off by political unanimity under one party. The invasions into Zambia were due to the fact that the country openly supported liberation struggles in the region. This put the country on a collision course with the minority settler governments. The ceasing of invasions after independence of the neighbouring countries is evidence of the fact that invasions were precipitated by Zambia's support for liberation struggles.<sup>125</sup>

The other argument postulated is that the independence Constitution was always viewed as a colonial vestige. It was essential that a home grown autochthonous constitution be developed to truly convey the aspirations of the Zambian people. The institutions the independence Constitution created were all alien, and not conducive to Zambia's socio economic development.<sup>126</sup> It is obvious that this is a plausible argument especially in view of how the independence Constitution was created. The period of colonialism was part of Zambian heritage and culture. The institutions it brought became part of Zambian heritage despite obvious subjugation. For this reason, Zambia was a multi-party system from the colonial period, with the first political parties being ANC, UFP, UNIP and ZANC.

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<sup>123</sup> R Molteno 'Cleavage and conflict in Zambian politics: A study in sectionalism' in W Tordoff & I Scott (eds) *politics in Zambia* (1974) 82.

<sup>124</sup> Shimba (n 116 above) 130.

<sup>125</sup> See R Hall *The high price of principles* (1969).

<sup>126</sup> KC Wheare *The constitutional character of the Commonwealth* (1960) 89.

The process of constitutional development leading to attainment of the one-party system was most simplistic. Kaunda announced at a press conference on 25 February 1972 that due to incessant and ever increasing calls for a one-party system, cabinet had decided to bring about a one-party system through legislation. It is unclear at which fora the incessant demands were expressed. No empirical evidence of the weight of support for the one-party system was shown. Thus in Nwabueze's view, the calls were from party stalwarts.<sup>127</sup>

### **3.5.2 Agenda**

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

### **3.5.3 Civic education**

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

### **3.5.6 Cultivation of political will**

The core players in the country were never engaged in negotiations to cultivate the necessary political will to accept the resultant constitution as an original will of the people. Paltry efforts were made to bring the major political player, ANC, on board. Understandably, the ANC president Nkumbula, and his deputy Mundia declined to take their appointments.<sup>128</sup>

### **3.5.7 The Chona Constitutional Review Commission**

Kaunda appointed a Constitutional Review Commission under the Inquiries Act on 30 March 1972.<sup>129</sup> The Inquiries Act<sup>130</sup> allowed the President to appoint a commission of inquiry to investigate into any matter, which in the opinion of the President is in public interest. The people of Zambia played no role in the appointment of the Commission. It can therefore be postulated that the Commission was more accountable to the President than to the nation.

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<sup>127</sup> Nwabueze (n 110 above) 5.

<sup>128</sup> JM Mwanakatwe 'The end of the Kaunda era' (1994) 15.

<sup>129</sup> The Chona Constitutional Review Commission (1972).

<sup>130</sup> Chapter 41 of the Laws of Zambia.

The terms of reference of the Commission were to consider and examine changes in the Republican and UNIP Constitutions; and practices and procedures of government, which were necessary to create a one-party system in Zambia.<sup>131</sup> It was not within the terms of reference to hear petitions against one-party system of government, as the one-party system was already preferred by the government. Any contrary views were unacceptable. The people's participation in the making of the constitution was therefore limited to giving their views on the character of the one-party system. Even then, the final decision on the content of the Constitution rested with the political leaders.

How extensive the consultation process was remains doubtful. As alluded to earlier, the Commission on the establishment of the one-party system in Zambia was appointed on 20 March 1972. By 13 December 1972, just nine months later, the new constitution was already in place.

After touring the country, and receiving submissions from the people, the Commission prepared and presented its report to government in October 1972.<sup>132</sup> The Commission made a number of recommendations that had the effect of curtailing presidential powers. In particular the Commission recommended that the President's powers of detention should be limited, that a president should only serve for two consecutive five year terms, and that UNIP should place three presidential candidates before the electorate.<sup>133</sup> Government analysed the various recommendations and presented a white paper indicating which submissions that the government accepted, and those that it rejected.<sup>134</sup> While the basic concept of the one-party system was accepted, the government however rejected all the recommendations pertaining to the limitation of presidential powers.

