

**OBSERVATIONS AND COMMENTS ON  
INTERIM REPORT AND DRAFT CONSTITUTION  
OF  
CONSTITUTION REVIEW COMMISSION**

**SUBMITTED**

**BY**

**JESUIT CENTRE FOR THEOLOGICAL REFLECTION**

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# JCTR SUBMISSION TO CRC

## INTRODUCTION

This is the formal submission of the Jesuit Centre for Theological Reflection (JCTR) to the Constitution Review Commission (CRC) in response to the public requirement to comment on the released *Interim Report* and the *Draft Constitution* by the end of October 2006.

Our submission is divided into two parts: *first*, those issues with which we agree; and *second*, those issues with which we disagree. We limit our attention only to specific issues that the JCTR has a particular interest in, including those about which we have earlier submitted comments and recommendations to the CRC.

We are accompanying this formal submission with a copy of our Third Quarter 2005 *Policy Brief*, which goes into more detail on the constitutional issues. This *Policy Brief* is widely circulated to interested groups around Zambia and outside, as well as posted on our website: [www.jctr.org.zm](http://www.jctr.org.zm).

We would be happy to discuss these matters directly and personally with the CRC if this would be helpful.

## 1. JCTR AGREES WITH THE COMMISSION ON THE FOLLOWING ISSUES BASED ON THE REASONS GIVEN:

### (a) The Bill of Rights

We strongly endorse the CRC proposal to redesign Part III of the current Zambian Constitution in order to update our Bill of Rights. We specially endorse the following recommendations: provisions guaranteeing human dignity (article 37); equality of men and women (article 40); protection of women and further rights for women (article 79), special measures for achieving gender equality (article 80); children's rights (article 42); rights of the elderly (article 41); rights of persons with disabilities (articles 45, 46); environment (article 71); access to information (article 72); freedom of media (article 54); consumer rights (article 62); freedom of religion, belief and opinion (article 51).

In addition, we applaud the explicit incorporation of economic, social and cultural rights in the Bill of Rights – rendering them justiciable. Notably, these include the rights to language and culture (article 47); to labour relations and pensions (article 65), social security (article 66), health (article 67), education (article 68), shelter and housing (article 69), food, water and sanitation (article 70).

We further commend the Commission for recommending the expansion of the "locus standi" to include "a group of persons or a person or institution acting on behalf of any other person" (article 86). We support the establishment of a Constitutional Court (article 204) within the judicial system to deal with matters related to human rights violations. Indeed, "the Constitution should explicitly provide relief to aggrieved parties against the State in enforcing judgements" (Interim Report, Chapter 3).

### (b) Loan Contraction Process

The recommendation to engage Parliament to be involved in loan contraction was one of the submissions made by the Jubilee-Zambia, the debt cancellation campaign hosted by the JCTR. As is often emphasised by Jubilee-Zambia, the public should be the prime beneficiaries of any loan

contracted in their name. Therefore, there must be constitutional guarantees that enable people to effectively participate in and control the debt contraction process.

In this regard, we welcome the Commission's recommendation that "the Constitution should provide that international and domestic contracts for public debt and loan guarantees should be approved by National Assembly before taking effect" (Interim Report, Chapter 21). This is explicitly provided for in article 164(3), (f); article 331 and article 332.

### **(c) Executive Reforms**

We support the recommendations of appointing Cabinet Ministers and Deputy Ministers from outside the National Assembly, subject to Parliamentary approval (articles 152, 153).

We applaud the appointment of Cabinet Ministers from outside Parliament for the following reasons: (i) this enables the government to engage as Ministers appointees from the wider pool of expertise; (ii) this avoids MP distraction of duties (for example, constituency and ministerial demands) and (iii) a process can be developed that will allow Ministers when necessary or whenever required to do so to appear before Parliament to answer any questions, as recommended by the Commission (Interim Report, Chapter 8).

### **(d) Electoral Reforms**

The demand to review electoral legislation is indeed a very vital component of the constitutional review. Therefore, we endorse the following recommendations: the requirement of the 50% plus one of the total votes cast for a winning presidential candidate (article 130); the chair of the Electoral Commission of Zambia to be the Returning Officer for the presidential election [article 134(6)]; the Vice-President to be elected by universal adult suffrage as a running mate of presidential candidate [article 149(3)]; a losing presidential or parliamentary or local government election candidate not to be eligible for appointment to Cabinet (article 106).

