ZAMBIA'S "NEW" CONSTITUTION – PROMISED SO MUCH, BUT DELIVERED SO LITTLE

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I

INTRODUCTION

Zambian President Mr. Edgar Lungu said the following about amendment of Zambia's constitution: -

> We are gathered here today to mark an important milestone in the constitutional history of our country. The nation, and people of this country, will forever remember this day as one that brought us to the shores of giving ourselves a truly people driven constitution since attaining independence in 1964[2]

On the 5th of January 2016, Mr. Lungu assented and signed into law, an Act to amend the Constitution of Zambia.[3] Mr. Lungu's stated later in his speech that even though a Constitution can make significant change and guarantees right, not even a perfect Constitution can ordain prosperity without individual input and effort.

For many, the symbolic event of signing into law this Act was seen as the culmination of several years of trials, hope and delays in amending Zambia's constitution. On the other hand, for several others, the amendment to the Constitution fell short of being truly people driven and lacks the ability to pursue transformation and provide a strong basis to move Zambia to the next level.

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2 President Edgar Lungu speech on 5th January 2016.

3 Constitution of Zambia (Amendment) Act No. 2 of 2016.

Zambia's constitutional amendments might bear political significance given provisions relating to the running mate,[4] a Presidential candidate having to attain 50% + 1 of the popular vote[5], the establishment of a Public protector,[6] and that a person is eligible to be elected as a Member of Parliament, if that person "has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent". [7] However, the amendment of Zambia's constitution has wider legal importance.

The purpose of this article is two-fold: first to critically analyse the Act with a comparison to the draft constitutions that that were released and secondly, to assess if it meets the standard of people driven.

II

Defining People Driven and a Bill of Rights

In defining what a Constitution requires, Professor Muna Ndulo states:

> "A constitution should be the product of the integration of ideas of all the major stake holders in the country i.e. all political parties both within and without Parliament, organised civil society and individual citizens"[8]

In 1993, a Constitutional review commission led by Mr. John Mwanakatwe S.C was tasked with recommending changes to the 1991 Constitution ("Mwanakatwe Commission").[9] At that point, Zambia's constitution had been amended twice in 1973 and 1991. However, the

4 Article 110 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

5 Article 101 (3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

6 Article 243 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

7 Article 70 (1) (d) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

8 Ndulo "The 1996 Zambian Constitution and the search for a Durable Democratic constitutional order in Africa" (1997) Kluwer Law International.

9 Constituted and established under Statutory Instrument No. 151 of 1993.

ruling party at the time, the Movement for Multi-Party Democracy (MMD) campaigned for drastic changes to the Constitution, including one which was more democratic, curbed presidential powers, enhanced separation of powers and promoted accountability. The Commission was tasked with ensuring that amongst other goals entrenched the Terms of Reference that Zambia makes appropriate arrangements for the entrenchment and protection of human rights, ensure good governance, impartiality of the judiciary and promote democratic principles. [10] The principles laid out in the Terms of Reference for the Mwanakatwe Commission offer a substantive basis for defining wat people driven is.

When the Mwanakatwe Commission completed its review, they made drastic recommendations pertaining to what was needed in our constitution. Amongst the recommendations, the Commission recommended that Cabinet be limited to 18 members and be appointed from outside Parliament, comprehensive Bill of rights which included social economic rights especially relating to women and unfair discrimination, the creation of a Constitutional Court and independent Electoral Commission.[11] However as was discussed at length in the *Derrick Chitala*[12] case, the government at the time developed a white paper that rejected several of the Commission's recommendations.[13]

At the time, the government was criticised for ignoring the strengthening on individual rights and freedoms and maintaining that Cabinet members are appointed
from Parliament.[14]It is on this basis that many hoped the 2016 Constitutional amendment Act would adopt the recommendations of the Mwanakatwe commission.

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[10] Ibid at Terms of Reference.

[11] Report of the Constitutional Review Commission, 1995.

[12] Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General (1995) S.C.Z. Judgment No. 14 of 1995.

[13] The Government White Paper, No 1 of 1995.

[14] Muna B. Ndulo and Robert B. Kent "The Constitutionalism in Zambia: Past, Present and Future" 1996 Journal of African Law Vol. 40, No. 2 of 1996 at 275. 14 Ibid at 277.