It is unclear which authorities in government played the role of adoption of the Constitution. It is however as has been stated, manifestly clear that the government rejected a lot of the submissions from the people. This denied the Constitution the attribute of being an original act of the people.

The recommendations and the various excisions government made to them were drafted into a Constitution (Amendment) Bill, submitted to the National Assembly and duly enacted on 13 December 1972. The amendment read as follows: "There shall be one political party in Zambia, namely UNIP."<sup>135</sup>

The party, UNIP, took precedence over all institutions in the country, government inclusive. Political competition was curtailed, dominant political parties were fortified, administrative structures

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<sup>131</sup> Report of the National Commission on the establishment of a one-party participatory democracy in Zambia (1971) 1.

<sup>132</sup> As above.

<sup>133</sup> As above 3 & 5.

<sup>134</sup> Government White Paper No 1 of 1972.

<sup>135</sup> Amendment No 22 of 1972.

were expanded, and decision-making was heavily centralised around the President and his cohorts.<sup>136</sup> The end result was a semi god of a president who permeated every institution in Zambia. The entire political process was characterised by party stalwart's hero-worshipping the President. Happily a nationwide movement compelled the government to reintroduce multi politics in 1991.

### 3.6 The multi-party Constitution

The years of one-party system in Zambia, like elsewhere in Africa, were very difficult. The economic and social development expected under one-party rule failed to materialise. Social infrastructures such as universities, schools, and hospitals collapsed, with the government in some cases failing to pay the salaries of civil servants. Inevitably, this led to the people venting their frustrations through riots and demonstrations.<sup>137</sup>

In addition, although the World Bank and the International Monetary Fund initially insisted on economic liberalisation as one of the conditions for further financial assistance to countries such as Zambia, they later came to a conclusion that economic liberalisation alone was not enough.<sup>138</sup> In addition countries had to reform their political institutions. This meant putting in place constitutions that guaranteed free competition for political power, and guaranteed the citizens certain fundamental rights and freedoms.<sup>139</sup>

The most significant pressure for democratic reform came from civil society. Once political space had been created by the decline of state authority, opposition parties, church groups, human rights activists, students, legal professionals, just to mention a few, provided leadership for a rejuvenated civil society. Through this leadership, mass discontent was channelled into a call for multi-party democracy.<sup>140</sup>

By the 1990s Africa's political environment was ripe for change. Starved of resources and lacking legitimacy due to the crisis of governance, state authority was in terminal decline. Zambia's embrace of multi-party democracy can therefore be explained by an agreement among all the core players involved, that is the state, civil society and the international community.<sup>141</sup>

Prior to the multi-party elections, the government amended the Constitution so as to allow for the formation of opposition political parties. It also announced its attention to make comprehensive

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<sup>136</sup> Chazan (n 34 above) 46.  
<sup>137</sup> Ocheje (n 106 above) 179-180.  
<sup>138</sup> Thomson (n 105 above) 234.  
<sup>139</sup> As above.  
<sup>140</sup> As above.  
<sup>141</sup> As above.

amendments to the Constitution, and consequently appointed a Constitutional Review Commission called the Mvunga Constitutional Review Commission to commence the process.<sup>142</sup>

### **3.6.1 The Mvunga Constitutional Review Commission**

The Commission toured the country extensively and obtained the views of a broad range of people on the future constitution of Zambia. Having obtained the views of the people, the Commission presented its report, containing recommendations, to the government.<sup>143</sup> The government picked the recommendations it preferred, rejected the others, and prepared a constitution for adoption by Parliament. Parliament being overwhelmingly controlled by UNIP, unsurprisingly, adopted and enacted the constitution on 2 August 1991.<sup>144</sup>

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

## **3.7 The 1996 Constitution**

Prior to the MMD coming into power, it undertook, once elected, to change the 1991 Constitution and replace it with one that would be above partisan considerations and reflect high goals of national interest. Thus on 22 December 1993, a year after the MMD acquired power, Chiluba appointed a Commission called the Mwanakatwe Constitutional Review Commission.<sup>145</sup>

### **3.7.1 The Mwanakatwe Constitution Review Commission**

The Commission had a wide term of reference. The Commission was given this broad mandate to enable it to consider provisions that would help the country create an open, transparent and democratic society and a constitution that 'would stand the test of time'.<sup>146</sup>

Its terms of reference included recommending a system that would ensure that Zambia was governed in a manner that would promote the democratic principles of regular and fair elections, transparency and accountability, and that would guard against the re-emergence of a dictatorial form of government. The Commission was also mandated to recommend appropriate arrangements for the entrenchment and protection of human rights, the rule of law, good governance, and the competence,

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<sup>142</sup> The Commission was appointed on 8 October 1990 under Statutory Instrument No 135 of 1990.