Other outstanding recommendations we affirm include the legal provision for a Fast Track Ad Hoc Electoral Tribunals to settle disputes of presidential [article 136(3)], parliamentary (article 171) and local government (article 240) elections; a definite month for Tripartite Elections and that Day to be a public holiday (article 107).

Moreover, we welcome the proposed mixed member proportional representation of National Assembly (article 165) and local government (article 239); by-elections to be held only where a vacancy is due to death, incapacitation of an MP or Councillor, nullification of an election or where a vacant seat was held by an independent MP or Councillor (articles 168 and 249 respectively); and the electorate to have an opportunity to recall a member of the national assembly (article 193) or councillor (article 242).

We feel that all of these electoral reforms are necessary to improve the electoral system in Zambia which has been marred over the years by unfairness and irregularities. Many of these reforms have also been recommended by the Electoral Reform Technical Committee and are therefore indications of holding very wide public support.

### **(e) The Removal of "Christian Nation Declaration" in the Preamble**

With regard to the "Christian Nation Declaration," we endorse the recommendation made by the Commission that the Constitution "should not declare Zambia as a Christian Nation" (Interim Report, Chapter 1). We agree with the Commission that the declaration is discriminatory and violates the provisions of the Constitution relating to freedom of worship and conscience.

Moreover, we support the removal of the declaratory paragraph for the following six reasons: First, there is no solid scriptural foundation for such a declaration. Second, there is no necessity for such a declaration in order to freely promote Christianity in the country. From independence in 1964 to the

constitutional amendment of 1996, there was no “Christian Nation Declaration” to promote Christianity and yet our religious spirit flourished in personal and social affairs.

Third, there is clear evidence that such a declaration has been previously used to promote personal political agendas, for example, the abuse of “slush-funds”. Fourth, there is no demonstration that such a declaration has been empirically verified. The Zambian Catholic Bishops’ pastoral letter “The Future Is Ours” in 1992 urged that a Nation is not Christian by *declaration* but only by *deeds*, especially the deeds of justice and concern for the poor.

Fifth, there is strong concern that the declaration in fact could act as a discriminatory bloc against the non-Christians, thereby creating a sense of “second class citizenship” in Zambia. This is also clearly observed by the Human Rights Commission that the declaration has the “potential of subjugating other religions and beliefs and excluding non-Christians from participating fully and effectively in the affairs of the country, and would breed religious intolerance” (The Post, 5 October 2005). Sixth, there is a great danger in ignoring intolerance and violence that can characterise such declarations, as often witnessed in “religious states”. For instance, in Spain (Catholic/Christian nation) and Saudi Arabia (Islamic nation).

In our view, the right to freedom of religion is clearly protected in article 51 of the Bill of Rights, which guarantees the right to freedom of conscience, religion, thought, belief and opinion. This article offers a clear and equal legal protection to all religions. Indeed, we maintain that true religious freedom cannot exist unless there is a clear separation of the State and religion.

#### **(f) Mode of Adoption of the Constitution**

On the mode of adoption of the Constitution, we support the Commission’s recommendation of adoption of the Constitution by the Constituent Assembly and a National Referendum (Interim Report, Chapter 26). This mode is constitutionally wise, legally possible and popularly demanded. It is surely a necessity if we are to see the opening of the Constitution to reflect a truth: “We the People....”

## **2. JCTR DISAGREES WITH THE COMMISSION ON THE FOLLOWING ISSUES BASED ON THE REASONS GIVEN:**

### **(a) The Right to Life**

The right to life is guaranteed in article 36 of the Bill of Rights, which protects life from the moment of conception, but stipulates two exceptions in clause 2 under which a foetus can be deprived of life and clause 3 under which a convicted criminal can be deprived of life. We do not believe that these exceptions should be in the Constitution.

Article 36(2) gives Parliament powers to enact a law that (a) allows abortion relating to mother’s health, but (b) allows “to the extent otherwise set out in legislation”. This latter exception has no constitutional restraint, opening to the situation whereby Parliament could simply legislate “abortion on demand” -- i.e., for any reason whatsoever. Such language is surely dangerous to the right to life and should be removed from the Draft Constitution.

