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Independence Celebration an Opportunity to Reflect on the Performance of our Democracy

As Zambia celebrates 58 years of independence, it is a cause of celebration for every advocate of democracy in this great nation. Over the past 58 years, the nation has made some strides in realizing the true potential of democracy through a democratic system of government in which supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodic free elections. Some of the characteristics of a good democracy which successive governments have been entrenching to varying degrees include respect for basic human rights, a multi-party political system paired with political tolerance, a democratic voting system, respect for the rule of law, democratic governance, and the citizen participation.

One outstanding issue in Zambia's democratic architecture is the on-going process of refining the Constitution of the Republic. Zambia has had the constitutional reforms of 1972 and 1991 under President Kaunda, the reforms of 1996 under President Chiluba, and the reforms of 2016 under President Lungu. All these attempts to refine the constitution have struggled to give Zambia a solid legal foundation which expresses the hopes and dreams of the people. Unfortunately constitutional reform agenda has many a times been driven by a party in government with a motive to entrench itself in power.

It is not clear if the current administration will be any different and avoid the pitfalls of the past by ensuring that the constitutional reform process really does result in a document that the people have participated in drafting by considering the input of different interest groups in the country.

The Problem of a Process Driven by the Executive

A major problem with past amendments of the Constitution has to do with the process of amendment. Previous presidents have opted to establish either commissions of inquiry under the Inquiries Act, or have used their executive powers to establish committees to prepare draft constitutions.¹ Therefore, we have had drafts prepared by such commissions as the Mung'omba Commission under President Mwanawasa in 2003, and by the Technical Committee on Drafting the Zambian Constitution, instituted by President Sata in 2011.

These commissions or committees have done good work in the past of conducting extensive public consultation in drafting its version of the constitution, conducting public hearings in all of Zambia's constituencies and receiving submissions from the public.² However, the major difficulty with these bodies appointed by presidents is that they operate solely according to the terms of reference given to them by the president. Moreover, at the end of their work, they submit a report to the president, who is then able to cherry-pick which recommendations to follow. Not surprisingly, presidents tend to choose the recommendations which seem to be the most politically expedient to the government at the time. In other words, the process of constitutional reform is ultimately driven by the Executive and is really not in the hands of the people.

¹ For a timeline of the various different commissions and committees, see the report provided by the Policy Monitoring and Research Centre, *Analysis of the Constitution Amendment Act No. 2 of 2016*, June 2016.

² Mung'omba Constitution Review Commission, *Report of the Constitutional Review Commission*, 2005, 1.

Ignoring the Voice of the People

As a consequence, the voice of the people is liable to be ignored or devalued in constitutional reform processes. For example the Mung'omba Commission noted that, according to a majority of submissions it received, the people wanted a Constituent Assembly to adopt the final draft of the constitution and not Parliament. The reasoning was that a Constituent Assembly - whose membership was deliberately representatives of the people - would be in the best position to adopt a constitution which express the peoples' views.³

In order to ensure a people-driven constitution the following three components to constitutional reform need to be in place:

1. A Legislative Framework

The first component involves legislation. To avoid the Executive branch of government being able to exert a disproportionate influence on the process, and to give all stakeholders a chance to provide their input, a legislative roadmap needs to be enacted. When South Africa was preparing its draft final constitution, this was done by following the roadmap set out in the Interim Constitution.⁴ When Kenya was preparing its draft constitution, the process to be followed was stipulated in the Constitution of Kenya Review Act of 2008.⁵ Therefore, in South African and in Kenya, legislation was needed to carefully set out the procedure to be followed.

This legislative framework is crucial to a successful constitutional reform process. It would stipulate the important dates when each period of preparation of the constitution would need to take place. Furthermore, it would set out the roles and limitations of each role-player in the process. Therefore, having this framework in place at the start of the process would avoid any unnecessary delays in the reform. It could also safeguard the input submitted by the public in the process.

2. Amendment of Article 79

The second component involves the amendment of Article 79 of the Constitution of Zambia. Article 79 deals with situations where the text of the constitution is modified. In particular, it stipulates that if any provisions of the Bill of Rights are to be modified, a national referendum would need to take place. However, the wording of this section needs to be amended in order to avoid the injustices of the past.

The wording indicates that in order for a successful national referendum to take place, not less than 50 percent of the *registered* voters need to vote. This formulation of the provision led to an injustice in the 2016 referendum. According to the results of that referendum, 71% of people voted in favour of the referendum. However, because only 44% of those entitled to vote actually voted on the day, the referendum failed.⁶ Therefore, even though the majority of people who voted on the day were in favour of the changes to the 1996 constitution, the changes were not approved.

Considering what happened in 2016, it becomes clear that if the voice of the people is to be heard through a national referendum, the wording of Article 79 needs to be amended. The voter turnout requirement needs to be removed. If it is removed, then it means that if the majority of voters are in favour of whatever text is produced by the constitutional reform process, then the text will be approved. It cannot be stopped because of voter apathy, for instance.

³ Ibid, 799.

⁴ Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution," *University of Arkansas at Little Rock Law Review* 23, no. 3 (2001), 813.

⁵ See Christina Murray, "Kenya's 2010 Constitution," in 61 Neue Folge Band, *Jahrbuch des öffentlichen Rechts*, 747 – 788.

⁶ See Grant Masterson, "Zambia's Constitutional Groundhog Day: Why National Debate about Constitutional Reform is Not Going Away Anytime Soon," in *South African Institute of International Affairs*, policy briefing 157, January 2017.

3. Getting the Right Balance of Input Between Different Interest Groups

The third component involves getting the right balance of input between three key players in the reform process: namely, the politicians, the legal professionals, and the public. As much as one would advocate avoiding a disproportionate influence by politicians over the reform process, one needs to provide space for their input. They are the elected representatives of the people. As such, their ideas will be important in producing a solid constitutional draft for the people. Additionally, the views of legal professionals are required, since the constitution is essentially a legal document. Finally, submissions from the public are indispensable, since we desire a people-driven constitution. The only problem is how to justly deal with the input from each of these players and arrive at a reasonably representative document, without allowing input from politicians to trump over input from other interest groups to ensure that the document enshrines the aspirations of the people and thereby providing the much needed legitimacy and ownership.

As long as the constitutional reform process continues to be driven by the Executive, a perception that “*the current administration is manipulating the Electoral Commission of Zambia (ECZ) and the judicial process to increase their number of MPs in parliament for the purpose of amending the constitution to entrench themselves in power*” will persist. We all know too well that this will inevitably have a negative impact on our budding democracy. This celebration of 58 years of independence provides the nation an opportunity to introspect and check the worrying tendency in this country of crippling and destroying the opposition by hook or by crook. For democracy to thrive in Zambia, we need a healthy and vibrant opposition. We end by quoting a renowned and respected politician in this country:

“Winning an election without your main competitor is no election at all. That is why ruling parties that we have seen before, have won by-elections and when the general elections come they lose because of creating uneven playfield in the by-elections...”

We wish you all happy independence celebrations.

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