<sup>143</sup> Report of the Constitutional Review Commission (1995).

<sup>144</sup> The Constitution of Zambia Act 1991.

<sup>145</sup> The Commission was appointed on 22 November 1993 under Statutory Instrument No 151 of 1993 as amended by Statutory Instrument No 173 of 1993.

<sup>146</sup> Ndulo (n 95 above) 20.

impartiality and independence of the judiciary. In addition, the Commission was to recommend whether the Constitution should have been adopted by the National Assembly, a constituent assembly, a national referendum or any other method. The Commission was also to propose a suitable method of amending the Constitution.<sup>147</sup>

The Commission toured the country extensively, and collected a large volume of views of the populace. Many of its recommendations had they been adopted, would have greatly strengthened democracy in Zambia. It recommended, amongst others, that a presidential candidate must receive 50% plus one of the valid votes cast, for him to be declared a winner; that to achieve maximum consensus, the Constitution should be adopted through a constituent assembly attended by representatives of all political parties, and by those drawn from many segments of Zambian society, such as trade unions, women's groups, churches and many others; and that a referendum be required for subsequent amendments.<sup>148</sup>

The government in a White Paper rejected most of the progressive recommendations of the Mwanakatwe report.<sup>149</sup> It rejected the idea of a referendum pleading 'parliamentary sovereignty' as well as 'legal, logistical, financial and material imperatives,' as legal and practical barriers. It also rejected the recommendation that a presidential candidate should obtain 50% plus one of the valid votes cast to be declared winner. Other rejected recommendations included the introduction of several new personal rights, and the establishment of a constitutional court and an independent electoral commission. The government clearly departed from its original promise in 1991 to introduce in Zambia a constitution that would strengthen individual rights and freedoms, and lessen the powers of the executive. The most telling of the government responses to the report was the rejection of the Commission's call for a broadly based constituent assembly to ratify proposed constitutional changes. Interestingly, the Commission recommended that a presidential candidate had to be born from parents who were citizens of Zambia by birth.<sup>150</sup> This was obviously aimed at preventing Kaunda from contesting the up-coming general elections. The government, unsurprisingly, accepted this recommendation.<sup>151</sup>

The government White Paper was widely condemned by opposition parties, scholars and students, members of trade unions, and a broad section of the Zambian population. NGOs and the churches organised what was termed a 'citizen conference' to raise public awareness and elicit public

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<sup>147</sup> The terms of reference are contained in Statutory Instrument No 151 of 1993.

<sup>148</sup> Report of the Mwanakatwe Constitutional Review Commission (1995).

<sup>149</sup> Government White Paper No 1 of 1995.

<sup>150</sup> As above.

<sup>151</sup> As above.

resistance to the governments proposed measures.<sup>152</sup> Despite the wide spread criticism, the 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 part III, which governs protection of fundamental rights and freedoms of the individual, and requires a national referendum for any amendment thereto.

### **3.8 The current draft Constitution**

On 17 April 2003,<sup>153</sup> President Mwanawasa announced the appointment of a fourth constitutional review commission.<sup>154</sup> He called upon certain groups of civil society to nominate members to sit on the Commission.

#### **3.8.1 The Mungomba Constitutional Review Commission**

The Commission toured the country extensively, and obtained the views of the people. It then proceeded to prepare, and publish its report and a draft Constitution.<sup>155</sup> Significantly, the Commission recommended that the draft Constitution be adopted by a constituent assembly and thereafter be subjected to a national referendum for approval. It also recommended that for a person to be elected president, he or she had to obtain 50% plus one of the valid votes cast, and where none of the candidates obtains this, a re-run should be held between the candidates with the two highest scores.<sup>156</sup>

The government's response, in particular to the above recommendations is that the Constitution of Zambia clearly states that the legislative power of the Republic of Zambia is vested solely in Parliament, and that it does not provide for the adoption of the constitution by a constituent assembly. As regards the second recommendation, the government's position on this is that the probability of a presidential candidate not obtaining 50% plus one of the valid votes cast, and thus having a re-run, which would entail expending the same amount of money spent on the elections, is very high. It is also the governments view that the basic principle of democracy is that the majority decision should always prevail, regardless of the number of votes obtained.<sup>157</sup>

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<sup>152</sup> 'Civil society condemns government White Paper on Constitution' *The Post* 29 April 1995 2.