In 1996, Professors Ndulo and Kent noted that a Bill of Rights is needed to provide limitation of the exercise of powers. [14] The Draft Constitution included a Bill of Rights that strengthened the rights elucidated in the Mwanakatwe commission. Per the Bill of Rights, rights to housing, life, human dignity, religion and expression amongst others were recognised. In addition to protection of rights to women, people with disabilities and protection from discrimination, the Draft Constitution was seen as moving in the direction that was delayed by 20 years. However, a Bill of Rights which purports to affirm democratic ethos and the rights of citizens has been deliberately excluded from the final constitutional amendment Act. Surely this cannot amount to being people driven as the "new "Constitution fails to consolidate important rights that need to be protected and promoted for the progressive advancement of the socio-economic fortunes of the Zambian people.

For a constitutional document to be truly people driven, the people must feel it is indeed people driven. People driven should mean full participation of the people - that the people should own the process. It is not only the outcome – as the process is as important as the substance. It is also the only time you can get the substance right. Although this paper will not deal with this issue in great detail, it should be noted that the Mwanakatwe Commission recommended that the amendment to the Constitution be ratified by a Constituent assembly. In 2015, several experts recommended that a referendum be held before the assenting to any amendment. For the standard mentioned above by Ndulo to be attained, a referendum would have been necessary to ensure input from all relevant stakeholders' especially civil society and citizens. In both 1996 and 2016, the government of the Republic of Zambia ignored recommendations and amended the Constitution through Parliament by legislation. This can be seen as undermining the goal of being people driven as it gives a limited say to Zambian citizens to truly confirm if the document meets the criteria expected.

III

Separation of powers

The constitutional scheme of separation of powers is generally envisaged to divide power between the three branches of power namely the Judiciary, the Legislature and the Executive. It envisages checks and balances between each branch. Although separation of powers is not explicitly mentioned in our constitution or many other constitutions, it is implied from the way the roles and duties of the three branches are divided.

Professor Muna Ndulo notes that since Zambia gained independence, the President has held a substantial level of power. [15] The constitutional amendment maintains powers relating to pardoning which does not subject to judicial review (due to the absence of the right to fair administration),[16] and appointing of eight (8) additional members of Parliament.[17] The maintaining of wide Presidential powers retains the status quo of the imbalance between the three branches of government.

Article 63 describes the role of Parliament to enact legislation. Section 63 (2) states that the National Assembly shall oversee the performance of executive functions.[18] However the constitutional amendment Act retains Article 116, which states that the President shall appoint a prescribed number of MPs as Ministers. The problem here is that MPs are supposed to oversee the performance of executive functions, essentially deflating separation of powers as MPs are holding themselves accountable.

It was recommended that once a Minister is appointed to Cabinet, he/she shall relinquish his position in the National Assembly. This was to ensure that some level of separation between the two branches exists. These recommendations were not considered. One must surely wonder if MPs who are also members of the Executive will be able

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15 Ndulo (Supra note 11) at 276.

16 Article 97 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

17 Article 68 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

18 Article 63 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

to fully hold themselves liable or answerable for their performance if they maintain positions in both branches of government. This essentially means that balance of power remains in favour of the executive.

The recent case of *Steven Katuka and Law Association of Zambia v Attorney General and 64 others*[19] had to deal with the issue of Ministers holding office after Parliament dissolved. Here the Constitutional court held that because Ministers are appointed to their portfolios by virtue of their Parliamentary seat, they cannot hold office beyond the dissolving of Parliament. The implication of this judgment was that the custom of permanent secretaries being the chief operators of ministries until election time should continue. Whether the practice of Permanent Secretaries conducting their duties in this way and a lack of Cabinet for three to four months before an election is tenable is still contentious.

The exclusion of the role of responsibilities of Deputy Ministers is beyond the purview of this paper.

IV

Proportional Representation

Article 165 of one version of the Draft constitution proposed a Mixed Proportional Representation system. Under this system, 60% of the seats would be directly elected by virtue of simple majority and the other 40% on the basis of the proportional representation system. The motif behind this provision was to ensure that the big parties no longer dominate Parliament but be more inclusive to smaller parties. This was to ensure that even though a smaller party doesn't directly win a seat, by virtue of amassing a certain number of votes, they could be represented in Parliament.

Currently three (3) parties out of the ten (10) political parties that ran in the 2011 election hold 97.5% in Zambian Parliament.[20] A wider spread of political party representation would be beneficial to Zambia's democracy. The domination by big parties in Parliament does not reflect the representation of votes by the Zambian people.

This Mixed proportional representation system would have ensured greater representativity in the Legislature. Its omission could have dire consequences in future elections as the ruling party could be set to dominate Parliament. This exclusion coupled with fact that there is not a clear separation of powers between the Executive and Legislature would further move Zambia away from true separation of powers.