A change in this regard is supported by the Convention on the Rights of the Child (1989), signed by Zambia in 1990, that clearly states, “The laws of the State must protect children before and after they are born.” Therefore, Zambia is both legally and morally called upon to preserve human life before and after birth.

Article 36(3) retains the death penalty in Zambia. We believe that the arguments advanced in the Interim Report for abolition of the death penalty are absolutely convincing. But the recommendation given for the retention is that “for the time being, the death penalty be retained; and that further debate and a national referendum be conducted on the subject” (Interim Report, Chapter 3). We do not believe that further discussion can override the basic moral principle of preserving life and can

warrant any justifications for retention of death penalty, such as a supposed deterrent to would-be offenders.

We would like to re-echo the Zambian Catholic Bishops' words from their pastoral letter "Choose Life" of 1997 that "every human life is sacred and demands the greatest respect and protection at every stage of development" (# 3). This human life includes even the life of an offender.

Moreover, even though Zambia has not yet signed the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989 that provides for the abolition of the death penalty, Zambia should still join the rest of the international community, especially other African states, that have explicitly rejected the death penalty in their Constitutions.

Quite evidently, *de facto* evidence (increasing statistics of people on death row), *de jure* evidence (reluctance of sitting Presidents to sign death warrants) and the moral principle to preserve life provide a solid basis for which Zambia should do away with death penalty. The new Constitution should make this very explicit and clear.

### **(b) Refugee Citizenship**

The issue of refugee citizenship needs further clarification and special considerations. Refugees appear in three provisions: article 20(3), concerning citizenship by registration; article 42(6), concerning children; and article 60, which deals with refugees and *non-refoulement*. Articles 42 and 60 concerning refugee children are indeed welcome.

However, the citizenship by registration provision [article 20(3)] explicitly excludes refugees who are born in Zambia from obtaining Zambian citizenship. We do not agree with this provision for the following reasons:

- This is a direct and biased discrimination against refugees, as opposed to other persons born in Zambia of non-Zambian parents;
- The thrust of the provision is contrary to incorporating long-term refugees more fully into the Zambian society in which they can contribute to the betterment of the society that has benefited them over the years;
- The proposed article 6 in the current Constitution only entitles persons to *apply* for citizenship. The actual *grant* of citizenship is governed by Chapter 124 of the Laws of Zambia which permits the citizenship board to grant or deny citizenship to applicants. The discretion of the board is unregulated and unreviewable in court. Citizenship can be denied for any reason or no reason at all. The proposed article 20 does not rectify this violation of due process.

Therefore, we endorse the observations made by the Jesuit Refugee Service (JRS) that: (a) article 20(3) be amended to eliminate the language in section 3 which excludes refugees from citizenship by registration (b) the words "to apply" in sections 1 and 2 of article 6 should be stricken and the provisions should each read "is entitled to be registered as a citizen."

### **(c) Removal of the Word "Secular"**

There have been considerable debates and confusions surrounding the word "secular" being used in Part II, "Republic of Zambia and its Sovereignty" of the Draft Constitution which reads:

- 8(1) Zambia is a secular State without a state religion.
- 8(2) State and religion are separate.

The JCTR understands that the word "secular" in constitutional law does not mean espousing for a "godless" nation or one that is freely immoral. However, due to the ambiguity and misunderstanding that has been generated in some circles in Zambia by the inclusion of the word "secular", we see that its use can have unnecessarily divisive potential. Indeed, as the recent debate demonstrates, this

issue has been unfortunately distracting from much more important constitutional issues that the public should be focusing on.

We therefore recommend that the word “secular” in Article 8 be explicitly dropped. We recommend instead that the following wording be used to simply state that:

- 8(1) Zambia has no state endorsed religion.
- 8(2) State and religion are separate.

## **CONCLUSION**

We want to commend the Constitution Review Commission for its hard and intelligent good work that can definitely move the country forward under a new fundamental rule of law.

We hope the CRC will find these comments and recommendations helpful in the preparation of the final draft. And we repeat our offer for any direct and personal discussions that the CRC would find helpful with members of the JCTR staff.

Thank you.

25 October 2005