<sup>153</sup> 'Mwanawasa appoints Constitution Review Commission' *Times of Zambia* 19 April 2003 1.

<sup>154</sup> The Mungomba Constitutional Review Commission (2005).

<sup>155</sup> Report of the Mungomba Constitutional Review Commission (2005) and the draft Constitution of Zambia (1995).

<sup>156</sup> As above 3.

<sup>157</sup> 'Government interim comments to the Constitution Review Commission draft Constitution' *The Post* 11 October 2005 2.



### **3.9 Conclusion**

The constitution-making process always determines the content of the constitution. The constitutional foundation of Northern Rhodesia lacked the contribution of Africans who out-numbered the white settlers, and who were reasonably expected to assume the reigns of power at some point, in not too distant a future. In essence the constitutional foundation of Northern Rhodesia lacked political legitimacy. Those wielding political power, and not the people, had had the final say on the character of the constitutions of Zambia. For instance the people of Zambia have said to all three Commissions appointed in the last 15 years that a presidential candidate must receive 50% plus one of the valid votes cast, for him to be declared a winner, but this has been rejected by the government. Another popular recommendation rejected by the government is that the draft Constitution be adopted by a constituent assembly. One can therefore conclude that this deliberate effort by all the governments since independence to undermine popular demands is to further narrow, selfish and transient interests.

## CHAPTER FOUR

### THE SOUTH AFRICAN EXPERIENCE

#### 4.1 Introduction

An examination of the constitutional development of Zambia, in chapter three, has revealed that due to the lack of maximum participation of the people in the making of their constitutions, the aspirations of the people were not reflected in the resultant constitutions. On the other hand, the South African Constitution is widely regarded as a model constitutional text. In addition, the process that was employed in its creation has been hailed as a key part of the successful transition from the oppressive apartheid regime to a democratic society. This chapter therefore focuses on the making of the current Constitution of South Africa.

#### 4.2 The need for a new constitution

The Republic of South Africa was led by a minority white regime for over 150 years.<sup>158</sup> The political system not only excluded the majority African population from political participation, but it also denied them economic rights and social amenities. This was pursuant to a national policy called apartheid.<sup>159</sup> Predictably this led to a protracted civil war, violent conflicts, loss of lives, long term imprisonment and exiles.

In the late 1980s the United States and other major powers started to pressurise both the National Party (NP) government and the liberation forces to commence negotiations.<sup>160</sup> This had a significant impact on the African National Congress (ANC), which as an opposition group was heavily reliant on international support.<sup>161</sup> Thus as early as 1987, the ANC began receiving strong signals from the international community to move towards negotiations.<sup>162</sup>

On the part of the NP government, sanctions imposed on it by the international community had a profound impact on its economy and psyche. For instance, sanctions cost South Africa an estimated 32 billion Rands in foreign loans and investment opportunities, and cut the growth rate of the economy in half to a paltry two percent per annum.<sup>163</sup> In addition, the international isolation of South Africa also exacted a high cost on the psyche of white South Africa. Especially painful to a sports mad nation was

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<sup>158</sup> A Chaskalson 'The transition to democracy in South Africa' (1997) 29 *University Journal of International Law and Politics* 285.

<sup>159</sup> Davis (n 21 as above) 81.

<sup>160</sup> PN Bouckaert 'The negotiated revolution: South Africa's transition to a multiracial democracy' (1997) 33 *Stanford Journal of International Law* 379.

<sup>161</sup> As above.

<sup>162</sup> As above.

<sup>163</sup> As above 380.

the ban from competing in international sports events.<sup>164</sup> There is therefore little doubt that the lifting of sanctions was a powerful carrot that lured the NP government to the negotiating table. Thus the ANC and the NP government each came to the table with the realisation that they had reached a stalemate in their often bloody struggle for power.