The Mwanakatwe Commission's recommendation of a Constitutional Court was rejected by the government in 1996. In 2016, a Constitutional Court was established by the constitutional amendment.[19] The establishment of the court together the Court of Appeal should be commended. Additionally the envisaging of courts (except the Supreme and Constitutional court) in every Province is an excellent initiative to ensure access to justice in all parts of the country.[20] We will have to see if having courts in every district as mentioned in Article 126 (4) will be feasible in the long run given Zambia's limited economic resources and considerations of infrastructure development and judicial salaries.

However, Article 121 raises a few problems as it ranks the Supreme Court and Constitutional courts equally. This is confusing because it is unclear as to which court shall be the final court of appeal. I submit that it would have been better to state that the Constitutional court is the highest court for all constitutional matters and the Supreme Court is the highest court in relation to non-constitutional matters.

From the wording of the Constitution, it seems as though the Constitutional court can only hear certain, exhaustive list of matters.[21]This is problematic because I may be interpreted to exclude appeals from the Court of Appeal in cases where leave to appeal to the Supreme Court is declined. Additionally, the list of matters implies that these matters need to be instituted in Constitutional court because the jurisdiction of the court does not include appeals. This

19 Article 127 of the Constitution of Zambia (Amendment) Act No. 2 of 2016.
20 Article 126 (4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.
21 Article 128 (1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

is dangerous for access to justice as constitutional court litigation is potentially more expensive than High court or court of appeal litigation.

V

Floor crossing

Floor crossing is the idea that a member of Parliament (MP) who was elected to Parliament with a given party and keep his seat in Parliament even if he changes his political affiliation or accepts a Cabinet post as an opposition MP. Zambia has a long history of floor crossing, with the ruling party often using it as a tactic to capture opposition MPs.

Article 71 (2) (d) provides that a Member of Parliament ceases to hold office if he resigns from the political party which sponsored the member for election to the National Assembly. However, this provision is not watertight as was demonstrated by Godfrey Bwalya Mwamba. Mr. Mwamba has remained the MP for Kasama Central despite joining another party, the United Party for National Development (UPND). Additionally, President Lungu has since January 2015 appointed UPND MPs Dawson Kafwaya and Greyford Monde, Ritchwel Siamunene to government posts, essentially amounting to floor crossing.

It was hoped that the Article 71 of the Constitution would be tidied up to ensure floor crossing is militated against. Floor crossing is hazardous to our democratic ethos as it undermines the opposition. Due to the fact that this provision remains unchanged, a ruling party President can continue to appoint MPs from the opposition by virtue of Article 116 of the Constitution.

Article 71 (6) permits an MP to choose to remain a member of his political party or retain his seat in Parliament as an independent member when a court overrules his/her expulsion adds to the problem mentioned above. The danger inherent in this provision is that the ruling party could seize an opposition MP who has had his expulsion revoked by a court and chooses to become independent.

The dangerous trend in Zambia has been the undermining of our democracy by virtue of floor crossing – the lack of foresight in this regard to hinder this process in Article 71 of the Constitution is set to allow this trend to continue.

VI

The right to just administration

A glaring omission from the final Constitution is the right to fair administrative action. Article 44 in one version of the draft constitution and Article 78 in another version elucidated the right as "Every person has the right to administrative action that is expeditious, lawful, reasonable and procedurally fair" under a Bill of Rights. This right, which is seen as a basic one would have ensured that organ of government and public administrators made decisions in a lawful, fair and reasonable way. The right to just administrative action would have ensured judicial review of decisions made by the Zambian government that fell short of this standard. This right would have been an excellent tool to curb corruption.

In the Zambia legal framework Order 53, Rule 9 of the Supreme Court Rules of Practice of England. This provision provides for the challenge to an administrative act through judicial review.[22] This section applies because of the gap in the laws of Zambia relating to the review of administrative action.[23] Order 53, Rule 9 was used in the *Dean Mung'omba* case. This provision raises a problem that one hoped the constitutional amendment would have resolved: how can a provision relating to the judicial review of administrative action (or omission) co-exist without a constitution that does not give effect to the principle right to just administrative action? It was therefore imperative that the amendment gave effect to such a fundamental right that affects so many people.

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22 Mung'omba and Other v. Machungwa and Others (SCZ Judgment No. 3 of 2003 (2003) ZMSC 10 (4 April 2003).

23 By virtue of section 10 of the High Court Act of Zambia, the Supreme Court Rules of Practice of England apply in Zambia when there is a lacuna in our law.