It is undisputable, therefore, that the country was in dire need of a new constitutional framework. A new constitution was essential to ensure that the majority was included in the political process. It was also essential to eradicate all forms of racial segregation fostered by the old constitutional framework.<sup>165</sup>

### **4.3 Cultivation of political will**

As has been stated in chapter two, constitution making requires consensus of a broad range of actors. Due to the deeply divided society, violence and mistrust, the cultivation of political will had to begin even before the inspiration for a new constitution was mooted. Without these efforts which were largely covert, prevailing mistrust would have obliterated any effort to inspire confidence in a constitution-making process.

The process therefore commenced with political negotiations between the ANC and the NP government.<sup>166</sup> The negotiations were commenced by secret talks between Kobie Coetsee, then Minister of Justice, and Nelson Mandela, then serving a term of imprisonment in the late 1980s. These talks are alluded to in Mandela's autobiography.<sup>167</sup>

The talks were very preliminary and meant to break the ice for higher level of talks. It was hoped by the regime that Mandela would be able to create within the ANC, a spirit of accommodation essential for formal talks. Subsequent extensive negotiations were held between the NP government and other main political parties, in order to create trust between the core players. This led to an agreement being reached on the ceasing of violence between the South African security forces and liberation movements, the release of prisoners, and an opportunity given to exiled South Africans to return to the country.<sup>168</sup>

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<sup>164</sup> As above.

<sup>165</sup> Murray (n 23 as above) 324.

<sup>166</sup> Koutnatzis (n 24 as above) 80.

<sup>167</sup> See N Mandela *Long walk to freedom* (1994).

<sup>168</sup> Murray (n 23 above) 324.

#### 4.4 Agenda

The NP government set a specific but ambitious agenda for the constitutional development process. The agenda was developed after the success of the preliminary talks, and subsequent negotiations between the core players. The initial agenda items which were preliminary included the establishment of the following transitional structures: an independent Broadcasting Authority; an interim Constitution, providing for the process for drafting the final constitution; and a new Electorate Act.<sup>169</sup> The transitional structures were essential to portray transparency and a commitment for impartiality in the process. For instance, the new Electoral Act allowed blacks to stand as parliamentary candidates for the first time in South African history. This was a milestone in the creation of confidence especially amongst the black South Africans.

A two stage process in the making of the constitution was agreed on by all the core players.<sup>170</sup> First, the 1994 Interim Constitution and a set of 'constitutional principles,' as politically agreed upon, with which the final constitution must comply, was adopted.<sup>171</sup> Second, the newly elected parliament (the National Assembly and the Senate together) would serve as the Constituent Assembly for the final constitution. However, before the final constitution could take effect, the Constitutional Court needed to satisfy its compliance with the 'constitutional principles'.<sup>172</sup>

The use of both chambers of the legislature as the Constituent Assembly was ingenious. It allowed a representative body accountable to the people to conduct the process of constitutional development. It also obviated the unnecessary costs of holding a separate national election for the Constituent Assembly members.

The final constitution could not be the negotiated deal that the interim Constitution was. It needed to be drafted through a more open process that involved, rather than excluded, the public.<sup>173</sup> Accordingly, the Agenda provided for the establishment of the following two main principles fundamental to the drafting process: the first, inclusivity, ensured that the constitution would integrate the ideals of all core players including political parties, civil society and individuals; the second principle, accessibility, entailed not only soliciting views from the public, but also launching an elaborate public awareness program to reach out and solicit the public's views.<sup>174</sup>

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<sup>169</sup> Koutnatzis (n 24 above) 80.

<sup>170</sup> As above.

<sup>171</sup> The principles which were 34 in number were contained in the interim constitution and included, amongst others, constitutional supremacy and judicial review, an independent judiciary, the protection of the right to equality, separation of powers, and protection of human rights.

<sup>172</sup> DM Jenkins 'A glimpse in South Africa's journey towards democracy' (1996) 13 *Arizona Journal of International and Comparative Law* 465.

<sup>173</sup> As above 327.

<sup>174</sup> Gross (n 22 above) 59.

## 4.5 Public awareness program

The public awareness program was very comprehensive and professional. The process was conducted through three distinct categories: community liaison; media liaison; and advertising.<sup>175</sup>

Under the community liaison, the public was engaged in extensive debate with members of the Constituent Assembly on a variety of issues. Due to the face to face argumentation, it excited the public and made them feel an intrinsic part of the process of constitutional development.

Under media liaison, there was use of existing channels of broadcasting. Through these channels the Constituent Assembly conducted extensive civic education. The importance of the constitution-making process was expressed on television, print media and radio. In addition, the Constituent Assembly had a specialised media department charged with the responsibility of promoting public awareness. The media department also made extensive use of existing media channels. The importance of an independent Broadcasting Authority assisted immensely in objective and balanced dissemination of the campaign.

Advertising was enhanced by placing a lot of advertisements on television, radio, newspapers and bill boards. Advertisements employed ear and eye catching phraseology intended to attract the public. For instance, the Constituent Assembly's slogan "you've made your mark now have your say," invited millions of South Africans who had voted for the first time in 1994 to contribute to the country's first democratic constitution, and over two million did so.<sup>176</sup> The public participation scheme was intended to provide both basic education on democracy and constitutionalism and to elicit the public's opinion on what the constitution should say.<sup>177</sup>

To do this it used the press, radio, television, the web and its own publicity campaign.<sup>178</sup> One goal frequently invoked by the Constituent Assembly was that the new constitution should be owned by all South Africans. It was felt that the South African people not only had to feel part of the process, but the content itself had to be representative of their views.<sup>179</sup>

The Constituent Assembly also made extensive use of the internet. It had a homepage with the following facilities: access to debates; on-line education materials; and submission facility. This immensely assisted the Constituent Assembly in communicating its public awareness campaign.

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<sup>175</sup> Murray (n 23 above) 327.

<sup>176</sup> As above.

<sup>177</sup> As above.

<sup>178</sup> As above.

<sup>179</sup> As above 334.

## 4.6 Consultation

The Constituent Assembly toured most of the country to get as wide as possible the people's submissions on what should be contained in the final constitution. The consultation process took four months. Due to the very professional and effective public awareness campaign, the consultation was a resounding success. In the rural areas, public meetings were conducted, while in the urban areas there was extensive use of information technology in the communication of submissions.<sup>180</sup> The public awareness campaign continued side by side with the consultation. The public awareness campaign greatly augmented the consultation process by maintaining public interest in the process.

The greatest difficulty experienced by the Constituent Assembly was that the constitutional development process was conducted simultaneously with political change. Given the gross inequities and injustices of the past apartheid regime, it was difficult to entice people to be interested in constitutional matters. To lay persons, the principles being disseminated were too abstract. Realisation of equality seemed to have greater significance to their lives.

The second difficulty was the high rate of illiteracy amongst the majority blacks. This is a vestige of apartheid which denied the blacks access to educational facilities. It manifested itself in the substance of the majority of the submissions which bore no relevance to a constitution.<sup>181</sup>

The submissions were analysed and a working draft Constitution prepared by the Constituent Assembly. Over 5 million copies in eleven languages were distributed. The Constituent Assembly invited more debate and submissions from the public. This effort solicited an extra 250,000 submissions, which were more focussed than the previous ones.<sup>182</sup>

Further negotiation was still necessary even at this stage between the political parties, women's movements, unions and other core players. Each interest group was allowed to voice out its concerns. Later, as the Constituent Assembly faced the most controversial issues such as language rights, right to education, language of education, and right to property, amongst others, the talks were restricted only to the NP and the ANC, being the major core political players.<sup>183</sup> This drew the wrath of smaller political parties and civil society which felt marginalised.

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<sup>180</sup> As above 336.

<sup>181</sup> These included petitions dealing with animal rights, abortion and pornography.

<sup>182</sup> Murray (n 23 above) 328.

<sup>183</sup> As above 335.