A possible explanation for the exclusion of the right to just administrative action could have been how to define administrative action. Administrative action can generally be defined as the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[24] Whereas this definition from the South African case of *Greys Marine* may seem clear and succinct, it could have caused problems in a country such as Zambia where the right has never existed before. Questions such as whether administrative action includes or excludes executive actions, prerogative powers, or even judicial decisions could have possible plagued the application of this provision. Additionally, the uncertainty as to whether administrative action applies to the actions of private bodies exercising public power or act in public interest such as the Football Association of Zambia (FAZ) or the Lusaka Stock Exchange (LSE).

Article 73 (3) of the Draft constitution provided that an Act of Parliament would be enacted to give effect to the right to just administrative action. Such an Act such as the South Africa Promotion of Administrative Justice Act (PAJA) [27] would have been able to define administrative action and adequately deal with any of the possible uncertainties mentioned above. It therefore follows that any possible future difficulty in defining administrative action cannot be an excuse for the exclusion of this right in the constitutional amendment Act. Currently, there are three grounds of review for administrative action namely lawfulness, rationality and procedural fairness. [25] Having the right to just administrative action would have expanded these grounds to review to include reasonabless and expediency.

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[24] Greys Marine Hout Bay Ltd v Minister of Public Works and others 2005 (6) SA 313 (SCA). 27 Act 3 of 2000.

[25] Mpongwe Farms Limited (in receivership) v The Attorney General 2004/HP/0010. 29 Article 117 of the Constitution of Zambian Act of 1973.

The fact that Order 53, Rule 9 continues to exist and apply in a vacuum should have been remedied. The unfortunate result is that without the constitutional guarantee to just administrative action and, it will become increasingly difficult to hold government agencies and public bodies accountable in Zambia.

Whereas it is not impossible to hold public officials accountable for their actions in Zambia, having a constitutional right to administrative action would have reinforced the need to ensure government agencies act properly in exercising their duties – a critical right that cannot be left out of any Constitution. The constitutional right coupled enabling legislation that would have been enacted to give effect to this right would have provided a great basis to further socio-economic rights in Zambia as public officials would have the duty to act lawfully, procedurally fairly and reasonably when acting in public interest.

VII

Removal of the Public Protector

Article 243 of the Constitutional amendment establishes the office of the Public Protector. This Office of Pubic protector is similar to that of the Office of the Investigator General established in the 1973 Constitution.[29] Article 244 lays down the duties of the Public Protector which includes investigating an action or decision taken or omitted by government. Whereas the formulation of the office of the Public protector has excellent intentions, the empowering provisions do not adequately cover what is needed to ensure the Office operates smoothly.

Ironically Article 244 mentions that the Public protector can investigate action in the performance of an administrative function but excludes the right to fair administration. This is problematic as having the Public protector review administrative decisions without the basic right to fair administration could cause problems in implementation.

A second problem with the provisions relating to the Public protector is that it states that the Public protector shall be removed in the same way as a judge.[26]The procedure for the removal of a judge is laid out in Article 143 of the Constitution which must be initiated and carried out by the Judicial Services Complaints Commission (JSCC).

This paper submits that this process cannot apply to that of the office of Public protector. This is because the Public protector is involved in investigating matters relating to corruption and abuse of office which could anger members of Cabinet and the President. The JSCC process although suitable for judges is unsuitable for dismissing a Public protector and could be open to abuse by the Executive. This is because an excellent Public protector could be dismissed based solely on recommendation of the JSCC. This article recommends that National Assembly ratification is required before a Public protector is dismissed. This would ensure the Public protector acts with greater impartiality without fear of dismissal and providing an extra level of scrutiny. In this vain, Article 247 could be seen as too vague for not clearly outlining if the Public protector has security of tenure which as mentioned would provide sound basis for the impartiality and fearness of this office in carrying out its duties.

VIII

Conclusion

The failure of the government to test the constitution through a referendum of Assembly taints the document with illegitimacy. However, one would hope that this paper does not taint the constitutional making process with cynicism but rather as a source of optimism for what more can be done to make our constitution truly people driven. Given the time and resources directed towards this project, it was hoped that the amendment would have resolved many of the issues highlighted above. Although it has been criticized for delivering so little in this article, it is one's hope that the constitution is used as a basis to build on what we need to take Zambia forward.

[26] Article 247 (3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

The establishment of the Constitutional Court, the office of the Public protector and provisions relating the running mate ought to be praised. However, this paper has proven that although the Constitutional Amendment Act has made some changes, it has delivered too little with a lot of the problems that existed still prevailing. One can fully challenge the President's assertion that we have brought us to the shores of giving ourselves a truly people driven Constitution – rather we are still searching and further amendments will need to be made to truly bring us to where we need to be.