## 4.7 Adoption and enactment

The draft Constitution was presented to the Constituent Assembly for adoption and enactment. The Constituent Assembly as earlier alluded consisted both chambers of the legislature, that is, the National Assembly and the Senate. This enabled adoption of the Constitution by a representative body and enactment within the confines of an existent constitutional order, the interim Constitution. In May, 1996 the Constituent Assembly voted to pass the new Constitution. However this was not the end of the process as the Constitution still had to be certified by the Constitutional Court. The Constitution Court however found fault with a number of provisions in the draft Constitution, on the ground that they failed to comply with the 'constitutional principles' contained in the interim Constitution.<sup>184</sup> The Constitution was thus referred back to the constituent Assembly for amendment. On 4 December 1996, the Constitution Court certified that the amended draft Constitution complied with the 'constitutional principles'. The new Constitution<sup>185</sup> was signed into law by the President on International Human Rights day.<sup>186</sup>

The resultant Constitution introduced a bill of rights which guarantees most internationally recognised human rights and has been widely praised for its progressive content.<sup>187</sup> The bill of rights gives specific rights which create a correlative duty on the part of the government of South Africa to strive and improve the well being of its people. The Constitution also provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.<sup>188</sup>

## 4.8 Conclusion

It is important that a constitution should genuinely be an act of the people. The people have an incentive to have a constitution that will uphold their values and improve their welfare. South Africa's constitution-making process took four years but the result was a solid constitution that the citizens felt part of. This was not only because the agenda was right, and agreeable to all the core players, but also because of the extensive consultation that was carried out. The NP government started the process by creating a sense of dignity, trust, and constitutionalism in the people. The people felt that the making of the constitution was not only a business for the politicians, but for all the people of South

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<sup>184</sup> As above 346.

<sup>185</sup> Act 108 of 1996.

<sup>186</sup> 10 December 1996.

<sup>187</sup> See chapter two of the Constitution

<sup>188</sup> As above.

Africa. They realised that a constitution is a document that can safeguard their interests and rights as citizens. There was also very little, if any, political interference in the whole process.

The then Commonwealth Secretary General said of the constitution-making process in South Africa that:<sup>189</sup>

Submissions have been invited and two million received! Information on the constituent assembly is available on the internet. And you have solicited the views of ordinary citizens in hundreds of meetings around the country. Whilst proceedings may at times appear cumbersome, they have given real meaning to the phrase 'participatory democracy'.

The words of the Commonwealth Secretary General are a fitting tribute to the Constituent Assembly's public participation experience. It was a resounding success, and presents many valuable lessons for other governments.

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<sup>189</sup> E Anyaoku Commonwealth Secretary General, Address to International Roundtable on Democratic constitution development 17 July 1995.



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

The constitutions drafted in Africa have shown a significant shift in strategies in constitution making. For instance the current Ghanaian Constitution was drafted by a Consultative Assembly, and submitted to a national referendum for approval. The interim Constitution of South Africa was popularly drafted by a Constituent Conference at which most of the interested parties were represented. The final Constitution was drafted by a Constituent Assembly made up of the National Assembly and Senate sitting together. The conditions in South Africa dictated that the constitutional changes be pursued in two phases, a situation very novel in the history of constitution making in Africa. These devices reveal the emergence of a new perspective in constitution making which is gaining popularity.

Unfortunately, such an idea has never taken root in Zambia. From the very inception of colonial influence in Northern Rhodesia, the system of government introduced was authoritarian. It was premised on the fact that, “good men and not good laws make good government.” A few months before independence, the ruling constitutional ideas changed: “good laws and not good men make good government.” Thus the independence Constitution of 1963 introduced various constitutional devices designed to limit government power and sustain constitutionalism. However, these ideas and innovations came too late in the history of the country. The authoritarian nature of British colonial government was, by then, too deeply entrenched to be eradicated through constitutional prescriptions.

In the making of the independence Constitution, the African majority had virtually nothing to do with the development of the territory’s constitutional order. Their involvement began just a few years before independence. However, even this was limited within the constitutional framework determined by the white settlers, the colonial government, and the British government as trustee of African interests. In fact African participation in the constitutional development was limited to a small number of African elite. Even they nevertheless, could not propagate constitutional ideas different from those that they had learnt from their colonial masters.

The task of the new post-independence government was to create confidence in and respect for the institutions of government, but this did not happen. The resultant Constitution was not an umpire above the competition for political power, but a weapon in the fight against perceived and imagined

political enemies. Thus, the independence Constitution was altered to gain temporary advantages over ones political opponents by banning multi party politics.

The study of previous constitution-making exercises in Zambia has revealed that the making of a new constitution, through a constitutional review commission is the best way for a president and his government to ensure that the constitution, when finally drafted, was one they wanted. For instance, the Mwanakatwe Constitutional Review Commission of 1996 unsurprisingly recommended that a prospective presidential candidate be born from parents who were both Zambian citizens by birth. This was obviously a deliberate move by President Chiluba to bar Kaunda, whose parents were born in Malawi, to contest the up-coming elections.

Since the commission's task is to make recommendations on the development of a constitutional order, the recommendations and draft constitution are subject to approval of the President. Thus recommendations which are not appealing to the president and his government are rejected. It is evident therefore that constitution making through a constitutional review commission amounts to a stage-managed constitution-making exercise on the part of the government in power, as the outcome is often known in advance. Thus Mcwhinney notes:<sup>190</sup>

But the constitutional and political domains are very close, and a government, through naming the members of the expert (or non-expert) commission is in a position to determine, or at least to decisively influence the commission's thinking in advance of it commencing its work.

The choice among the different constitution-making options may be made casually or inadvertently, but it will never be value neutral in its consequences. What looks like a simple technical machinery choice may in fact predetermine or influence the final substantive recommendations, as to the content and direction of a new or renewed constitutional order. The evidence would suggest that the different presidents of Zambia are very often aware of this truth, and shape their choice of the instrument of constitution making accordingly.

## **5.2 Recommendations**

- The first step towards correcting past constitutional failures and establishing a viable constitutional order in Zambia is to change the constitutional perspective which has determined constitution making. The future constitution of Zambia must be popularly determined in order to give it legitimacy and a truly national character, instead of being identified with a small group of people or government.

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<sup>190</sup> E Mcwhinney *Constitution making: Principles, process and practice* 27.

- To achieve this goal in Zambia, the constitution must be adopted either by a constituent assembly, conference, or any other such popular body. The body must be made up of one or two representatives from each ward in Zambia, popularly chosen by the people in that ward. Each ward must have its own meetings and agree on what they would like to see in the constitution. In addition, interest groups must be reasonably represented. The body must be assisted by experts in various fields who will deal with technical matters, but the final decision must be that of the body. The procedure suggested is no doubt costly, but given the country's experience, this will be a worth while investment.
- It follows that for a constitution-making exercise to be effective the timing is important. Constitution making must take place at a time when there is a national consensus for a new constitution to be drafted or when it is possible to enlist wide support for the exercise. It is not enough that a particular leader sees such a need. Its frequency in a country erodes the sanctity of the constitution.
- The agenda stage should not be disregarded. Success or failure emanates from this stage. It is impossible to succeed in a constitutional development process with a poor agenda. Subsequent amendment of an agenda is usually due to political pressure. At this stage, the essential confidence and trust of the people would have been destroyed.
- Transparency and accountability are essential to successful implementation of the constitution making-process. Transparency insists that every procedure is open and above board, while accountability requires that the body conducting the process be elected directly by the people.
- A comprehensive and objective public awareness campaign is essential for the people to be familiar with the process. It is amazing how ignorant non lawyers are on constitutional matters. The campaign should not be used to advance a government's preferred direction. A comprehensive and objective public awareness campaign will ensure that the people feel part of the process.
- Civic education by the state and civil society must be objective, and not inhibited. It must enhance the people's knowledge of constitutional issues to ensure that submissions are relevant; otherwise consultation of the people becomes a mere formality.

- The consultation process must be well thought out. The people must have specific guidance on the substance of the consultation. It is wasteful to spend vast resources and solicit irrelevant submissions.
- The government must not play any role in evaluating the submissions. This destroys the entire purpose of the consultation. It also takes away the people's aspirations. It is important that a constitution be truly an act of the people. If government engages in excisions of submissions, as the case was in Zambia, then the constitution becomes an instrument to further the interest of the rulers of the day.
- Experts in constitutional law should play a major role in shaping and evaluating provisions of a constitution. It is essential that a constitution assists in meeting the people's deliberate aspirations. Only experts can see through a provision and evaluate its utility.
- Finally the constitution must stand the test of time. This gives it respect and recognition as a grand norm. If a constitution is going to be changed at will, nothing will distinguish it from ordinary statutes. However, this is not to say that a country should be inextricably wedded to a constitution. If a constitution no longer reflects the aspirations of the people it can be amended accordingly.

**Word count 16,384**

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